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CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO KHIEU SAMPHÂN'S APPEAL OF THE CASE 002/02 TRIAL JUDGMENT

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Before:

Supreme Court Chamber
Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
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Note on references and cross-references

In these submissions the Lead Co-Lawyers have provided hyperlinks to Legal Tools Database permanent URLs for the sources cited, where these are available. Where a document is unavailable on Legal Tools, another stable URL is hyperlinked. The Lead Co-Lawyers note that several documents cited herein are unavailable online. Where these documents are not decisions or other filings of the ECCC, they will be provided as attachments within the time frame provided in **F56/2/2** Decision on Civil Party Lead Co-Lawyers' Requests Concerning KHIEU Samphân's Non-Compliance with Article 6 of the Practice Direction on the Filing of Documents, 6 July 2020.

Internal cross-references in the document are also hyperlinked.

1 INTRODUCTION

1. On behalf of the consolidated group of civil parties in Case 002 ("Civil Parties"), the Civil Party Lead Co-Lawyers ("Lead Co-Lawyers") hereby file their Response ("Response Brief" or "Brief") to KHIEU Samphân's Appeal Brief ("Appeal Brief").[1] This Response Brief is filed pursuant to the Supreme Court Chamber's ("Chamber's") Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal of 6 December 2019,[2] which granted the Lead Co-Lawyers leave to file their Response, not exceeding 320 pages in English or French, within 40 days from the notification of the response filed by the Co-Prosecutors' ("OCP Response" or "OCP Response Brief").[3]

2. On 16 November 2018 KHIEU Samphân was convicted of crimes against humanity, grave breaches of the Geneva Conventions and genocide, and sentenced to a further term of life imprisonment (ordered to be merged with that imposed in Case 002/01).[4] In this appeal he challenges both convictions and sentence.

3. The Defence appeal is fatally flawed in its approach. It collects together a mass of separate and often incoherent arguments about minor points, while failing to demonstrate an impact on the verdict of any of them. On numerous issues it simply relitigates the factual matters on which it was unsuccessful at trial. Nevertheless, through sheer volume of complaints, in places bolstered by the use of unrestrained language, a superficial impression is created of a Trial Judgment peppered with errors. That impression does not withstand even a basic analysis of the Appeal Brief. The Lead Co-Lawyers appreciate that the Chamber will not be influenced by rhetorical flourish unsupported by legal argument and evidence. They urge similar scrutiny from other readers. Two particular dangers must be guarded against.

4. First, the mere quantity of allegations made cannot be permitted to stand in for substantiation. The legal tests for demonstrating a material error must be rigorously applied to individual appeal grounds. The Defence must demonstrate not only an error, but also an impact on the

[1] **F54** KHIEU Samphân's Appeal Brief (Case 002/02), 27 February 2020.
[2] **F52/1** Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal, 6 December 2019. A Table of Authorities and attachments for this Brief will be filed within 28 days in compliance with **F56/2/2** Decision on Civil Party Lead Co-Lawyers' Requests Concerning KHIEU Samphân's Non-Compliance with Article 6 of the Practice Direction on the Filing of Documents, 6 July 2020, para. 21.
[3] **F54/1** Co-Prosecutors' Response to KHIEU Samphan's Appeal of the Case 002/02 Trial Judgment, 12 October 2020.
[4] **E465** Case 002/02 Judgement, 16 November 2018 (reasons notified on 28 March 2019) ("Trial Judgment"), pp. 2231-2232.

verdict. These principles do not leave room for broad, unparticularised generalisations or for a cumulative approach constructed out of numerous non-material points. The standard of proof must be met.

5. Secondly, the gaps, errors and confusion which are rife throughout the Appeal Brief can easily propel the reader into undertaking her own research and investigations in order to decipher the Defence's meaning. This temptation must be resisted. A process whereby each responding Party constructs its own interpretation of unintelligible arguments is unlikely to result in submissions which actually engage with each other and assist the Chamber. The onus falls on the Defence to substantiate its arguments. This is required by the adversarial process. Where the appeal arguments are incoherent, the Civil Parties and the OCP are denied the opportunity to respond. The burden of substantiating appeal grounds must be borne by the appellant.

6. To these overarching concerns, the Lead Co-Lawyers add a third and more specific call for caution which relates to cries of procedural injustice found in some parts of the Appeal Brief.[5] These allegations must be carefully assessed, including by reference to the Defence's past submissions (or the absence thereof). Frequently the alleged unfairness is nothing more than a product of the Defence's own inaction. By remaining silent when it observed (or should have observed) the matters now complained of, the Defence itself generated the prejudice which it seeks to leverage in this appeal. The Appeal Brief frequently omits to give a clear history of these matters, thus obscuring the fact that the Trial Chamber was not seized of them in a timely manner, and also thereby avoiding the question of why objections or requests were not made at the appropriate time. In this way the Defence at times creates the impression of a Trial Chamber which ignored the rights of the Accused. This was not the case. The Trial Chamber was not required to hypothesise about Defence objections; it was incumbent on the Defence to raise them.

7. While KHIEU Samphân is undoubtedly the central focus in this case, he is not alone in being affected by its outcome or the manner in which it is handled. The Civil Parties are also entitled to a fair trial and to be heard on matters touching upon their interests. In this Brief, the Lead

[5] For example in relation to arguments about the scope of the case (see especially at para. 155 below) and arguments about post-hearing disclosure which did not result in the reopening of the case (see below in Section 6.3.2, paras 102-105).

Co-Lawyers respond to the matters raised in the appeal which are of the greatest concern to the Civil Parties. These include the distortion and misuse of Civil Party evidence, as well as ill-founded attacks on the credibility of Civil Parties. It also includes misinterpretations of the law and arguments about legality which, if successful, would render lawful the abuses experienced by the Civil Parties. The innumerable, albeit weak, attacks on factual findings made by the Trial Chamber are equally of concern to the Civil Parties. For many Civil Parties, these factual findings constitute an important form of official acknowledgement regarding the events they experienced and their consequent suffering. The value of that acknowledgment also depends on the legitimacy and certainty of the Court's proceedings. For that reason Civil Parties also have a strong interest in calling for full and proper compliance with the Court's procedural rules, and in defending the Court against frivolous allegations of bias.

8. The Civil Parties do not question the importance of KHIEU Samphân's right to appeal. It forms one part of the procedural framework on which the Court's legitimacy rests. However, that same framework also creates procedures and standards for appellate litigation which are just as indispensable. They protect not only the rights of the Accused, but also those of the Civil Parties. When assessed against these procedures and standards the Defence appeal fails. The Lead Co-Lawyers request that it be dismissed.

1.1 Contents and structure of this Response Brief

9. Civil Parties have a distinct role in this appeal process, which is reflected in the contents and structure of this Brief.

10. The OCP has already responded to each individual argument in the Appeal Brief. The Lead Co-Lawyers will not duplicate that process by attempting a comprehensive response on all matters. As elaborated below,[6] this Brief focuses on certain matters of particular interest to Civil Parties.

11. Neither does this Brief adopt a ground-by-ground structure. On the matters which fall within Civil Party interests the Lead Co-Lawyers have sought to group together arguments from the Appeal Brief which appear to be based on a common premise, and to address them together.

[6] See Section 3.3, para. 53 *et seq*.

Arguments made about individual Civil Parties or their evidence are mostly dealt with while responding to the particular substantive issue which the ground is linked to. However for some Civil Parties, where overarching issues arise, or the Lead Co-Lawyers have not sought to intervene on the substantive issue in question, responses are provided in a separate section.[7] That section responds to Defence arguments concerning 14 Civil Parties.

12. Responding to incoherent arguments involves particular challenges. These are writ large in the present appeal. Not only is it frequently difficult to understand the content of the arguments made by the Defence, but the arguments are not structured into clearly defined grounds. In an attempt to impose some order and enable responses to identified points, the OCP has adopted the Defence's Annex A as a putative list of "grounds", numbered in the OCP's Annex C.[8] The identified "grounds" are taken from the Defence's Annex A[9] (which, when numbered, became the OCP's Annex C). Annex A is described as a "Summary of Grounds". It contains an outline of the Appeal Brief, using its headings, within which "Summary" boxes are included, with each "Summary" box correlating to a portion of the Appeal Brief.

13. For consistency, and because it is a helpful shorthand, the Lead Co-Lawyers have adopted the OCP's use of the term "grounds" to refer to the numbered items in the OCP's Annex C. However they do so with the caveat that these are in reality not "grounds" in the usual sense of the word. They rather refer simply to portions of Defence argument, some apparently including multiple different alleged errors of fact and law,[10] others appearing to cover only the introductory or overview portion of a section of the Appeal Brief.[11] The Lead Co-Lawyers here refer to what the "grounds" *appear* to cover, because no indication is given in the Defence's Annex A of which paragraphs of the Appeal Brief are encompassed by each "Summary" box. This must be deduced from the placement of the "Summary" boxes relative to headings, and in some instances this is far from clear. Some portions of the Appeal Brief

[7] See below, Section 10, paras 727 *et seq*.
[8] **F54/1.2.3** OCP Response Brief, Annex C Appeal Ground Numbers for Appellant's Summary of Grounds, 12 October 2020.
[9] **F54.1.1** Appeal Brief, Annex A - Summary of Grounds for KHIEU Samphân's Appeal (002/02), 27 February 2020 ("Appeal Brief, Annex A").
[10] See for example **ground 125**, **F54** Appeal Brief, paras 825-827.
[11] See for example **F54** Appeal Brief, paras 100-104, 351-366, 876-879.

do not appear to be covered by any "Summary" box.[12] Conversely, the "Summary" box correlating to ground 124 in the OCP Annex C does not appear to be linked to any text in the Appeal Brief. The lack of defined links between the Appeal Brief and its Annex A also mean that different views may be taken as to which paragraphs in the Appeal Brief are encompassed by which "ground".

14. Annex A to this Response Brief sets out an index table indicating which paragraphs in the Appeal Brief the Lead Co-Lawyers have assumed to be caught by which of the "grounds" as numbered in the OCP's Annex C, as well as designations for material in the Appeal Brief which does not appear to be covered by any of the "grounds". Annex A further gives as an indication which of the "grounds" are dealt with by the Lead Co-Lawyers' Response Brief and in which paragraphs thereof.[13]

1.2 Terminology

15. To promote clarity in this Brief, the Lead Co-Lawyers have adopted particular terminology as follows.[14]

16. The Lead Co-Lawyers use the term "crimes" to refer to the legal characterisations defined by Articles 4, 5 and 6 of the ECCC Law,[15] the elements of which have been interpreted by this Chamber. When the Lead Co-Lawyers use "conduct", they mean the specific acts or omissions which may constitute the *actus reus* of the crimes at issue.

17. The Lead Co-Lawyers consider that particular care is necessary in the choice of language used to discuss the subjects of marriage and sexual intercourse within marriage, especially to minimise unintended evaluative connotations. In this Brief, the term "forced sexual intercourse" has generally been preferred over "rape" when discussing the underlying conduct. The Lead Co Lawyers note that "rape" is a legal characterisation involving a particular mental state of the actor in question. Thus, the Lead Co-Lawyers have sought to

[12] This is the case for example in respect of **F54** Appeal Brief, paras 351-366, which sets out the Defence's position regarding the law applicable to its type 1 scope arguments. See Annex A: Index of Defence grounds and responses. It is also the case in respect of **F54** Appeal Brief, paras 1966-2009, which sets out a considerable portion of the Defence's arguments relating to JCE. See Annex A: Index of Defence grounds and responses, fn. 13.
[13] Annex A: Index of Defence grounds and responses.
[14] For full versions of the abbreviations used in this Response Brief see: Annex B: List of abbreviations.
[15] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001, as amended on 27 October 2004 (ns/rkm/1004/006) ("ECCC law").

avoid the insinuation that it applies to those who were forced to marry and to become instruments in those rapes. They also note that the specific charges in this case which relate to forced sexual intercourse are not charges of "rape", but of other inhumane acts; accordingly, careful and sparing use of the term "rape" can assist in avoiding the confusion regarding the relevant charge. The Brief uses the term "consummation" to refer to sexual intercourse following marriage, in part because this term is used throughout the evidence and in part because it appropriately captures the link between the marriage and the sexual intercourse, the latter being treated as a duty arising as part of the former. The term "forced marriage" is used as a shorthand to refer to the range of conduct (as opposed to a legal characterisation) through which people were forced to marry by state officials. More broadly, the term "regulation of marriage" in respect of the DK period encompasses the DK's policies relating to marriage and its consummation, as well as their implementation.

18. When discussing matters concerning persecution of New People, the Lead-Co Lawyers have predominantly used the terms "New People" and "Base People", but in some places have adopted the terminology used by the Trial Chamber or a Civil Party or witness.[16]

19. Also in respect of political persecution, the Lead Co-Lawyers use the terms "those associated with the former Khmer Republic" or "former Khmer Republic officials". By these terms they mean both civilian and military personnel of the Khmer Republic, including for example, teachers, police officers, military personnel and civil servants employed during the Khmer Republic regime, as well as their families.[17]

20. Application forms submitted for civil party or complainant status are referred to as "Victim Information Forms" or "VIFs".[18] Additional material submitted subsequently to a VIF is referred to as a Supplementary Information Form.

21. Specific to testifying Civil Parties, the Lead Co-Lawyers use the term "impact hearings" to refer to the hearings at the end of each trial segment, in which Civil Parties gave evidence on the harm they suffered. Where, in contrast, a civil party was called by the Trial Chamber to testify on facts during the main part of a trial segment, and was given an opportunity at the

[16] Regarding the various other terms used see **E465** Trial Judgment, para. 998.
[17] This group is sometimes also referred to in some filings on the Case File as "former LON Nol soldiers and officials". See **E465** Trial Judgment, para. 3520.
[18] Documents in the Case File sometimes use the term Civil Party Application.

end to address the harm which he or she suffered, the Lead Co-Lawyers refer to that portion of the evidence as a "statement of suffering".

22. When referring to a Civil Party, the Lead Co-Lawyers have used the pronoun corresponding to the gender which that Civil Party identifies with. The Lead Co-Lawyers respectfully request that the Chamber do likewise in its final judgment.

2 APPLICABLE LAW ON APPEAL PROCEEDINGS

2.1 Standard of Review

23. Internal Rule 104(1) of the Internal Rules establishes three types of errors in respect of which a judgment may be appealed, as well as the basis for the standard of review applicable in respect of each:

(i) "an error on a question of law invalidating the judgment or decision";

(ii) "an error of fact which has occasioned a miscarriage of justice"; or

(iii) "a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant."

24. The applicable standards of review on appeal have been well established by the Chamber and do not appear to be contested in this appeal. They are set out here briefly because they form the basis for the arguments that follow.

2.1.1 Errors of law

25. The Chamber is not bound to consider every conclusion of law reached by the Trial Chamber. It exercises its review "within the limits of the issues appealed"[19] and will only review legal questions outside those issues in "exceptional circumstances".[20]

26. However where an error of law is raised, the Chamber is not limited to the arguments made by the parties. Where it is said that an error of law has been committed – whether this concerns a question of procedural law or of substantive criminal law – the Chamber must assess whether the Trial Chamber's findings on the law are *correct* ("not merely whether they are reasonable"[21]), and whether they have been applied so as to reach a precise and

[19] **Case 001 – F28** Appeal Judgement, 3 February 2012, para. 15.
[20] *Ibid.*, para. 15.
[21] **Case 001 – F28** Appeal Judgment, para. 14; **F36** Appeal Judgement, 23 November 2016, para. 85.

unambiguous result.[22] Therefore "the burden of proof on appeal is not absolute with regard to errors of law. Even if [a] party's arguments are insufficient … the Supreme Court Chamber may find other reasons and come to the same conclusion, holding that there is an error of law."[23]

27. However even where an error of law is identified, this does not necessarily result in a reversal of the first instance decision. This follows from the reference in Internal Rule 104(1)(a) to "an error on a question of law *invalidating the judgment*" [*emphasis added*]. The Chamber "applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced on the relevant standard of proof as to the factual finding challenged".[24] "Consequently, not every error of law justifies a reversal or revision of a decision of the Trial Chamber";[25] an appeal will only succeed where, but for the error, "a different verdict, in whole or in part, would have been entered."[26]

2.1.2 Errors of fact

28. The standard of review is higher where an error of fact is alleged. The Chamber affords a "margin of deference" to the Trial Chamber and "will not lightly disturb" its factual conclusions.[27] The Chamber therefore considers "not whether the finding is correct", but rather whether it "was one that no reasonable trier of fact could have reached".[28] It necessarily follows from this high standard that "arguments limited to disagreeing with the conclusions of the Trial Chamber and submissions based on unsubstantiated alternative interpretations of the same evidence are not sufficient to overturn factual findings".[29]

29. In determining whether the Trial Chamber's conclusion is one which was open to a reasonable trier of fact, the Chamber will have particular regard to the Trial Chamber's

[22] **Case 001 – F28** Appeal Judgment, para. 14.
[23] *Ibid.*, para. 15.
[24] **Case 001 – F28** Appeal Judgment, para. 16; **F36** Case 002/01 Appeal Judgment, para. 86.
[25] **Case 001 – F28** Appeal Judgment, para. 16; **F36** Case 002/01 Appeal Judgment, para. 86.
[26] **F36** Case 002/01 Appeal Judgment, para. 99.
[27] **Case 001 – F28** Appeal Judgment, para. 17 (citing the ICTY Appeals Chamber decisions in *Prosecutor v Furundžija*, IT-95-17/1, Judgement, 21 July 2000, para. 37 and ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-A, Judgement, 23 October 2001, paras 30, 32); **F36** Case 002/01 Appeal Judgment, paras 88-89.
[28] *Ibid*.
[29] **F36** Case 002/01 Appeal Judgment, para. 90.

reasoning in its factual analysis of the evidence in question. The amount of reasoning demanded from the Trial Chamber to justify its decision will depend in part on the evidence:

> …when faced with conflicting evidence or evidence of inherently low probative value… it is likely that the Trial Chamber's explanation as to how it reached a given factual conclusion based on the evidence in question will be of great significance for the determination of whether that conclusion was reasonable. As a general rule, where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than where there is a sound evidentiary basis.[30]

30. Even where the Chamber finds that the Trial Chamber's reasoning reveals that a factual finding was not one which a reasonable trier of fact could have reached, the finding will only be disturbed where it occasions a miscarriage of justice, meaning a "grossly unfair outcome in judicial proceedings".[31] This will only be the case where the factual errors "create a reasonable doubt as to an accused's guilt",[32] meaning that the errors must have been "critical to the verdict reached."[33] The burden falls on the appealing party to demonstrate not only the error, but also that it occasioned a miscarriage of justice.[34]

2.1.3 Errors in the exercise of a discretion

31. This Chamber has also permitted appeals against judgment based on arguments that the Trial Chamber erred in the exercise of a discretion when making a procedural decision.[35] It indicated that in respect of such appeals it will follow the approach of the ICC, ICTY and ICTR in adopting a standard of review deferential to the Trial Chamber.[36] According to this approach such an appeal will only succeed:

> …(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on [a] patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[37]

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[30] **F36** Case 002/01 Appeal Judgment, para. 90.
[31] **F36** Case 002/01 Appeal Judgment, para. 99.
[32] **Case 001 – F28** Appeal Judgment, para. 18; **F36** Case 002/01 Appeal Judgment, para. 91.
[33] **Case 001 – F28** Appeal Judgment, para. 19; **F36** Case 002/01 Appeal Judgment, para. 99.
[34] **F36** Case 002/01 Appeal Judgment, para. 99.
[35] **F36** Case 002/01 Appeal Judgment, para. 97.
[36] **F36** Case 002/01 Appeal Judgment, paras 97-98.
[37] ICC *Prosecutor v Kony et al.*,Judgment on the appeal of the Defence against the "Decision on admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009, para. 80, quoted in **F36** Case 002/01 Appeal Judgment, para. 97.

32. As with other grounds of appeal, the appellant must actually demonstrate an error, rather than merely repeating arguments which were unsuccessful at trial:

> [The Chamber] will not consider arguments that merely claim that a given decision or finding of the Trial Chamber was erroneous, without actually substantiating why the decision or finding was in error.[38]

33. It is also remains necessary to show a prejudicial impact of the error. An error in the exercise of a discretion will only lead to a successful appeal against judgment where, in light of the proceedings as a whole, the Chamber finds that the error occasioned a miscarriage of justice.[39]

> In other words, not all procedural errors will lead to a reversal of the judgement, but only procedural errors that resulted in a "grossly unfair outcome in judicial proceedings.[40]

2.2 Requirements falling on the appellant

2.2.1 Scope of the appeal

34. In an appeal against judgment the appellant must file a notice of appeal setting forth the grounds of appeal and, in respect of each ground, the errors of law and fact which are alleged. Pursuant to Internal Rule 110(1), the scope of the appeal shall be limited to the issues raised in that notice.[41]

2.2.2 Substantiation of appeal grounds

35. Grounds of appeal must not only fall within the scope of the Notice of Appeal, they must also be adequately substantiated:

> …the Supreme Court Chamber "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies." The Supreme Court Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing. The Supreme Court Chamber may dismiss arguments that are evidently unfounded without providing detailed reasoning.[42]

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[38] **F36** Case 002/01 Appeal Judgment, para. 102.
[39] **F36** Case 002/01 Appeal Judgment, para. 100.
[40] **F36** Case 002/01 Appeal Judgment, para. 100.
[41] See further below at Section 4.1.1, paras 60-63.
[42] **Case 001 – F28** Appeal Judgment, para. 20; **F36** Case 002/01 Appeal Judgment, para. 101.

36. A ground will be considered as unsubstantiated where it does no more than repeating arguments which were unsuccessful at trial, disagreeing with the Trial Chamber, or offering "unsubstantiated alternative interpretations of the same evidence".[43]

37. An appellant should provide sufficient details to enable the Parties to respond and the Chamber to identify the issues in dispute.[44] This includes providing sufficient references to transcripts, and challenged portions of the appealed judgment.[45]

38. Where grounds are incoherent, unsubstantiated or otherwise procedurally defective the Chamber retains a discretion to dismiss them as inadmissible without consideration of their merits.[46]

39. As the Chamber reminded the Defence early in these appeal proceedings: "he must demonstrate a *lasting* gravamen relating to one or more permissible grounds of the appeal".[47] The appeal process "is intended to correct legal errors and verify whether the evidentiary standard was met; not to relitigate trial issues *de novo*."[48]

2.3 Scope of the Civil Party response

40. The Chamber has held that civil parties have standing to respond to a Defence appeal brief filed in support of an appeal against judgment.[49] This right to respond is subject to two limitations:

> First, the arguments set out in the proposed response must relate to grounds directly affecting Civil Parties' rights and interests. Second, the Lead Co-Lawyers must endeavour to avoid repetitiveness and overlap with issues already

[43] **F36** Case 002/01 Appeal Judgment, para. 90; see also **Case 001 – F28** Appeal Judgment, para. 20.
[44] **Case 001 – F28** Appeal Judgment, para. 41.
[45] **Case 001 – F28** Appeal Judgment, paras 20 and 41. See also Internal Rule 105(4) ("Appeals shall identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber.").
[46] **Case 001 – F28** Appeal Judgment, para. 41.
[47] **F49** Decision on KHIEU Samphân's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 16.
[48] **F49** Decision on KHIEU Samphân's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 16.
[49] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests relating to the Appeals in Case 002/01, 26 December 2014, para. 14; **F52/1** Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal, 6 December 2019, para. 11.

covered by the Co-Prosecutors' projected response to the Defence Appeal Briefs.[50]

3 THE CIVIL PARTIES AND THEIR RIGHTS AND INTERESTS

3.1 Composition of the Consolidated Civil Party Group

41. A total of 3,869 victims have participated in Case 002 as members of the consolidated group of Civil Parties.[51] Initially the Office of Co-Investigating Judges (OCIJ) admitted 2,117 individuals as Civil Parties.[52] An additional 1,752 individuals were admitted as Civil Parties by the Pre-Trial Chamber (PTC) following appeals against the Admissibility Decisions.[53]

42. The size of the consolidated group has been reduced during the course of Case 002.[54] Two Civil Parties withdrew from the proceedings.[55] A more significant number have died. As of May 2017, when the Lead Co-Lawyers' Closing Brief was filed, information had been received indicating that 181 Civil Parties had died.[56] Since then, the Lead Co-Lawyers have received unofficial information indicating that a further 131 Civil Parties have died, bringing the number of informally reported deaths to 312 in total. Forty-three claims of deceased Civil Parties have been carried on by surviving relatives through the granting of a successor claim.[57] The Lead Co-Lawyers believe it likely that additional Civil Parties have died without their knowledge.[58]

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[50] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests relating to the Appeals in Case 002/01, 26 December 2014, para. 17; **F52/1** Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal, 6 December 2019, para. 12.
[51] See **E465** Trial Judgment, para. 4407.
[52] See **E457/6/2.2.1** [Confidential] Annex A.1: Consolidated Group of Civil Parties and Admissibility Information, 2 May 2017. The OCIJ and PTC used different admissibility grounds. Civil Parties were usually admitted for more than just one ground.
[53] *See*, **E457/6/2.2.1** [Confidential] Annex A.1: Consolidated Group of Civil Parties and Admissibility Information, 2 May 2017.
[54] Regarding the reduction in the consolidated group by the time of the Case 002/02 Trial Judgment see **E465** Trial Judgment, para. 4407.
[55] **E2/39** Letter of Withdrawal (CHEY Theara), 18 November 2011; **E2/28** Letter of Withdrawal (SENG Chantheary), 3 March 2014.
[56] See **E457/6/2.2.2** [Confidential] Civil Party Lead Co-Lawyers' Closing Brief in Case 002/02, Annex A.2: List of Deceased Civil Parties with Successor Claims in Case 002/02, 2 May 2017.
[57] See **E465.2** Annex A.2: List Civil Parties, ERN (En) 01605025-01605026 (Deceased Civil Parties with Successor Claims). The Lead Co-Lawyers are aware of one pending successor claim filed since the Trial Judgment and not yet determined: **F57** Request to continue civil action, 2 October 2020.
[58] Confirming information about Civil Party deaths can be difficult; death certificates or other objective documents proving death are only rarely able to be obtained. In addition, the Lead Co-Lawyers are largely reliant on Civil Party Lawyers and VSS to furnish this information. (Regarding the structure of civil party legal representation at the ECCC

3.2 Civil Party rights and interests

43. As the Civil Parties are permitted only to address aspects of the appeal which directly affect their rights and interests,[59] it is apposite to identify what those rights and interests are. It is noteworthy that the Chamber has permitted civil parties to be heard not only where their *rights* are affected, but also where their *interests* are at stake. The two concepts are interrelated, but different. Defining them briefly may assist in clearly establishing the range of subjects on which civil parties may be heard.

44. In legal usage, a "right" is a legally recognised entitlement or claim: it is protected by law.[60] Where a "right" exists, its holder is entitled to compliance, or to a legal remedy in the event of a breach.[61] In contrast, an "interest" is a significantly broader concept, encompassing not only the processes and outcomes to which a person is *entitled*, but also others which would benefit her.[62] Overlap occurs because *rights* are recognised precisely because of the existence of an underlying *interest*. A right can thus be seen arising where the law protects a specific interest; it is an "interest or privilege recognized and protected by law".[63] While rights reflect an interest, an interest can exist where there is no right.

45. It is therefore significant that the Chamber has not restricted the Civil Parties to making submissions on matters only affecting their rights. Rather Civil Parties are permitted to be heard on matters affecting their interests as well. This is in keeping with the broad participatory role given to the Civil Parties as a Party in these proceedings.

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see Internal Rule 12 *ter*.) However civil party representation has increasingly been affected by insufficient funding. Only three Civil Party Lawyers were funded by the ECCC during Case 002/02. External donor funding has also continued to diminish, making it difficult or impossible for Civil Party Lawyers, VSS and NGOs to maintain continuous contact with all Civil Parties and to maintain accurate records relating to Civil Party deaths.

[59] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests relating to the Appeals in Case 002/01, 26 December 2014, para. 17.

[60] See Bryan A. Garner, *Black's Law Dictionary*, (Thomson Reuters, 11th ed.), 2019, p. 1581 ("A power, privilege or immunity secured to a person by law" or "A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong"). *Attachment 1*

[61] See for example **Case 004/02 – E004/2/1/1/2** Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/02, 10 August 2020, para. 59.

[62] See Bryan A. Garner, *Black's Law Dictionary*, (Thomson Reuters, 11th ed.), 2019, p. 968 ("The object of any human desire; esp., advantage or profit of a financial nature"). *Attachment 1*

[63] Elizabeth A. Martin, *A Dictionary of Law*, (Oxford University Press, 5th ed.), 2003, p. 435. *Attachment 2*

3.2.1 Civil Party Rights

46. Article 33 new of the ECCC Law requires that proceedings fully respect "the protection of victims and witnesses."[64] This principle is reflected in Internal Rule 21(1) requiring that victims' interests are safeguarded; that a balance of rights is preserved between the Parties; and that victims are kept informed and their rights respected.[65]

47. Most of the rights accorded to civil parties before the ECCC are procedural. As parties to the proceedings,[66] civil parties benefit from any right provided to "parties," provided the right is not functionally party-specific or explicitly limited.[67] Broadly speaking the rights can be grouped into the following categories:

(i) Rights relating to being kept *informed*: All victims have a right to be kept informed about the proceedings.[68] However, civil parties also have additional and more detailed rights (to access material in the case[69] and to be notified of developments in the proceedings[70]) which are necessary in order for their participation as Civil Parties to be effective.

(ii) Rights concerned with being *heard*: The Internal Rules expressly set out a number of specific instances in which civil parties can be heard, including at the judicial investigation stage;[71] the trial stage;[72] during appeals;[73] and generally.[74]

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[64] ECCC Law, Article 33 new, see also Article 37 new ("The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.").
[65] Internal Rule 21(1)(a) and (c).
[66] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests relating to the Appeals in Case 002/01, 26 December 2014, para. 11; **Case 001 – F28** Appeal Judgment, para. 488; **F36** Case 002/01 Appeal Judgment, para. 311.
[67] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests relating to the Appeals in Case 002/01, 26 December 2014, para. 14.
[68] Internal Rule 21(c).
[69] For example, Internal Rules 55(6), 55(11).
[70] For example, Internal Rules 46(1) and (4), 59(5), 66(1), 66 *bis* (2), 67(5).
[71] For example, at the judicial investigation stage, a civil party is expressly permitted to request the CIJs to take investigative actions or collect certain evidence, including by interviewing the civil party herself (Internal Rules 55(10) and 59(5)); to raise procedural defects (Internal Rule 76(2)); to be heard on any proposal to narrow the scope of the investigation (Internal Rule 66*bis*(2)); appeal orders of the Co-Investigating Judges (Internal Rule 74(4)).
[72] For example, during the trial stage, civil parties may propose witnesses, experts, and civil parties to testify at trial (Internal Rule 80(2)) or evidence to be put on the Case File (Internal Rule 87(4)); raise and respond to preliminary objections (Internal Rule 89); make written submissions (Internal Rule 92); they may also request reparations (Internal Rule 23 *quinquies*); and make closing statements (Internal Rule 94(1)(a)).
[73] For example, to appeal the decision on reparations (Internal Rule105(1)(c)); appeal the verdict if the Co-Prosecutors have appealed (Internal Rule 105(1)(c)); request the admission of additional evidence (Internal Rule 108(7)).
[74] For example, on protective measures (Internal Rule 29(1) and (2)); to have experts appointed (Internal Rule 31(10)); and to have a judge disqualified (Internal Rule 34(2)).

(iii) Rights concerned with *fairness*: Internal Rule 21(1)(a) requires proceedings to be fair and adversarial and preserve a balance between the rights of the parties.[75] Parties have a right for the legal texts to be interpreted so as to ensure legal certainty and transparency of proceedings.[76] This Chamber has also recognized that civil parties' rights to *fair* proceedings encompass the guarantees set out in Article 14(1) of the ICCPR,[77] namely to "be equal before the courts and tribunals" and "to a fair and public hearing by a competent, independent and impartial tribunal established by law."[78]

(iv) Rights to *expeditious* proceedings: In addition to the general principle that consideration shall be given to ensuring expeditious proceedings;[79] this Chamber has recognised that civil parties have a right to obtain a timely verdict.[80]

48. ECCC jurisprudence has recognised that civil parties' procedural rights are derived from "two core rights – the right to truth and the right to justice."[81]

3.2.2 Civil Party Interests

49. Civil parties have various interests in the proceedings which exceed the rights set out above.

50. Some of these interests relate to the outcomes of the proceedings. It is clear that obtaining reparations can be an interest of civil parties.[82] This Chamber has also recognised the importance of satisfaction as a form of reparations, including through the Court's findings and recognition of victims' suffering.[83] The Pre-Trial Chamber's reference to victims' core underlying right to truth[84] also reflects that civil parties have an interest in seeing the truth correctly established through the proceedings. Other international courts have recognised that

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[75] Internal Rule 21(1)(a).
[76] Internal Rule 21(1).
[77] **F26/2/2** Decision on Co-Prosecutors and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, para. 7 (recognizing that Civil Parties "enjoy fair trial rights defined in Article 14(1) of the ICCPR" and "have a specific and limited role in the proceedings, as set out in the ECCC's Internal Rules").
[78] International Covenant on Civil and Political Rights, 16 December 1966, article14 (1).
[79] **F49** Decision on KHIEU Samphân's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 19.
[80] *Ibid*., para. 20.
[81] **C22/I/69** Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, 29 August 2008, para. 8.
[82] Internal Rule 23(1)(b).
[83] **Case 001 – F28** Appeal Judgment, para. 661.
[84] **C22/I/69** Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, 29 August 2008, para. 8.

this is one of the primary interests motivating victims to engage with such mechanisms.[85] However civil party interests are not limited to reparations and truth, they have also been recognised as including an interest in a decision on the guilt or innocence of the accused.[86]

51. Civil parties also have interests concerning the manner in which proceedings are conducted, which underpin and are potentially broader than the rights set out above. They have an interest in "ensuring legal certainty and the transparency of proceedings"[87] as well as in "meaningful and timely justice".[88]

52. Finally, individual civil parties have interests related to the ways in which the proceedings affect them personally. This includes an interest in obtaining recognition from the Court of their status as victims of the crimes, and therefore of the suffering that they experienced.[89] It also includes an interest in ensuring that the proceedings do not cause them any personal harm, whether as a matter of physical and psychological well-being,[90] privacy,[91] or in terms of their personal dignity.[92] Similarly, where a civil party's evidence is challenged, the civil

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[85] ICC *Prosecutor v Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para. 97; ICC *Prosecutor v Katanga and Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, paras 32-36; ICC *Prosecutor v Gbagbo and Blé Goudé*, Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, Annex C – Dissenting Opinion Judge Herrera Carbuccia (Public redacted version), ICC-02/11-01/15-1263-Anx C-Red, 16 July 2019, para. 7.

[86] **Case 001 – E72/3** Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, para. 25; see also Dissenting Opinion of Judge Lavergne, paras 7 and 23.

[87] **Case 001 – D288/6.65/9** Decision on Group 1 – Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 23 September 2009, paras 14 and 16. In the ICC context, see also: ICC *Prosecutor v Gbagbo and Blé Goudé*, Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, Annex C – Dissenting Opinion Judge Herrera Carbuccia (Public redacted version), ICC-02/11-01/15-1263-Anx C-Red, 16 July 2019, para. 7.

[88] **E301/5/5/1** Decision on KHIEU Samphan Request to Postpone Commencement of Case 002/02 until a Final Judgement is Handed Down in Case 002/01, 21 March 2014, para. 15.

[89] ICC *Prosecutor v Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para. 97. See also **Case 001 – F28** Appeal Judgment, para. 661.

[90] Internal Rule 29 (1) ("The ECCC shall ensure the protection of Victims who participate in the proceedings, whether as complainants, or Civil Parties, and witnesses, as provided in the supplementary agreement on security and safety and the relevant Practice Directions.").

[91] **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019, para. 11.

[92] ICC *Prosecutor v Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para. 97.

party has an interest in defending his or her credibility and advocating for the reliability of that evidence.[93]

3.3 Civil party perspectives in the present submissions

53. In compliance with the Lead Co-Lawyers' mandate and the limits of their standing in this appeal,[94] this Brief is restricted to addressing matters of most relevance to Civil Party interests.

54. The Lead Co-Lawyers take the view that some matters are most appropriate for the OCP to address, except where a particular Civil Party is affected or arguments relating to Civil Parties is raised. This is the case particularly in respect of the following two areas:

    (i) The Lead Co-Lawyers have deferred to the OCP concerning the joint criminal enterprise ("JCE") or the individual criminal responsibility of KHIEU Samphân,[95] except to the extent that Civil Party evidence is called into question on those issues by the Defence. Similarly, in regard to many of the crimes charged, the Lead Co-Lawyers have not made independent submissions on arguments concerning intent, and in most cases agree with the OCP position. In a small number of instances, where Civil Party evidence has been impugned or where Civil Party interests seem particularly engaged by an argument on intent a limited response is provided.

    (ii) Arguments concerning sentencing[96] are primarily left to the OCP. However an exception is made in respect of two grounds concerning sentence, which directly implicate Civil Party interests.[97]

55. Within the remaining subject matter of the appeal (which includes matters concerning procedural decisions, the scope of the case, the principles applicable to evidence, the elements of the crimes and their legality, and factual findings concerning the *actus reus* of those crimes) some matters are especially of interest to the Civil Parties. Without purporting

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[93] **F50/1/1/2** Decision on KHIEU Samphân's Request to Reject the Civil Party Submission, 29 January 2020, para. 10.
[94] See para. 40 above.
[95] These matters are principally addressed in **ground 175** to **ground 251** (**F54** Appeal Brief, paras 1399-2141), however matters of intent are also raised in the context of arguments concerning specific crimes.
[96] Addressed in **ground 252** to **ground 256** (**F54** Appeal Brief, paras 2145-2183).
[97] See below at Section 11, paras 842 *et seq*.

to provide an exhaustive list, the Lead Co-Lawyers note that their primary focus in this Brief falls on the following matters:

(i) *Submissions protecting individual Civil Parties and their evidence from challenges by the Defence*. The Defence raises numerous arguments specifically addressing the evidence of individual Civil Parties and the use to which the Trial Chamber put it. In some instances the credibility of individual Civil Parties is expressly challenged. In others, Civil Party evidence is misrepresented. In others, unjustified adverse factual claims are made about Civil Parties or their family members. Responding to these points is central to the rights and interests of these Civil Parties. The Chamber has recognised the Civil Party interest in responding to challenges against Civil Party evidence.[98] For similar reasons Civil Parties also have an interest in defending their dignity and reputations where their evidence is misrepresented or misused. In addition, Civil Parties' right to the truth via these proceedings entails that their accounts are accurately reflected in the public record. This requires that Civil Party evidence is correctly represented to the Chamber, so that it is equipped to reach a judgment reflecting a truthful record of the events in question.

(ii) Submissions concerning the characterisation of particular conduct as unlawful, or addressing arguments about the principle of legality. Civil parties have a right to the truth which includes seeing certain conduct characterised as criminal; and an interest in seeing the individuals responsible for their suffering be held criminally responsible. This means that it is in the interest of the Civil Parties not only that the events in question are publicly documented and recognised, but that they are correctly identified as crimes under international law. It is this characterisation which establishes accountability; with a view to the deterrence of future crimes as a guarantee of non-repetition. Consequently, where the Appeal Brief acknowledges that certain conduct occurred, but refutes that it constituted a crime under international law, civil parties have an interest in responding. Therefore, in a number of areas this Brief makes arguments concerning the correct definition of crimes and issues of legality.

[98] **F50/1/1/2** Decision on KHIEU Samphân's Request to Reject the Civil Parties Submission, 29 January 2020, para. 10.

(iii) *Submissions concerning the harm inflicted.* In respect of several of the crimes at issue, a constituent element of the offence relates to the *gravity* of the crime or the level of suffering which it inflicted in victims (or both). This is a question of particular interest to Civil Parties. They are the persons who experienced this suffering. For those who testified it was a key aspect of their evidence; but all civil parties have had their lives marked by the crimes. Defence arguments which diminish the suffering caused by the crimes are therefore a matter of particular Civil Party interest, and these are responded throughout this Brief. A similar issue arises where the Defence challenges findings which established the underlying conduct which caused Civil Parties' suffering – for example the torture, killing or disappearance of their family members, or their own subjection to mistreatment.

(iv) *Legal certainty, and the fairness and legitimacy of the proceedings.* The benefits which Civil Parties may achieve through these proceedings depend on their certainty, fairness and legitimacy. These are threatened by some of the Defence arguments on appeal. These include, for example repeated unsubstantiated insinuations of bias which jeopardise the Court's legitimacy and arguments presented with extensive and unexplained delay. They also include Defence arguments seeking to challenge procedural decisions which correctly took into account fairness to Civil Parties. These interests are also engaged in relation to the fair conduct of the present proceeding – for example, fairness and certainty require that the Defence is required to comply with the procedural law regulating appeals, and to properly particularise and substantiate its grounds in order to enable a response.

56. Despite the Civil Party interests in these matters, the current Brief does not purport to address them comprehensively. This is because many submissions which the Lead Co-Lawyers would have made have already been presented with sufficiently similar content by the OCP.

57. Although the Lead Co-Lawyers have refrained from making specific submissions on a significant number of matters, nonetheless the Lead Co-Lawyers consider it important for the Chamber and the other Parties to be aware of its position on the matters litigated. This is

frequently done by indicating agreement with the OCP and refraining from further contribution in their written submissions.[99]

4 DEFECTS IN THE APPEAL

58. As discussed above, the Civil Parties have clear interests in legal certainty. Adherence to legal procedures applicable to the appeal protects the rights of all Parties and ensures the fair and expeditious conduct of proceedings.

59. In the sections which follow, the Lead Co-Lawyers submit that the Defence has not satisfied procedural requirements relating to appellate proceedings. The result is that the appeal in its entirety, or in the alternative, parts of it, should be dismissed. Alternative submissions are made below, relevant in the event that these arguments on defects, or some of them, are not accepted.

4.1 The Defective Notice of Appeal

4.1.1 Applicable law

60. An appeal against judgment has a confined scope.[100] That scope is determined by reference to the notice of appeal which must be filed by the appellant.[101] Internal Rule 105(3) makes clear what is required of the notice of appeal and how it relates to the appeal brief to be filed subsequently:

> A party wishing to appeal a judgment shall file a notice of appeal setting forth the grounds. The notice shall, in respect of each ground, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice. The appellant shall subsequently file an appeal brief setting out the arguments and authorities in support of each of the grounds, in accordance with the requirements of paragraphs 2(a) and (c) of this Rule.

Thus, the arguments contained in an appeal brief must be related to the grounds of appeal contained in the notice. Rule 110(1) provides that the scope of an appeal "shall be limited to the issues raised in the notice."

[99] The Lead Co-Lawyers remain available to the Chamber for submissions on these matters should the Chamber request them during the Appeal Hearing.
[100] See para. 34 above.
[101] Internal Rule 105(3).

61. The same principles apply at other international tribunals: in fact, the MICT requires that an appeal brief "must be set out and numbered in the same order as the Appellant's Notice of Appeal, unless otherwise varied with leave of the Appeals Chamber".[102] While this Chamber has ruled that no requirement exists at the ECCC for explicit linking of this kind, nonetheless it must be possible for "such a connection [to] be drawn by the parties."[103]

62. Where, having filed a notice of appeal, an appellant anticipates a disjunction between that document and the appeal brief, the appropriate course of action is to request leave to amend the notice of appeal.[104] Although the ECCC's legal texts do not explicitly provide for this possibility (in contrast to other international tribunals),[105] this Chamber has recognised its power to grant leave to amend grounds of appeal.[106]

63. Where an amendment is not sought (or not granted) and some matters eventually raised in an appeal brief exceed the contents of the notice of appeal, the result is that those matters are inadmissible. The Defence recognised during Case 002/01 that: "a ground of appeal that is not identified and set forth in the notice of appeal cannot be raised at a later stage and, *a fortiori*, cannot be considered by the Supreme Court Chamber, whose decisions are final."[107] The Chamber has held that "if any argument in the appeal brief cannot be related to any

[102] MICT Practice Direction on requirements and procedures for appeals, MICT/10/Rev.1, 20 February 2019, para. 5. See also: ICTY Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 4.
[103] **F18/3** Decision on Co-Prosecutors' Requests Relating to KHIEU Samphân's Appeal Brief, 16 January 2015, p. 4.
[104] Among the numerous instances in which this has been done, see for example: ICTY *Prosecutor v Blagojević and Jokić*, IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006; ICTR *Muvunyi v Prosecutor*, ICTR-2000-55A-A, Decision on "Accused Tharcisse Muvunyi's Motion for Leave to Amend His Grounds for Appeal and Motion to Extend Time to File His Brief on Appeal" and "Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds for Appeal", 19 March 2007; ICTR *Zigiranyirazo v Prosecutor*, ICTR-01-73-A, Decision on Protais Zigaranyirazo's Motion for Leave to Amend Notice of Appeal, 18 March 2009; ICTR *Prosecutor v Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Élie Ndayambaje's Motion to Amend his Notice of Appeal, 5 April 2013.
[105] ICTY Rules of Procedure and Evidence, (Rev.50), 8 July 2015, Rule 108; ICTR Rules of Procedure and Evidence, 13 May 2015, Rule 108; MICT Rules of Procedure and Evidence, (Rev.7), 4 December 2020, Rule 133; ICC Regulations of the Court, 12 November 2018, Regulation 61; STL Rules of Procedure and Evidence, (Rev.10), 10 April 2019, Rule 177(B); KSC Rules of Procedure and Evidence before the Kosovo Specialist Chambers, (Rev.2), 5 May 2020, Rule 176.
[106] **F44/1** Decision on KHIEU Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 7 June 2019, p. 3.
[107] **F3** Urgent Application for Extension of Time and Page Limits for Submissions on Appeal by the Defence for Mr KHIEU Samphân and the Defence for Mr NUON Chea, para. 15, 13 August 2014.

ground of appeal in the notice of appeal it shall normally not be given consideration unless it is in the interests of justice to do so".[108]

4.1.2 The Defence Notice of Appeal

64. The Defence filed its Notice of Appeal ("Notice") on 1 July 2019. The French version was 61 pages long. The Notice stated that it identified "at least 1,824 errors" in the Trial Judgment as well as a "non-exhaustive" list of 355 interlocutory decisions contained in an annex.[109]

65. In reality the "errors" are not grounds each setting out an alleged error of law or fact and explaining its consequence (as required by Rule 105(3)). Instead, the document is a list of findings or paragraphs from the Trial Judgment which the Defence disagrees with, in most cases without any explanation of the basis on which they are challenged. Moreover, the paragraphs identified appear to cover most of the Trial Judgment.

66. These factors have meant that the Lead-Co Lawyers were unable to discern from the Notice either which parts of the Trial Judgment the Defence would challenge, or the basis on which they would do so. The Notice failed to meet the purpose for which it is intended: namely, "to focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief."[110]

67. This conclusion has only been reinforced by the Appeal Brief. It barely refers to the Notice. It acknowledges that the two documents do not have a common structure, but claims that "the connection between them is readily apparent" because "the same numbering of errors" is used in the Defence's Annex A "Summary" boxes.[111] This is far from the case. The inclusion in the "Summary" boxes of lists of paragraph numbers from the Notice is unhelpful given that those paragraph numbers were never linked to an identified error, but only to a paragraph in the Trial Judgment. Moreover as explained above, the precise relationship between each of Annex A's "Summary" boxes and the text of the Appeal Brief is sometimes

[108] **F18/3** Decision on Co-Prosecutors' Requests Relating to KHIEU Samphân's Appeal Brief, 16 January 2015, p. 4.
[109] **E465/4/1** KHEIU Samphân's Notice of Appeal (002/02), 1 July 2019, para. 15.
[110] ICTR *Nahimana et al., v Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006, para. 50, citing *Procureur c Bagilishema*, ICTR-95-1A-A, Decision (*Requete Tendant a voir Declarer Irrecevable l'Acte d'Appel du Procureur*), 26 October 2001, p. 4.
[111] **F54** Appeal Brief, para. 17.

unclear.[112] A comparison between the paragraphs listed in a given "Summary" box, and the portion of the Appeal Brief it refers to demonstrates that the correlation is minimal.[113] The fact that Annex A is of doubtful value in linking the Appeal Brief to any pre-identified grounds of appeal was confirmed by the Defence's own description of Annex A as "an optional tool" which is "not an 'integral part' of the brief and is not 'essential'".[114]

68. Many of the paragraphs in the Notice are not relied on in Annex A. The Lead Co-Lawyers count 1839 itemised paragraphs in the Notice, 682 of which (more than one third) they have been unable to find mentioned as an "error" in any of the Annex A "Summary" boxes. Some are mentioned as "subsequent/related error(s)", however it is unclear what this designation signifies and no explanation is included with it in the "Summary" boxes, in contrast to the "error(s)" themselves. In any event, the Notice did not make clear which part of the cited paragraphs of the Trial Judgment would be called into question or on what basis. This is why an additional explanation has been necessary in each summary box of Annex A, explaining the alleged error and its consequence. In effect, Annex A sought to do part of what the Notice should have done eight months earlier.

69. The Notice was therefore fundamentally flawed. Its contents were at once too broad (covering almost everything in the Trial Judgment linked to KHIEU Samphân) and empty of content (giving no indication of the errors alleged other than that the error was factual and/or legal in nature). It thus failed to give notice of the issues to be raised on appeal.

70. As set out above, the usual remedy where a notice of appeal is defective is its correction (with leave) or the summary dismissal of any grounds not adequately identified in it. No request has been made to correct the Notice. The question therefore arises as to whether the Appeal

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[112] See para. 13 above. (See also Annex A of this Response Brief) As explained there, entire substantive sections of the Appeal Brief do not appear to have a corresponding "Summary" box in Annex A of the Appeal Brief. These sections are therefore also without any link to the Notice.

[113] As an example, the Lead Co-Lawyers refer to **ground 165**, which is detailed at **F54** Appeal Brief, paras 1191-1210. It covers 10.5 pages in the English version of the Appeal Brief, dealing with a range of arguments concerning the DK marriage regulations, and alleges errors in the Trial Chamber's assessment of documentary evidence, evidence from DK cadres as well as applying its so called "statistical" approach to evidence (on which see further Section 8.5 below, at paras 260 *et seq*). The "Summary" box in **F54.1.1** Appeal Brief, Annex A at p. 57 includes no paragraphs from the Notice, but only a reference to one of the decisions listed its annex. That decision is the Trial Chamber's refusal to hear testimony from Stephen Heder and François Ponchaud. That decision is referred to in one paragraph of the Appeal Brief material covering **ground 165** and is at best peripheral to the material set out there. See **F54** Appeal Brief, para. 1195 and fn. 2227.

[114] **F55/1** Response from KHIEU Samphân's Defence to the Prosecution's Request for Additional Pages, 26 March 2020, para. 4.

Brief, or parts of it, should be struck out. The difficulty in the present instance is that it is not only a small portion of the Defence appeal which falls outside the scope of an otherwise properly constituted notice of appeal. The Notice entirely fails to meet the requirements of the Internal Rule 105(3), with the consequence that the *entire* appeal is without foundation under Internal Rule 110(1). No arguments have been made that particular grounds should be considered anyway in the interests of justice. The appeal should therefore be rejected as inadmissible in its entirety.

71. At the very least, and anticipating judicial reluctance when faced with such a drastic (if entirely correct) outcome, the Lead Co-Lawyers request that the Defence be required to demonstrate why it is in the interests of justice for this appeal to be heard despite the Defence's disregard of the applicable legal framework. To do otherwise would be to signal that compliance with the procedural rules concerning appeals is optional, since no adverse consequences flow from a violation. Indeed, it may be deduced that the more comprehensive the omission in a notice of appeal, the *less* likely it is that adverse consequences will result.

4.2 Other Defects

72. As set out above,[115] the Lead Co-Lawyers have found it difficult to understand parts of the Appeal Brief. They have strived, to the extent possible, to decipher the arguments and respond based on their apparent meaning. Despite these efforts, the burden ultimately falls on the Defence to substantiate its appeal.[116] The principle of adversarial proceedings, much touted by the Defence,[117] requires that all Parties have an opportunity "to comment … on the opposing party's submissions, with a view to influencing the court's decision."[118] This necessarily entails that the Parties are able to understand the submissions made.[119] Thus, although "[i]t is not the function of the Supreme Court Chamber to scrutinize the quality of a convicted person's written appellate advocacy",[120] nonetheless the Chamber should only engage with arguments which are intelligible. Areas of confusion, incoherence or omission

[115] See above at paras 12-13.
[116] See above at Section 2.1, at paras 23 *et seq*.
[117] See for example **F54** Appeal Brief, paras 98, 141, 142, 157, 158-174.
[118] **F36** Case 002/01 Appeal Judgment, para. 185.
[119] **Case 001 – F28** Appeal Judgment, para. 41.
[120] **Case 001 – F28** Appeal Judgment, para. 41.

in the Appeal Brief should therefore be resolved by dismissing any grounds which remain incomprehensible or unsubstantiated.[121]

73. The Lead Co-Lawyers submit that **ground 15** (double standard with regard to inculpatory and exculpatory evidence),[122] **ground 22** (inconsistencies),[123] **ground 26** (cultural bias),[124] **ground 124** (scope relating to persecution on political grounds),[125] **ground 191** (use of term *Angkar*)[126] and **ground 192** (concerning Office 870)[127] must be dismissed as defective without further consideration of their merits.

74. The Lead Co-Lawyers support the submissions of the OCP that the arguments contained in **ground 15** are unparticularised and must be dismissed.[128] The ground makes the serious allegation that the Trial Chamber applied a "double standard" as between inculpatory and exculpatory evidence. However it consists of a single paragraph with a single footnote listing cross-references to other paragraphs in the Appeal Brief, without any analysis or explanation.[129]

75. In **ground 22**, titled "inconsistencies", the Defence argues that the Trial Chamber did not consistently apply the framework for analysing the credibility of evidence, which it does not challenge.[130] The Defence provided one example of this lack of consistency and no specific impugned Trial Judgment paragraphs.[131]

76. In **ground 26** the Defence accuses the Trial Judges of displaying cultural bias in making certain of its findings, a serious allegation.[132] The Defence fails to substantiate its arguments. It references two sources of limited relevance to the obligations of the international judges and fails to particularise how it claims that these obligations were violated by the Trial

[121] See above at paras 35-39.
[122] **F54** Appeal Brief, para. 234.
[123] **F54** Appeal Brief, para. 243.
[124] **F54** Appeal Brief, paras 254-256.
[125] **F54.1.1** Appeal Brief, Annex A, p. 45; See also **F54/1.2.3** OCP Response Brief, Annex C Appeal Ground Numbers for Appellant's Summary of Grounds, 12 October 2020, p. 45.
[126] **F54** Appeal Brief, paras 1633-1636.
[127] **F54** Appeal Brief, paras 1637-1639.
[128] **F54/1** OCP Response Brief, para. 121; **F54** Appeal Brief, para. 234.
[129] **F54** Appeal Brief, para. 234 fn. 316 (referring to Appeal Brief paras 241-242, 293-305, 312-313, 314-319, 329-330, 891, 922, 999, 1195, 1235, 1383, 1529, 1752 (fn 3400)). The Lead Co-Lawyers address several of these paragraphs in other sections of this Response.
[130] **F54** Appeal Brief, para. 243.
[131] **F54** Appeal Brief, para. 243 fn. 347.
[132] **F54** Appeal Brief, paras 254-256.

Chamber. A general cross-reference to other grounds regarding the regulation of marriage adds nothing to the arguments made in that part of the Appeal Brief, and gives no explanation of how they demonstrate bias.[133] The reference to the Trial Chamber's findings about flies is patently insufficient to found an allegation of this gravity.[134] The Lead Co-Lawyers submit that the ground must be dismissed as unsubstantiated.

77. The Lead Co-Lawyers support the OCP's response to **ground 191** (use of term *Angkar*)[135] and **ground 192** (concerning Office 870)[136] but consider that both grounds should be dismissed as unsubstantiated. In each ground, the Defence makes a generalized argument that the Trial Chamber "misappreciated" the evidence, but does not explain how. It simply lists impugned paragraphs in Annex A,[137] without specifying which evidence or findings in them it takes issue with, or why. It is not fair on the Parties, especially the Civil Parties whose evidence is relied on in the referenced Judgment paragraphs, to be required to guess at the Defence's objections.

78. The Lead Co-Lawyers submit that **ground 124** is defective and must be dismissed. While it appears in Annex A, it does not appear in the Appeal Brief itself.[138] The content of the ground is therefore unknown.

79. In the following section, the Lead Co-Lawyers address allegations of bias made by the Defence. Most of these are not identified as distinct "grounds". Nonetheless, for the reasons explained below they should be expressly dismissed as unsubstantiated.

5 GROUNDS CONCERNING BIAS

80. The Appeal Brief is riddled with claims that the Trial Chamber as a whole was biased against KHIEU Samphân. More than fifty grounds are expressly stated as linked to an allegation of

[133] **F54** Appeal Brief, fn. 379.
[134] **F54** Appeal Brief, para. 255.
[135] **F54** Appeal Brief, paras 1633-1636; **F54/1** OCP Response Brief, paras 946-948.
[136] **F54** Appeal Brief, paras 1637-1639; **F54/1** OCP Response Brief, paras 1057-1059.
[137] **F54.1.1** Appeal Brief, Annex A, p. 66.
[138] **F54.1.1** Appeal Brief, Annex A, p. 45. In the Appeal Brief **ground 123** appears to finish at paragraph 824 and **ground 125** begins at paragraph 825.

bias,[139] and throughout the Appeal Brief, offhand allegations of the Trial Chamber's supposed bias are made with a surprising frequency.[140]

81. These assertions of bias can be divided into two types: The first alleges an actual or apparent bias arising out of the involvement of judges who have previously adjudicated related matters; the second draws an inference of bias from the decisions or analysis of the Trial Chamber. Both have been made repeatedly by KHIEU Samphân throughout this case. Both should be summarily dismissed by the Chamber, for the following reasons.

82. The first type of argument is made in **ground 4**.[141] The Defence alleges bias arising from the fact that the same Trial Chamber judges (or most of them) have been involved in two consecutive trials of KHIEU Samphân. This question should be dismissed as a subject which is *res judicata*. The Lead Co-Lawyers agree with the submissions of the OCP.[142]

83. The second category of bias allegations accounts for the overwhelming majority of bias claims in the Appeal Brief. These are instances where the Defence appears to allege that bias is demonstrated by the content of the Trial Chamber's decisions.

84. The Lead Co-Lawyers submit that these arguments should be dismissed as vague and unsubstantiated. The caselaw of this Court and others establish clear tests for judicial bias, with the applicable test dependent on whether the bias alleged is actual or apparent.[143] It is

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[139] Six grounds fall under the heading "Biased approach to the guiding principles of the criminal trial" (grounds 2 to 7); a further thirty grounds fall under the heading "Partial Approach to the Submission of Evidence" (grounds 8 to 37); (including one ground headed "Cultural Bias" (ground 26)); one ground is headed "Demonstration of Bias on the Objectives of Sentencing" (ground 252). In addition, a further seventeen grounds include "bias" as an alleged error in the summary given in Annex A (grounds 164, 165, 166, 170, 174, 176, 181, 199, 202, 203, 204, 206, 207, 222, 223, 244, 250).

[140] See **F54** Appeal Brief, paras 97, 216, 233, 675, 1007 (footnote 1861), 1030, 1072, 1124, 1156, 1158, 1172, 1175, 1186, 1211, 1226, 1228, 1229, 1233, 1241, 1244, 1246, 1249, 1251, 1255, 1259, 1262, 1263, 1278, 1279, 1280, 1312, 1322, 1324, 1339, 1340, 1341, 1370, 1386, 1387, 1397, 1417, 1424, 1426, 1435, 1441, 1443, 1444, 1447, 1455, 1496, 1510, 1530, 1593, 1594, 1601, 1603, 1670, 1702, 1714 (footnote 3308), 1736, 1754, 1785, 1824, 1883, 1918, 1968, 2115, 2141. Additional references are made to findings that would have been reached if an "unbiased" or "non-biased" approach had been used: see **F54** Appeal Brief, paras 1214, 1239, 1269, 1273, 1373, 1622, 1636.

[141] **F54** Appeal Brief, paras 127-133.

[142] **F54/1** OCP Response Brief, paras 39-44.

[143] See for example: **Doc. No. 11** Decision on KHIEU Samphân's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 July 2020, para. 63; **E55/4** Decision on Ieng Thirith, Nuon Chea and Ieng Sary's application for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 23 March 2011, paras 11-12; **E137/5** Decision on Motions for Disqualification of Judge Silvia Cartwright, 2 December 2011, para. 13; **E171/2** Decision on Application for Disqualification of Judge Silvia Cartwright, 9 March 2012, para. 12; **E191/2** Decision on Ieng Sary's Application for Disqualification of Judge Cartwright, 4 June 2012, para. 13; ICTY, *Prosecutor v Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189.

noteworthy that the Appeal Brief at no point articulates which category of bias is alleged. Neither does it make any attempt to analyse the bias by reference to the well-established legal standards. Indeed, in contrast to the number of claims of bias it contains, the Appeal Brief does not once mention the legal tests applicable to such claims. The Lead Co-Lawyers also note that some of the claims of bias now made are repetitions of assertions made by KHIEU Samphân in the Case 002/01 appeals, which were dismissed by the Chamber because they were "cursory and [did] not substantiate how the purported errors, if established, would give rise to a finding of bias, as opposed to errors of law or fact."[144]

85. Even if the Chamber considers in its discretion that any of these arguments are worthy of consideration, they may be readily rejected. It is well-recognised, by this Court[145] as well as others,[146] that judicial bias is not established simply by virtue of a party alleging that a judge or chamber has erred; mere disagreement with a decision, without more, does not support a claim of bias. Similar claims of bias made by KHIEU Samphân against this Chamber were dismissed earlier this year by a Special Panel by reference to this principle.[147]

86. Civil parties have a particular interest in ensuring that allegations of judicial bias are handled appropriately. The Court has recognised the roles that its proceedings play in achieving victims' rights to truth and justice,[148] and to achieving national reconciliation.[149] These roles depend fundamentally on the Court's legitimacy and credibility. Upholding that legitimacy and credibility must involve reassuring Parties and the public that any properly-founded concerns about bias will be dealt with thoroughly and properly. However it equally means

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[144] **F36** Case 002/01 Appeal Judgment, para. 131.
[145] **Doc. No. 11** Decision on KHIEU Samphân's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 July 2020, para. 101, see also para. 122, dismissing part of KHIEU Samphân's application on this basis.
[146] See, for example, ICTY *Prosecutor v Šešelj*, IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007, para. 11; ICTY *Prosecutor v Šešelj,* IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, 2 December 2009, para. 13; STL *In the Case Against Akhbar Beirut S.A.L. et al.*, STL-14-06/PT/OTH/R25, Decision on the Motion for Disqualification of Judge Lettieri, 5 September 2014, paras 30, 31; STL *Prosecutor v Ayyash et a.l*, STL-11-0l/T/OTH/R25, Decision on Oneissi Defence Rule 25 Motion for the Disqualification and Withdrawal of Presiding Judge David Re, Judge Janet Nosworthy, and Judge Micheline Braidy, 4 May 2018, paras 51, 75.
[147] **Doc. No. 11** Decision on KHIEU Samphân's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 July 2020, paras 105, 111, 122.
[148] **C22/I/69** Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, 29 August 2009, para. 8.
[149] **D404/2/4** Decisions on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, para. 65.

that allegations of bias should be made judiciously, and only with thorough substantiation. The Court has articulated the danger that arises if judges too readily recuse themselves in response to unjustified allegations of bias:

> [I]t is as much of a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias, as the real appearance of bias itself.[150]

87. The practice of making flippant and unsupported claims of bias is a menace of the same nature, with the potential to undermine the legitimacy of the Court. Having received an unfavourable verdict, KHIEU Samphân is of course entitled to challenge it properly on appeal. However the purpose of the appeal is to identify the Trial Chamber's errors, if any; not to discredit it. The Lead Co-Lawyers request the Chamber to not only reject the "grounds" related to bias, but also to make clear that the repeated casual assertions of bias throughout the Appeal Brief are without basis.

6 GROUNDS CONCERNING ALLEGED PROCEDURAL VIOLATIONS

6.1 Overview

88. The Lead Co-Lawyers refer to the established standard for seeking an appeal from the exercise of the Trial Chamber's discretion on a procedural question.[151] The Defence has failed to meet that standard with respect to **ground 8** (rolling decisions on witnesses, experts, and civil parties),[152] **ground 10** (disclosure from cases 003/004),[153] **ground 23** (statements disclosed after the proceedings),[154] **ground 6** (legal recharacterisation),[155] and **grounds 125 and 126** (as they relate to the influence of factual findings in Case 001 in Case 002/02).[156]

89. The Lead Co-Lawyers limit their response regarding procedural matters to the above grounds to the extent that they directly affect Civil Party interests and are not repetitive to the OCP

[150] **Doc. No. 11** Decision on KHIEU Samphân's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 July 2020, para. 64.
[151] See Section 2.1.3, above at paras 31-33.
[152] **F54** Appeal Brief, paras 175-181.
[153] **F54** Appeal Brief, paras 198-215.
[154] **F54** Appeal Brief, paras 244-246.
[155] **F54** Appeal Brief, paras 135-157.
[156] **F54** Appeal Brief, paras 825-827 (**ground 125**) and paras 828-835 (**ground 126**).

Response. In particular the Lead Co-Lawyers highlight that they support the OCP Response to **ground 1** (delayed publication of reasons)[157] and **ground 6** (legal recharacterisation).[158]

6.2 Rolling decisions on witnesses/CPs/experts

90. In **ground 8**, the Defence argues that the Trial Chamber "committed a discernible error in the exercise of its discretion" by issuing the lists of witnesses, experts, and civil parties ("WECPs") prior to the start of each trial segment, and that this procedure caused them prejudice.[159] The Lead Co-Lawyers support the arguments of the Co-Prosecutors.[160]

91. The Lead Co-Lawyers add that the Defence submission ignores the context in which this exercise of discretion took place. This included, most relevantly, the length of the trial and the advanced age of most witnesses and Civil Parties. Less unusually, but similarly relevant were challenges in securing the appearances of experts. These factors meant that decisions could not have been made on all WECPs prior to trial. To do so would have involved determining many of the WECPs years in advance of their anticipated appearance. Had this occurred, the Parties and the Trial Chamber would have expended significant resources preparing for WECPs who would not ultimately have been able to attend. Even the lists as they were issued, much closer in time to the respective hearings, were changed on several occasions owing to WECP availability, deaths, and health conditions.[161]

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[157] **F54** Appeal Brief, paras 30-79; **F54/1** OCP Response Brief, paras 24-28.
[158] **F54** Appeal Brief, paras 135-157; **F54/1** OCP Response Brief, paras 84-91.
[159] **F54** Appeal Brief, paras 175-181.
[160] **F54/1** OCP Response Brief, paras 45-52.
[161] **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 26 ("As in Case 002/01, the Chamber has adopted a phased approach to determining which witnesses, Civil Parties and experts will testify on a particular topic. This is done for a variety of reasons, including the unpredictability of whether witnesses contacted at the beginning of trial will be able to testify on a date far in the future and the limited resources of the Witness and Expert Support Unit to contact every proposed individual. The Chamber has generally provided the parties with at least four weeks' notice of the list of witnesses, Civil Parties and experts it intends to hear on a trial topic. The Chamber considers this sufficient time for the parties to prepare for the examination of witnesses in view of their participation during the pre-trial phase of the case. Providing at this time a comprehensive list of witnesses, Civil Parties and experts is impracticable and unnecessary to the proper administration of these proceedings."); **E459** Decision on Witnesses, Civil Parties and Experts Proposed to be heard during Case 002/02, 18 July 2017, paras 28, 50, 51, 75, 80, 103-104, 151, 168, 174-177, 190. See also, for example, **E380/2** Decision on Motions to Hear Additional Witnesses on the Topic of the Treatment of the Vietnamese and to Admit Related Written Records of Interview (E380, E381, E382) (Full Reasons), 25 May 2016, para. 26 ("The Chamber has considered all individuals proposed to testify on this topic, including the six put forward by the Co-Prosecutors, and has informed the parties of the list of witnesses and Civil Parties scheduled to testify on the treatment of Vietnamese. The process of selecting individuals to testify is an evolving one, dependent on the exigencies of trial, the availability of witnesses and other unforeseeable circumstances. The Chamber therefore clarifies that notification of this list does

92. The Defence has not engaged with the Trial Chamber's reasoning as to the exercise of this discretion. The Trial Chamber considered the Accused's right to a fair trial, the fairness and expeditiousness of proceedings, and which WECPs were the most conducive to ascertaining the truth, all while ensuring that the proceedings are "fair and adversarial and preserve a balance between the rights of the parties".[162]

93. In addition, the Trial Chamber's selection of WECPs to testify in Case 002/02 did not arise unexpectedly. Those who were selected to testify were put forward by all of the parties through updated WECP Lists filed in May 2014,[163] subject to Rule 87(4) requests made during the course of proceedings.[164] The Trial Chamber also noted the Parties' participation in the pre-trial phase of the proceedings.[165] The Trial Chamber generally provided four weeks' notice of the lists of WECP selected to testify on a particular segment. The Defence has failed to demonstrate any error in the exercise of the Trial Chamber's discretion, or any prejudice as result of this practice, indeed, the Defence engaged in vigorous questioning of WECP who appeared throughout the trial.

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not foreclose the possibility of calling other witnesses and Civil Parties who have been proposed for a topic. The Chamber has adopted a phased approach to selecting witnesses, Civil Parties and experts to testify in this case and, as in Case 002/01, will issue a fully reasoned decision on witnesses in due course."); **E390/3** Trial Chamber Memorandum entitled "Decision on Co-Prosecutors' Rule 87(4) Request to Call an Additional Witness and an Additional Civil Party During the Phnom Kraol Security Centre Trial Segment", 11 July 2016, paras 3, 5.

[162] **E459** Decision on Witnesses, Civil Parties and Experts Proposed to be heard during Case 002/02, 18 July 2017, paras 9-21.

[163] **E305/6** Co-Prosecutors' Proposed Witness, Civil Party and Expert List and Summaries for the Trial in Case File 002/02 (With 5 Confidential Annexes I, II, IIA, III and IIIA), 9 May 2014; **E305/7** Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 with Confidential Annexes, 9 May 2014; **E305/5** *Témoins et experts proposés par la Défense de M. KHIEU Samphân pour le procès 002/02*, 9 May 2014; **E305/4** Updated Lists and Summaries of Proposed Witnesses, Civil Parties and Experts, 8 May 2014. Following the filing of these lists, the Parties were directed to file Rule 87(4) motions for individuals appearing on the revised lists that did not appear on their original WECP lists in 2011. See **E9/35** [Confidential] List of Proposed Witnesses, Experts and Civil Parties – Pseudonyms, 07 February 2012; **E307/1** Trial Chamber Memorandum entitled "Decision on Parties' Joint Request for Clarification regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3)", 11 June 2014; **E307/6** [Confidential] Civil Party Lead Co-Lawyers' Rule 87(4) Request to Admit Into Evidence Oral Testimony and Documents and Exhibits Related to Witnesses, Experts and Civil Parties Proposed to Testify in Case 002/02, 29 July 2014; **E307/2** *Demande de la Défense de M. KHIEU Samphân tendant à la comparution d'un nouvel expert au cours du procés 002/02 (règle 87-4 du Règlement intérieur)*, 19 June 2014; **E307/4** New Witness, Civil Party and Expert list for Case 002/02, 24 July 2014; **E307/3/2** Co-Prosecutors' Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02, 28 July 2014.

[164] These requests came from the NUON Chea Defence, the OCP, and the Lead Co-Lawyers. See **E465.1** Trial Judgment, Annex I: Procedural History, para. 47 and fn. 113.

[165] **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 26

6.3 Disclosure

94. The Lead Co-Lawyers respond to certain Defence arguments relating to the disclosure of materials from Cases 003 and 004, as they have an independent interest in the disclosed material and as recipients of disclosed material, faced challenges similar to those of the Defence. The Lead Co-Lawyers request that the Chamber take into account the context in which the disclosures took place in determining the merits of two disclosure points below. The Lead Co-Lawyers also note that they here address questions relating to the disclosure of certain materials by the OCP; the separate question of that material's admission into evidence is addressed below in the section of this Response dealing with Evidence and its Treatment.[166]

6.3.1 Disclosure during the trial of material from Cases 003 and 004

95. In **ground 10**[167] the Defence argues that the Trial Chamber failed to apply the correct legal criteria regarding the OCP's disclosure obligations. The Lead Co-Lawyers submit that in determining this ground the Chamber should take into account the context of the disclosures, as well as the fundamental principle that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."[168]

96. The Lead Co-Lawyers note that the Trial Chamber took the question of disclosure seriously, scheduling a trial management meeting on 5 March 2015 after the second disclosure of documents was announced.[169] The Trial Chamber invited the Parties for a full public discussion of the issues raised and their impact on all of the Parties.[170] At no point during

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[166] See below at paras 254-257.
[167] **F54** Appeal Brief, paras 198-215.
[168] Internal Rule 21(1)(a).
[169] The Lead Co-Lawyers note that the first disclosure of documents did not raise all the same issues since it took place on 20 October 2014, prior to the commencement of evidentiary hearings. See **E319** International Co-Prosecutor's Disclosure of Statements from Case File 004, 17 October 2014. The subject was addressed at a Trial Management Meeting held on 21 October 2014. See **E1/243.1** [Closed] T., 21 October 2014 (TMM), pp. 4-6. The Defence did not attend this meeting. See **E320** Trial Chamber Memorandum entitled "Warning to counsel for NUON Chea and KHIEU Samphan", 24 October 2014. Another Trial Management Meeting was held on 28 October 2014, this time with the Defence teams present. **E1/244.1** [Confidential] [Corrected 3] T., 28 October 2014 (TMM), p. 18 line 18 – p. 19 line 10 after [14.10.02]. No party objected to the Co-Prosecutors' request for the admission of the statements pursuant to Internal Rule 87(4). The Defence only objected to the practice of witnesses reviewing their statements before their testimony. See **E319/7** [Corrected 1] Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, 24 December 2014, para. 10.
[170] **E1/272.5** T., 5 March 2015 (TMM), p. 2 lines 2-19 after [13.44.07] ("Yesterday the Nuon Chea defence provided the Chamber and the Parties with a courtesy copy of a motion in relation to the disclosure of statements from Cases 003 and 004. The motion was filed today in both English and Khmer. In the motion, the Nuon Chea defence requested

that trial management meeting did any of the Parties signal that the disclosure of materials was inappropriate for the reasons now argued by the Defence.[171] To the contrary, the Defence suggested that "[i]f the statement is conducive to ascertain[ing] the truth, the Parties should request for the appearance of the witness in accordance with the Internal Rules."[172]

97. The Trial Chamber accommodated the NUON Chea Defence request for an adjournment – supported by the KHIEU Samphân Defence and the Civil Parties – in order to process newly disclosed documents in relation to this disclosure.[173] It did likewise in subsequent ones, as the Trial Chamber explained on 22 October 2015,

> Noting the time to read and analyse a large quantity of newly-disclosed documents, the Chamber has taken steps to ease this burden. It has adjourned proceedings for a total of 4.5 weeks to permit parties to review disclosures and has indicated a willingness to grant further adjournments. Where appropriate, it has delayed the hearing of particular witnesses or Civil Parties and informed the parties that witnesses may be recalled if good reason is shown to do so. It has also issued guidelines restricting the scope for disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02. Furthermore, upon learning that the Defence were in need of additional resources, the Chamber has contacted the Office of Administration which has pledged to identify additional financial resources as warranted by the disclosure process. The Chamber therefore directs the Defence teams to contact the Defence Support Section if they consider further resources are required.[174]

98. The Lead Co-Lawyers support the submissions of the OCP,[175] while also acknowledging the difficulties faced by the Defence in undertaking a sizeable document review process during

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the Chamber, among other things, to schedule a Trial Management Meeting to facilitate the Parties^ discussion on the on-going disclosure process and the possible way forward, and to postpone the hearing of 2-TCW-803 and 2-TCW-809. After briefly hearing the Parties on the postponement of witness 2-TCW-803, the Chamber informed the Parties by email that today that it will not hear the testimony of 2-TCW-803 as previously scheduled and will instead hold a Trial Management Meeting to allow the Parties to fully discuss the on-going disclosure process for statements from Cases 003 and 004. Each of the Parties will have 20 minutes to make submissions…").

[171] The entirety of the Defence's submissions on that day are found at **E1/272.5** T., 5 March 2015 (TMM), p. 17 line 7 – p. 21 line 20 after [14.16.13], p. 45 line 8 – p. 46 line 16 before [15.44.35].

[172] **E1/272.5** T., 5 March 2015 (TMM), p. 21 lines 6-8.

[173] **E1/280** Written Record of Proceedings – 19 March 2015, p. 3 ("The Trial Chamber ruled on the NUON Chea Defence Team request to adjourn the hearings (see E319/16, T. 4 March 2015, T. 5 March 2015) and announced it will adjourn the hearings during the week of 6 and 9 April and resume after the Khmer New Year judicial recess, in order to allow the Parties to review the disclosed material."). The Lead Co-Lawyers note that hearings were adjourned to process disclosed materials from 26 February 2015 to the afternoon of 3 March 2015, prior to the Trial Management Meeting. See **E1/268** Written Record of Proceedings – 24 February 2015, p. 3.

[174] **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 38.

[175] **F54/1** OCP Response Brief, paras 68-70.

the course of trial. The Lead Co-Lawyers have some sense of that challenge, given that they were placed in a position similar to that of the Defence in processing volumes of information while simultaneously preparing for trial, as well as conducting other responsibilities unique to their mandate.[176] However it was also relevant for the Trial Chamber to have in mind other, countervailing, factors.

99. The Civil Parties have a strong interest in the efficient and expeditious conduct of proceedings, but they also have an interest in seeing the fullest possible set of relevant facts brought before the Trial Chamber.[177] Indeed, the disclosed material held significant value to the Civil Parties who are also civil parties in Cases 003 or 004.

100. The Trial Chamber acknowledged the value of disclosed materials to the NUON Chea Defence.[178] That Defence team had sought to receive and admit material from Cases 003 and 004, a factor which the Trial Chamber was equally entitled to consider.

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[176] **E1/272.5** T., 5 March 2015 (TMM), p. 36 lines 6-21 after [15.22.37], p. 40 line 11 – p. 41 line 12 after [15.31.13]. The Lead Co-Lawyers note that the disclosure process caused challenges with respect to the selection of Civil Parties for the hearings on harm suffered at the end of each trial segment. See, for example, **E315/1/4** Lead Co-Lawyers' Submission of the List of Civil Parties to Testify during the Hearings on Harm Suffered (Third Segment) and Request pursuant to Rule 87(4) (with Confidential Annexes), 10 February 2016, para. 6 ("Lastly, noting the discussion on 8 January 2016 concerning the remaining disclosure due to be received from the Co-Prosecutors, the Lead Co-Lawyers recall that as per the estimates provided by the Co-Prosecutors in court, there remains 'another 120 witness statements, investigation reports and a few annexes to statements and four or 500 civil party applications' of which 'it appears that about 30 of the additional witness statements have some relation to the Vietnamese segment that relate to Vietnamese or Khmer Krom'. Therefore, pending a review of such disclosure by the Lead Co-Lawyers, Annex A and Annex B are being filed provisionally."). The same submission requested the admission of a disclosed document from a Civil Party who was proposed to be heard during the hearings on harm. **E315/1/4** Lead Co-Lawyers' Submission of the List of Civil Parties to Testify during the Hearings on Harm Suffered (Third Segment) and Request pursuant to Rule 87(4) (with Confidential Annexes), 10 February 2016, paras 11-14.

[177] **E1/272.5** T., 5 March 2015 (TMM), p. 35 line 15 – p. 36 line 4 after [15.21.11] ("I will start by explaining our general position, by telling you that what we wish above all and the civil parties have already stated on several occasions, is that the case should proceed. And what we want to discuss with you and the Parties today, is the modalities according to which the case can move forward. What is also very important for us is the manifestation of the truth, quite obviously, and we're convinced that the disclosures that have been done contribute to the manifestation of the truth. And so it is therefore directly of interest to us that as many documents as possible be disclosed as part of Case 002/02 particularly bearing in mind the uncertainties over Cases 003 and 004 in which numerous civil parties are also [a] party. So we are fundamentally in favour of a continuing process of disclosures and that it should continue as broadly as possible.").

[178] **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 28 *et seq*. The Lead Co-Lawyers particularly note paragraph 33: "The Chamber further notes that the NUON Chea Defence, which has sought additional disclosure from Cases 003 and 004 and the admission of statements from those cases in Case 002/02, might be prejudiced if the Chamber were to be overly restrictive in its approach. Indeed, where disclosure violations are alleged at other international tribunals, these generally arise where the Defence considers that evidence has been unfairly withheld. The Accused are within their rights to pursue their own unique defence strategies, but the Chamber must be cognisant of preserving the rights of both Accused as well as the other parties."

101. The Lead Co-Lawyers recognise that the disclosure procedure used in Case 002/02 had its challenges, but the Defence has not demonstrated that the Trial Chamber erred in the exercise of its discretion. The Trial Chamber properly conducted this exercise in a novel situation. It provided appropriate adjournments and postponements,[179] requested resources on behalf of the affected parties,[180] and imposed a deadline within which parties could propose disclosed documents to be admitted pursuant to Rule 87(4).[181] The Lead Co-Lawyers further submit that there was no impropriety in the hearing of one Civil Party (PREAP Sokhoeurn) whose statement had been disclosed through this process.[182] Rather, this served to highlight the value of the disclosed information in the Trial Chamber's ascertainment of the truth.

6.3.2 Subsequent statements disclosed after the end of trial

102. The Lead Co-Lawyers respond in a limited manner to the first aspect of **ground 23**,[183] in which the Defence argues that the Trial Chamber erred by refusing to reopen the proceedings following the disclosure of eight subsequent statements given by two witnesses and two Civil Parties who had testified during the hearings in Case 002/02. They consisted of five Written Records of Interview, one VIF, and two Supplementary Information Forms.[184] The Lead Co-Lawyers submit that the Defence arguments in this ground mischaracterise the context.

103. On 10 September 2018, the Trial Chamber requested that the CIJs authorise the disclosure of these documents to the Parties in Case 002/02.[185] The CIJs authorised the disclosures.[186]

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[179] **E465** Trial Judgment, para. 145; see also **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 38 and fn. 75.
[180] **E465** Trial Judgment, para. 145; see also **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 38 and fns 78, 79.
[181] **E465** Trial Judgment, para. 145; **E363/3** Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, para. 35.
[182] **F54** Appeal Brief, paras 211, 212. The Lead Co-Lawyers respond below more specifically to this Defence argument concerning the Trial Chamber's decisions to hear Civil Parties SUN Vuth and PREAP Sokhoeurn – see below at paras 256-259. They also note that the relevance of Civil Party SUN Vuth to Defence **ground 10** is unclear, given that Civil Party SUN Vuth was not the subject of any Case 003 or 004 disclosure.
[183] **F54** Appeal Brief, paras 244-246.
[184] **E319/71** [Confidential] International Co-Prosecutors' Proposed Disclosure of Documents from Cases 003 and 004, 3 September 2018; **E319/71/1** [Confidential] Trial Chamber Memorandum entitled "International Co-Prosecutors' (ICP) Request to Disclose Case 003 and 004 Documents", 10 September 2018, paras 2-3 (specifically noting that "[g]iven the late stage of proceedings in Case 002/02, the Chamber respectfully requests that this matter be considered as soon as possible".).
[185] **E319/71/1** [Confidential] Trial Chamber Memorandum entitled "International Co-Prosecutors' (ICP) Request to Disclose Case 003 and 004 Documents", 10 September 2018, paras 2-3.
[186] **E319/71/2** [Confidential] Decision on Disclosure Request E319/71/1 Directed through the Trial Chamber, 11 September 2018, para. 8; **E319/71/3** [Confidential] Decision on Disclosure Request E319/71/1 Directed through the Trial Chamber, 13 September 2018, para. 9.

Following the disclosure of the statements, no request to re-open hearings or to admit any document was made by any Party.

104. The Lead Co-Lawyers acknowledge that Internal Rule 96(2) provides that during Trial Chamber deliberations "no further applications may be submitted to the Chamber, and no further submissions may be made. During the course of the deliberations, the judges may reopen the proceedings." However, on the matter of this disclosure, the International Co-Prosecutor did submit a filing to the Trial Chamber that was accepted, notified to the parties, and acted upon. There was therefore good reason to believe that a Defence filing on the same subject would be entertained by the Trial Chamber. The Defence failed to even attempt to seek guidance or clarification from the Chamber on the application of Internal Rule 96(2), and did not file an application to reopen proceedings.[187] It was not until October 2019 that the Defence sought admission of two Written Records of Interview as additional evidence on appeal, those of Witnesses EK Hen and CHUON Thy.

105. The Defence now complains of "a missed opportunity to discuss the arguments advanced concerning EK Hen's new inconsistencies and the confirmation of CHUON Thy's exculpatory evidence."[188] However the opportunity was only missed by the Defence itself, having made no request of this nature. In any event, the new material is before the Supreme Court Chamber.[189] The Defence has therefore not demonstrated any prejudice.

6.4 Role of Case 001 findings in this Case

106. The Lead Co-Lawyers respond to a specific point raised in **ground 125** and **ground 126**,[190] namely the extent to which the Trial Chamber was bound by factual findings from Case 001 concerning matters which are also contested in Case 002/02 (in this instance matters concerning persecution in S-21). The Lead Co-Lawyers submit that the Trial Chamber in Case 002/02 was required to make its own findings based upon the evidence before it and was not bound by factual findings made in any other case.

[187] The Lead Co-Lawyers note that throughout the trial in Case 002/02, the Parties have been able to seek clarification or guidance on matters such as this by email through the Trial Chamber's Senior Legal Officer.
[188] **F54** Appeal Brief, para. 246.
[189] **F51/3** Decision on KHIEU Samphân's Request for Admission of Additional Evidence, 6 January 2020, para. 40.
[190] **F54** Appeal Brief, paras 825-827 (ground 125) and paras 828-835 (ground 126).

107. The Lead Co-Lawyers agree with the OCP that the Defence have misrepresented this Chamber's rulings in Case 001,[191] but emphasise that this case involves different charges and its outcome cannot be pre-determined or limited by reference to a separate case.[192] The Defence has itself previously argued that the judges must not be influenced by factual findings in previous cases.[193] The Trial Chamber's only obligation in this regard was to properly consider the evidence which was before it in the present case – including material from Case 001 which was admitted in Case 002/02. The Defence arguments do not demonstrate that it failed to do so.

108. The Lead Co-Lawyers note in particular with respect to **ground 125** that the Defence failed to substantiate its assertion at paragraph 827 that "[a]lthough these are two different cases, the evidence relating to S-21 really evinced nothing new that would support a finding different from that of the Supreme Court."[194] Similarly, when alleging that the Trial Chamber erred in not taking into account findings in Case 001 with respect to **ground 126**, the Defence failed to substantiate its assertion that "[t]he [Trial] Chamber did not take this reasoning into account, without justifying why in this case the interpretation of the evidence was different."[195] The Lead Co-Lawyers support the Responses of the OCP on the other matters raised by these grounds.[196]

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[191] **F54/1** OCP Response Brief, para. 645 referring to **F54** Appeal Brief, paras 833-834 and **Case 001 – F28** Appeal Judgment, paras 281-284; and **F54/1** OCP Response Brief, para. 848 referring to **F54** Appeal Brief, paras 826-827 and **Case 001 – F28** Appeal Judgment, para. 282.

[192] See for example **E301/9/1/1/3** Decision on KHIEU Samphân's Immediate Appeal Against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, para. 85, where this Chamber made the equivalent point in respect of findings from Case 002/01. See ICTY *Prosecutor v Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014, para. 180 ("Even on the same facts, evidence and witness testimony may differ from case to case. It is therefore accepted that two reasonable triers of facts might reach different but equally reasonable conclusions, even if they concern the same events. The question before the Appeals Chamber is whether no reasonable trier of fact could have reached the same conclusion as the Trial Chamber and not whether the conclusion reached by another trial chamber was a reasonable one.") See also ICTY *Prosecutor v Lukić and Lukić*, IT-98-32/1-A, Judgement, 4 December 2012, para. 396 ("The Appeals Chamber recalls that two reasonable triers of facts may reach different but equally reasonable conclusions when assessing the reliability of a witness and determining the probative value of the evidence presented at trial. An error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way.").

[193] **F53** KHIEU Samphân's Application for Disqualification of the Six Appeal Judges who Adjudicated in Case 002/01, 31 October 2019.

[194] **F54** Appeal Brief, para. 827.

[195] **F54** Appeal Brief, para. 835.

[196] **F54/1** OCP Response Brief, paras 844-850 (**ground 125**) and paras 639-645 **(ground 126**).

7 GROUNDS CONCERNING THE SCOPE OF THE CASE

109. In this section of their Brief, the Lead Co-Lawyers respond to the Defence challenges concerning the scope of the case.[197] As previously held by this Chamber,[198] the Defence must raise objections concerning the scope of the case at the appropriate time, with failure to do so meaning that those arguments will not be considered. Yet many of the arguments made by the Defence concerning the scope of the case were significantly delayed, as demonstrated below. The Lead Co-Lawyers request that the Chamber protect the Civil Parties' rights to legal certainty by dismissing those arguments.

110. By way of brief background, the Lead Co-Lawyers note that the Trial Chamber was seized with the facts set out in the Closing Order[199] as limited by the two severance decisions: the decision severing Case 002/01,[200] and the Decision on Additional Severance of Case 002 and

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[197] The arguments concerning scope are principally set out in Part II of the Appeal Brief, which is headed "Errors Concerning the Scope of the Judicial Investigation/the Trial"; and more specifically in **grounds 38 to 82** and **ground 84** (**F54** Appeal Brief, paras 335-543 and 547-549). However, additional substantive arguments concerning scope are also contained in **ground 112** (**F54** Appeal Brief, para. 757), **ground 123** (**F54** Appeal Brief, paras 814-824) and **ground 134** (**F54** Appeal Brief, paras 884-886). Additional, although somewhat unparticularised, arguments concerning scope in general are set out in **ground 2** (**F54** Appeal Brief, paras 106-118). The Lead Co-Lawyers have understood the points raised in **ground 2** to be made in support of the other, particularised, grounds of appeal relating to scope, rather than to form a separate basis for appeal in their own right, since the Defence does not clearly articulate any impact on the verdict of the alleged errors raised.
In this section of its Brief the Lead Co-Lawyers do not respond to arguments alleging the use of so-called "out-of-scope evidence" (including **ground 3 and ground 112**). Regarding the Defence's general arguments on that topic (**ground 3**) the Lead Co-Lawyers agree with the OCP position set out at **F54/1** OCP Response Brief, paras 351-359. A response to **ground 112** is set out later in this Brief, in paras 588-589 and 597-603. The Lead Co-Lawyers also do not respond in this section to **ground 83**. Although it is included in the midst of submissions concerning the scope of the case, it relates to *ne bis in idem*, a different question. That ground is dealt with at paras 618-626 of this Brief.
Finally, **ground 124** is described in Annex A as being concerned with scope, but does not exist in the Appeal Brief. It is therefore unknown what the substance of this ground was intended to be. It is dealt with above along with other defective grounds of appeal, at paras 72-73 and 78.

[198] **F36** Case 002/01 Appeal Judgment, para. 237.

[199] The Closing Order (**D427** Closing Order) is based on the investigation of the Co-Investigating Judges, which is defined by the Co-Prosecutors' Introductory Submission, and any Supplementary Submissions. See Internal Rule 55(2).

[200] **E284** Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013. (Upheld by this Chamber in **E284/4/8** [Corrected 1] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013.) See also, concerning the scope of Case 002/01: **E124** Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011; **E163/5** Trial Chamber Memorandum entitled "Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs", 8 October 2012; **E163/5/1/13** Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013.

Scope of Case 002/02 ("Additional Severance Decision").[201] The Trial Chamber was required to admit and hear evidence relevant to those facts and make its legal findings upon them.[202] The Trial Chamber was not bound by the CIJs' legal characterisation of those facts so long as any recharacterisation did not introduce any new constituent element of a crime.[203]

111. As already identified by the OCP,[204] the Defence's challenges to the scope of the case fall into four broad "types": (1) that certain facts should not have been included in the Closing Order, because they were not contained in the Introductory Submission or Supplementary Submissions; (2) that certain facts should not have been included in the Closing Order because they were insufficiently supported by the available evidence;[205] (3) that certain facts should not have been included within the scope of the trial because they fell outside the Closing Order; (4) that certain facts should not have been included within the scope of the trial because they fell outside the parameters of Case 002/02 as a result of severance.

112. Concerning the merits of these arguments, the Lead Co-Lawyers support the OCP's Response on "*Saisine* & Scope of the Trial",[206] and agree that any of these grounds which are not dismissed in connection with their belatedness should in any event be rejected on their merits. The Lead Co-Lawyers will not add here to the submissions on the substance of these grounds.[207]

113. Instead, these submissions focus on the timeliness of the Defence's challenges regarding scope. For the purpose of these submissions, the Defence's arguments can be considered in two categories: types 1 and 2 (according to the OCP's groupings, explained above) are complaints about the judicial investigation. They are matters which should have been raised

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[201] **E301/9/1** Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, upheld in **E301/9/1/1/3** [Corrected 1] Decision on KHIEU Samphân's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014. See also, concerning the termination of the remainder of Case 002, **E439/5** Decision on Reduction of the Scope of Case 002, 27 February 2017.
[202] Internal Rule 87(2) and Internal Rule 98.
[203] Internal Rule 98(2).
[204] **F54/1** OCP Response Brief, para. 245.
[205] The Lead Co-Lawyers note that the OCP's categorisation of the Defence's arguments on the scope of the case divides this group of grounds into two categories: those alleging that parts of the Closing Order were not within the Introductory Submission or Supplementary Submissions, and those alleging that the Closing Order was not supported by sufficient evidence in a particular area. See **F54/1** OCP Response Brief, para. 245. For the purpose of the arguments made by the Lead Co-Lawyers, these can be dealt with together.
[206] **F51/1** OCP Response Brief, paras 245-359.
[207] Submissions on **ground 112**, which is presented as an "out-of-scope evidence" argument, but is based on an erroneous understanding of the Closing Order, are found elsewhere in this Brief (see paras 588-589 and 597-603).

during the judicial investigation or in an appeal against the Closing Order. Types 3 and 4 are complaints about the Trial Chamber's interpretation of the Closing Order or the Additional Severance Decision. Objections on these questions should have been raised as soon as the Defence became aware of the interpretation to which they now object.

114. The majority of these arguments were raised with considerable delay. In most cases they were raised not only years too late, but also after the relevant stage of proceedings had concluded. The legal consequences of that delay are set out below, first in respect of the type 1 and 2 arguments, and then for types 3 and 4.

7.1 Civil Party rights and interests regarding the scope of the proceedings

115. Civil parties have rights and interests concerning the fair and expeditious conduct of proceedings, legal certainty, and the judicial determination of the charges that concern them.[208]

116. This Chamber has acknowledged the importance of satisfaction to victims in proceedings before the ECCC, which "is achieved through the 'verification of the facts and full and public disclosure of the truth' as fostered by the findings of the Co-Investigating Judges and three Chambers, through the access and participation of victims to proceedings, and through victims' identification and individual recognition in the final judgment that represent a public acknowledgement of their suffering."[209]

117. The question at hand involves an interplay between the Civil Parties' right to satisfaction (including the right to truth), and their interest in legal certainty. At key moments in the proceedings, particularly the issuance of the Closing Order and the Additional Severance Decision, it was made clear which matters would fall within the Court's determinations, and which would not. Civil Parties have relied on that position during the intervening years, with some testifying on that understanding, but others simply understanding that their experiences would be acknowledged in the judgment of the Court. Their interest in legal certainty[210] is intended to protect precisely this kind of reliance. The consequences of a ruling now which

[208] Internal Rule 21(1). See Section 3.2 above, at para. 43 *et seq*.
[209] **Case 001 – F28** Appeal Judgment, para. 661.
[210] Internal Rule 21(1).

limits the scope of the case would be to quash these expectations which have been quite understandably maintained during years of Defence silence on the subjects in question.

7.2 Type 1: Grounds alleging that the judicial investigation exceeded its permitted scope

7.2.1 Overview and procedural history

118. In numerous grounds, the Defence argues that the scope of the case must be reduced, and convictions therefore overturned, because the CIJ were never empowered to investigate certain matters. The Defence claims that these matters were outside the limits of the Introductory Submission and Supplementary Submissions.

119. These arguments are raised in: **ground 39** (events outside the 8 communes in Tram Kak District listed in the Closing Order),[211] **ground 40** (deaths other than those due to hunger),[212] **ground 41** (deportation of Vietnamese people from Tram Kak),[213] **ground 42** (enforced disappearances at Trapeang Thma Dam),[214] **ground 43** (killings at Baray Choan Dek pagoda),[215] **ground 44** (deaths caused by accidents at 1st January Dam),[216] **ground 45** (discrimination against New People at 1st January Dam),[217] **ground 46** (discrimination on religious grounds as against the Cham at 1st January Dam),[218] **ground 47** (disappearances at the 1st January Dam),[219] **ground 48** (enslavement at K-17 and Phnom Kraol Prison),[220] **ground 49** (other inhumane acts through acts against human dignity at Phnom Kraol),[221] **ground 50** (enforced disappearances at K-11 and Phnom Kraol),[222] **ground 51** (deaths due to conditions at Kraing Ta Chan),[223] **ground 52** (enslavement at Kraing Ta Chan),[224] **ground 53** (torture at Kraing Ta Chan),[225] **ground 54** (ill-treatment as other inhumane acts through

[211] **F54** Appeal Brief, paras 367-377.
[212] **F54** Appeal Brief, paras 378-379.
[213] **F54** Appeal Brief, paras 380-385.
[214] **F54** Appeal Brief, paras 386-387.
[215] **F54** Appeal Brief, paras 388-390.
[216] **F54** Appeal Brief, paras 391-392.
[217] **F54** Appeal Brief, paras 393-394.
[218] **F54** Appeal Brief, para. 395.
[219] **F54** Appeal Brief, para. 396.
[220] **F54** Appeal Brief, paras 397-398.
[221] **F54** Appeal Brief, paras 399-400.
[222] **F54** Appeal Brief, paras 401-403.
[223] **F54** Appeal Brief, paras 404-407.
[224] **F54** Appeal Brief, paras 408-409.
[225] **F54** Appeal Brief, paras 410-411.

acts against human dignity at Kraing Ta Chan),[226] **ground 55** (disappearances at Kraing Ta Chan),[227] **ground 56** (persecution on racial grounds as against the Vietnamese at Au Kanseng),[228] **ground 57** (lack of medical assistance and physical and psychological ill treatment as OIA at Au Kanseng),[229] **ground 58** (internal purges outside of North and East Zones),[230] **ground 59** (treatment of Buddhists at Tram Kak Cooperatives),[231] **ground 60** (treatment of Vietnamese),[232] and **ground 123** (deaths from accidents at the Kampong Chhnang Airfield).[233]

120. The Defence argues that the Trial Chamber incorrectly construed the applicable law governing the relationship between the Introductory Submission (including its supporting annexes) and Supplementary Submissions, and the Closing Order.[234] The Lead Co-Lawyers support the OCP's submissions as to why these arguments should be rejected.[235]

121. The Lead Co-Lawyers note that with one exception, the Trial Chamber ruled the type 1 arguments inadmissible, based on the Internal Rules and the Cambodian Code of Criminal Procedure.[236] In **ground 38** the Defence challenges the Trial Chamber's admissibility ruling on type 1 arguments, but fails to engage with the substance of the Trial Chamber's reasoning.[237]

122. As the list in paragraph 119 above indicates, these Defence arguments affect a significant portion of the case. Only two of these arguments about the scope of the Closing Order were ever raised by the Defence before the end of trial.

123. The first of these relates to the argument contained in **ground 58**. In June 2016 the Defence filed a request for clarification before the Trial Chamber, raising questions about the scope

[226] **F54** Appeal Brief, paras 412-413.
[227] **F54** Appeal Brief, paras 414-415.
[228] **F54** Appeal Brief, paras 416-417.
[229] **F54** Appeal Brief, paras 418-419.
[230] **F54** Appeal Brief, paras 420-425.
[231] **F54** Appeal Brief, paras 426-434.
[232] **F54** Appeal Brief, paras 435-438.
[233] **F54** Appeal Brief, para. 818.
[234] **F54** Appeal Brief, paras 351-366.
[235] **F54/1** OCP Response Brief, paras 253-256.
[236] **E465** Trial Judgment, para. 165; see also paras 809, 1206, 1435, 1714, 2638, 2981, 3024, 3179, 3356.
[237] **F54** Appeal Brief, paras 335-350.

of the case concerning "purges".[238] The Defence request was largely concerned with the interpretation of the Closing Order and the Additional Severance Decision, but also included brief references to the Introductory Submissions and the CIJ's *saisine*.[239] The Trial Chamber ruled that the scope of the case remained as set out in the Additional Severance Decision.[240] It noted that it was "regrettable that the matter was raised at such a late stage."[241] Subsequently, in the Trial Judgment, the Trial Chamber recognised that arguments concerning the scope of the Introductory Submissions regarding purges had been made in the June 2016 request, and noted that those arguments had "never been raised before the Pre-Trial Chamber or before the opening of the trial in Case 002."[242]

124. The other argument raised before the end of trial concerned the Closing Order's inclusion of deportation of Vietnamese people (now raised in **ground 41**).[243] Arguments challenging the inclusion of these facts in the Closing Order were raised by IENG Sary in his appeals against the Closing Order before the Pre-Trial Chamber.[244] The Pre-Trial Chamber ruled these arguments inadmissible, taking the view that they should be dealt with before the Trial Chamber.[245] IENG Sary repeated his arguments before the Trial Chamber in January 2011, before the start of trial.[246] As this issue did not concern Case 002/01, it was deferred by the Trial Chamber until 2014 at which point, IENG Sary having died, the Parties were requested to indicate whether they adhered to the position put forward by him and if so to make submissions.[247] In response, and for the first time, KHIEU Samphân raised this issue, adopting IENG Sary's arguments that the Closing Order was defective in respect of deportation (the "Deportation Request").[248] These arguments were rejected by the Trial Chamber in September 2014 in its Decision on Defence Preliminary Objection regarding

[238] **E420** *Requête urgente de la Défense de M. KHIEU Samphân aux fins de clarification de l'étendue de la saisine de la Chambre concernant les « purges internes »*, 22 June 2016.
[239] *Ibid.*, paras 11-16, for example.
[240] **E420/1** Trial Chamber Memorandum entitled "Decision on KHIEU Samphan Urgent Request for Clarification of the Scope of Case 002/02 concerning Internal Purges", 1 July 2016, para. 9.
[241] *Ibid.*, para. 10.
[242] **E465** Trial Judgment, fn. 362.
[243] **F54** Appeal Brief, paras 380-385.
[244] **D427/1/6** IENG Sary's Appeal Against the Closing Order, 25 October 2010, para. 204.
[245] **D427/1/30** Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, para. 47.
[246] **E58** IENG Sary's Motion to Strike Portions of the Closing Order Due to Defects, 24 January 2011, para. 11.
[247] See **E306** Trial Chamber Memorandum entitled "Further information regarding remaining preliminary objections", 25 April 2014, paras 1 and 5.
[248] **E306/2** *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statue* ("Deportation Request"), 20 May 2014, paras 14-20.

Jurisdiction over the Crime Against Humanity of Deportation ("Deportation Decision"), which ruled that the objections were out of time and inadmissible, as they had not been made at the stage of proceedings required by Internal Rule 76.[249]

125. Internal Rule 76 is the mechanism in the legal framework designed to address procedural defects in the conduct of a judicial investigation. According to Internal Rule 76(2), "[w]here, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seize the Chamber with a view to annulment."[250] However it mandates that such matters be dealt with at the pre-trial stage. Internal Rule 76(7) states that: "Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber."[251]

126. Applying these principles, the Trial Chamber held that KHIEU Samphân should have raised the issue during the investigation phase.[252] However, it went on to note that the Trial Chamber may,

> in very limited circumstances, [consider] specific and reasoned procedural challenges related to alleged irregularities occurring during the pre-trial phase *where the parties can demonstrate that they did not have an opportunity to detect, before the opening of the trial*, the alleged distortion in the nature of an individual's statements as reflected in their written record of interview from the investigative phase or if it appears necessary to safeguard the fairness of trial proceedings.[253] [*emphasis added*]

The Trial Chamber concluded that KHIEU Samphân had the opportunity to know of the issue, and observed that "[h]ad the scope of the judicial investigation been a matter of controversy, this should have been raised before the opening of the trial. The Trial Chamber

[249] **E306/5** Decision on Defence Preliminary Objection regarding Jurisdiction over the Crime Against Humanity of Deportation, 29 September 2014, paras 5-10 ("Deportation Decision").
[250] Internal Rule 76(2). Internal Rule 76(4) provides that applications for annulment may be declared inadmissible where sufficient reasons are not furnished in the application, the application relates to an order that could be appealed, or "is manifestly unfounded." A decision finding an application inadmissible on these cannot be appealed.
[251] Internal Rule 76(7). See also Code of Criminal Procedure of Cambodia, Article 256.
[252] **E306/5** Deportation Decision, para. 5.
[253] **E306/5** Deportation Decision, para. 6.

is seized of the Closing Order which, according to Internal Rule 76(7), shall cure any procedural defects in the judicial investigation."[254]

127. Despite the Trial Chamber's ruling that submissions concerning defects in the Closing Order must be raised during the investigation phase (or, in narrow circumstances, prior to the start of trial) three years later in his Closing Brief, KHIEU Samphân argued again that the Closing Order was defective. The Defence at that point expanded these arguments significantly beyond deportation, to include a range of other areas.[255]

128. The Trial Chamber reiterated the principles it had applied in the Deportation Decision.[256] It noted that among the charges challenged by the Defence, the only one which had been raised at all before the Pre-Trial Chamber (albeit by a different Accused) was deportation.[257] It therefore dismissed the other objections as out of time,[258] specifically noting that:

> The allegations contained in these objections are based on a mere comparative reading of the Introductory Submission, Supplementary Submissions and the Closing Order. All the necessary information was available since 15 September 2010 when the Closing Order was issued. Since then the Accused have been on notice of the scope of the charges against them but have failed to avail themselves of the opportunity to raise the matter before the Pre-Trial Chamber or before this Chamber in a preliminary objection.[259]

The arguments concerning deportation were entertained on the merits only because it was recognised that the Deportation Decision had failed to take account of the Pre-Trial Chamber's (perhaps incorrect) deferral to the Trial Chamber on this issue, creating a risk that the Accused would be left without recourse.[260] Ultimately the arguments were rejected on their merits.[261]

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[254] *Ibid*., para. 9.
[255] **E457/6/4/1** KHIEU Samphân's Closing Brief (002/02), 2 May 2017 (amended on 2 October 2017) ("Defence Closing Brief"). The type 1 arguments now maintained are found in paras 219-276, 277-293, 848-852, 859-863, 1018-1021, 1063-1068, 1069-1070, 1072-1074, 1106-1116, 1223-1242, 1243-1246, 1249-1253, 1274-1276, 1277-1283, 1326-1329, 1330-1333, 1372-1379, 1394-1399, 1492-1521, 1933-1934. See further at para. 129 and fn. 263 below regarding type 1 scope arguments apparently raised for first time in the Appeal Brief.
[256] **E465** Trial Judgment, para. 160.
[257] **E465** Trial Judgment, para. 163.
[258] **E465** Trial Judgment, para. 165; see also paras 809, 1206, 1435, 1714, 2638, 2981, 3024, 3179, 3356.
[259] **E465** Trial Judgment, para. 165 fn. 363.
[260] **E465** Trial Judgment, para. 164.
[261] **E465** Trial Judgment, paras 166-168.

129. The Defence now seeks to relitigate these questions. In the grounds identified in paragraph 119 above it raises many of the same type 1 arguments which it had set out in its Closing Brief,[262] and even appears to add some entirely new arguments which the Lead Co-lawyers have been unable to locate any version of in the Defence Closing Brief.[263] The Lead Co-Lawyers submit that the Trial Chamber was correct to find that (with the exception of the objections concerning deportation, which had been raised in the Deportation Request) these arguments were inadmissible. Regarding the arguments concerning deportation (**ground 41**), the Lead Co-Lawyers submit that they should be dismissed on their merits for the reasons given by the OCP.[264]

7.2.2 Procedural avenues for raising defects in the Closing Order, and their required timing

130. The Lead Co-Lawyers submit that multiple avenues were open to the Defence through which objections against a defective Closing Order could have been made, including: requests for annulment before the Closing Order was issued;[265] an appeal against portions of the Closing Order before the Pre-Trial Chamber;[266] or an objection before the Trial Chamber.[267] However once the Defence failed to make use of these avenues at the appropriate time, Internal Rules 76(7) and 89 precluded it from doing so at the end of trial.

131. As the Lead Co-Lawyers have previously submitted,[268] the Deportation Decision correctly states the applicable law, and correctly identifies the multiple points in time at which the Defence was made aware of the scope of the judicial investigation, such that objections could have been made.[269] The Deportation Decision makes clear that arguments about defects in

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[262] See fn. 255 above for paragraph references in the Defence Closing Brief.
[263] The Lead Co-Lawyers note that they have not been able to identify in the Defence Closing Brief any version of **ground 44** (concerning accidents at the 1st January Dam Worksite). The section of the Defence Closing Brief dealing with the scope of the *saisine* regarding murder and extermination at the 1st January Dam Worksite does not address accidents. See **E457/6/4/1** Defence Closing Brief, paras 1049-1061. Arguments made in the Defence Closing Brief regarding other inhumane acts at Au Kanseng appear to have been limited to claiming that the *saisine* did not extend to lack of medical treatment. No mention is made there of psychological mistreatment treatment (now argued in **ground 57**). See **E457/6/4/1** Defence Closing Brief, paras 1330-1333.
[264] **F54/1** OCP Response Brief, para. 284.
[265] Internal Rule 76(2). Internal Rule 74(3)(g) provides for the right of the Accused to appeal against refusals of annulment requests. See also Internal Rule 48.
[266] See Internal Rules 67(5) and 74.
[267] Internal Rule 89.
[268] **E1/526.1** T., 21 June 2017 (Closing Statements), p. 57 line 20 – p. 61 line 3, after [13.37.15].
[269] **E306/5** Deportation Decision, paras 5-10.

the judicial investigation or Closing Order can only be raised during the judicial investigation, either before the CIJ or the Pre-Trial Chamber.[270] The only exceptions to this arise "in very limited circumstances": (i) where the party did not have the opportunity to detect the alleged defect during the investigation phase; or (ii) "if it appears necessary to safeguard the fairness of trial proceedings."[271]

132. The Trial Judgment later confirmed this position, also noting that in this respect the Internal Rules are consistent with the Cambodian Code of Criminal Procedure.[272] It went on to additionally consider whether arguments concerning alleged defects in a closing order can ever be brought as preliminary objections before the Trial Chamber under Internal Rule 89.[273] It referred to the objective of Internal Rule 89 – namely to ensure that the parameters of the trial are clear before evidence is heard – and concluded that challenges to the Closing Order could be brought under Internal Rule 89 so long as this is done within the prescribed time limit (30 days after the Closing Order becomes final).[274]

133. However the Trial Judgment does not address directly what the relationship is between Internal Rule 76(7) and Internal Rule 89. The Lead Co-Lawyers submit that in order for Internal Rule 76(7) to retain any meaning, it must be the case that Internal Rule 89 only applies where there is a valid reason for an objection to the Closing Order to be raised *after* the investigation phase. In other words, Internal Rule 89 only comes into play where one of the exceptions to Internal Rule 76(7), identified by the Trial Chamber in the Deportation Decision, arises. Only where that is the case, a challenge to the Closing Order could still be validly brought before the Trial Chamber as a preliminary objection under Internal Rule 89.

134. The importance of Internal Rule 76(7) was reiterated recently by the Pre-Trial Chamber, demonstrating that, notwithstanding its approach to IENG Sary's arguments on deportation in the present case,[275] it now takes the view that:

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[270] *Ibid*., para. 5.
[271] *Ibid*., para. 6.
[272] **E465** Trial Judgment, para. 160, referring to Code of Criminal Procedure of Cambodia, Article 256. See also **E465** Trial Judgment, para. 161, referring to Code of Criminal Procedure of Cambodia, Article 323 as serving a purpose similar to that achieved through Internal Rule 89.
[273] **E465** Trial Judgment, para. 161.
[274] *Ibid*.
[275] See above at para. 124.

> The Pre-Trial Chamber notes that the Chamber's power of review can be grasped in Internal Rule 76(7) which states that "[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation". This power of review is so important and determinative that "[n]o issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber". As a consequence, the Pre-Trial Chamber is responsible for ensuring, at the investigation stage, that the fundamental principles underlying the criminal procedure applicable before the ECCC are respected.[276]

135. A consistent approach was taken in Case 002/01, with the Trial Chamber ruling that arguments about defects in the Closing Order, raised for the first time at the end of trial proceedings, were out of time and inadmissible.[277] That approach was approved by this Chamber on appeal.[278]

136. Therefore, while the Lead Co-Lawyers do not disagree with the OCP's conclusion that the Defence arguments concerning alleged defects in the Closing Order having been raised too late under Internal Rule 89,[279] they contend that, in any event, these arguments were already barred by Internal Rule 76(7) unless one of the circumstances identified in the Deportation Decision was demonstrated.

7.2.3 The Defence has demonstrated no error in the Trial Chamber's determinations that the type 1 scope arguments were inadmissible

137. The Lead Co-Lawyers recall[280] that the Chamber will only overturn a decision taken by the Trial Chamber in the exercise of its discretion on a procedural matter:

> …(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on [a] patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[281]

138. In **ground 38** the Defence appears to argue that (i) the Trial Chamber erred in finding that Internal Rule 89 applied to type 1 scope arguments;[282] and (ii) the Trial Chamber's decision

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[276] **Case 004/2 – D359/24 & D360/33** Considerations on Appeals against Closing Orders, 19 December 2019, para. 52.
[277] **E313** Case 002/01 Trial Judgment, para. 628.
[278] **F36** Case 002/01 Appeal Judgment, para. 237.
[279] **F54/1** OCP Response Brief, paras 273-280.
[280] See Section 2.1.3, above at paras 31-33.
[281] **F36** Case 002/01 Appeal Judgment, para. 97 quoting ICC *Prosecutor v Kony et al.*,Judgment on the appeal of the Defence against the "Decision on admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009, para. 80.
[282] **F54** Appeal Brief, paras 336-346.

on admissibility amounted to a "miscarriage of justice".[283] In the following submissions, the Lead Co-Lawyers respond to these arguments by reference to the correct legal test set out above.

7.2.3.1 The Defence has not demonstrated that the Trial Chamber based its admissibility determinations on an erroneous interpretation of the law

139. In its first set of arguments in **ground 38,** the Defence claims that its arguments concerning defects in the Closing Order must have been admissible at the end of trial because there was no legal avenue available for them to have been raised any earlier.[284] The Defence points to no specific basis that permits it to raise such objections at the end of trial. Rather it focuses on arguing that it was not able to make objections sooner. The Lead Co-Lawyers reject that contention for the reasons which follow.

140. The Defence begins with an attempted textual analysis of Internal Rule 89, claiming that the type of objections it wanted to make were not envisaged by the Rule and that it was therefore barred from objecting at the start of trial.[285] There are two convenient omissions in this analysis.

141. First, the Defence ignores Internal Rule 76. It neither explains why it would not have been able to challenge the investigation and the Closing Order *before* reaching the trial stage; nor does it explain why arguments about defects in the Closing Order brought at the end of trial would not be barred by Internal Rule 76(7). By ignoring Internal Rule 76 the Defence presents a distorted picture of the wider procedural framework, arguing implicitly that if a challenge could not be brought under Internal Rule 89, it follows that it must be possible to raise that challenge at the end of trial. This ignores the plain meaning and evident purpose of Internal Rule 76(7): some challenges must be brought at the investigation phase, or they will not be entertained at all.

142. Secondly, the Defence also fails to address the Deportation Decision. Although that decision did not consider Internal Rule 89, which the Defence now focuses on, it is clearly relevant. The Trial Chamber made clear (by reference to Internal Rule 76), that although defects in a

[283] **F54** Appeal Brief, paras 347-350.
[284] **F54** Appeal Brief, paras 336-346.
[285] **F54** Appeal Brief, paras 336-339.

Closing Order should usually be raised before the trial stage, they could nonetheless be raised before the Trial Chamber in certain circumstances.[286]

143. Of course, in claiming that arguments about defects in the Closing Order could not be made until the end of trial, the Defence faces an obvious hurdle in the fact that it *did* make one such argument at the start of trial (in the Deportation Request).[287] Thus, the Defence now claims that the Deportation Request was not brought under Internal Rule 89, but rather on some other unspecified legal basis.[288] In arguing this position it points to the Trial Chamber's September 2011 decision which struck out portions of the Case 002 Closing Order as defective.[289] Contrary to the Defence claim,[290] in that decision the Trial Chamber did not draw a legal distinction between preliminary objections and motions to strike out portions of the Closing Order. Both were admitted, with the Trial Chamber granting the motion to strike and therefore holding it unnecessary to consider the preliminary motions.[291] It is ultimately unnecessary to speculate as to whether the motion to strike was (a) treated as falling within Internal Rule 89 without being expressly stated; or (b) accepted pursuant to some other legal basis. The point remains that the Trial Chamber allowed it, noting that although no specific avenue existed in the ECCC's legal texts for the remedy sought, the fair trial rights of the accused required it.[292] This caselaw thus only further serves to demonstrates that KHIEU Samphân was not procedurally barred from raising his objections at the relevant time.

144. Finally, the Defence turns to a decision of the Pre-Trial Chamber in Case 003.[293] Again, far from assisting the Defence, that decision in fact emphasises that multiple avenues are available to a Defence team for seeking annulment of a defective investigative step or Closing Order. The Pre-Trial Chamber rejected as inadmissible MEAS Muth's request for

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[286] As set out above at para. 126. See **E306/5** Deportation Decision, para. 6.
[287] The arguments concerning deportation, which KHIEU Samphân adopted from IENG Sary: **E306/2** Deportation Request.
[288] **F54** Appeal Brief, paras 345-346.
[289] **F54** Appeal Brief, para. 346; **E122** Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011.
[290] **F54** Appeal Brief, para. 346 fn. 551, referring to **E122** Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, paras 1-2.
[291] **E122** Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, p. 11.
[292] *Ibid.*, paras 16 and 22.
[293] **F54** Appeal Brief, para. 340 referring to **Case 003 – D158/1** [Redacted] Decision on Request For The Pre-Trial Chamber To Take a Broad Interpretation Of the Permissible Scope Of Appeals Against The Closing Order & To Clarify The Procedure For Annulling The Closing Order, Or Portions Thereof, If Necessary, 28 April 2016.

clarification of the applicable procedural law, holding that there was no need for hypothetical clarification. It pointed to the "right in international law to an *effective* remedy for violations of the [fundamental] rights of an accused, as reflected in article 2(3)(a) ICCPR", and noted that this principle and Article 35(new) of the ECCC Law had been used to enable appeals against a Closing Order.[294] On the specific question of which challenges are available where an investigation is thought to exceed the scope of the Introductory Submission, the Pre-Trial Chamber emphasized that such challenges are clearly available via an application for annulment during the investigation, or in response to the OCP Final Submission, or even at trial (referring to the Trial Chamber's Deportation Decision).[295] Noting that the request did not demonstrate any lack of clarity which might prevent the enjoyment of procedural rights, the Pre-Trial Chamber found the request inadmissible.[296] Thus, while the Pre-Trial Chamber did not rule on the scope of permissible appeals after the Closing Order, its ruling nonetheless made clear that several options exist for objecting to an over-broad judicial investigation.

145. The Defence's arguments therefore fail to demonstrate that procedural bars prevented it from raising objections before the CIJ or the PTC, or at the start of the trial proceedings. No reason has been given why the approach set out in the Deportation Decision and the Trial Judgment is wrong.

146. Finally, as an alternative argument, the Defence refers to jurisprudence from the MICT and ICTY which it claims supports the possibility to file preliminary motions out of time.[297] While such authorities may provide guidance on basic principles where there is a lacuna or uncertainty about the ECCC's applicable rules,[298] they cannot supplant them.[299] In any event, as explained below,[300] the authorities cited do not even support the Defence's position. They highlight the fundamental principle that objections must be timely, and that where a narrow

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[294] **Case 003 – D158/1** [Redacted] Decision on Request For The Pre-Trial Chamber To Take a Broad Interpretation Of the Permissible Scope Of Appeals Against The Closing Order & To Clarify The Procedure For Annulling The Closing Order, Or Portions Thereof, If Necessary, 28 April 2016, para. 19.
[295] *Ibid*., para. 20.
[296] *Ibid*., paras 21-22.
[297] **F54** Appeal Brief, para. 349.
[298] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 1 August 2005, ("ECCC Agreement"), Article 12(1); ECCC Law, Article 33 new.
[299] **F46/2/4/2** Decision on Urgent Request concerning the Impact on Appeal Proceedings of Nuon Chea's Death prior to the Appeal Judgement, 22 November 2019, para. 40.
[300] See para. 173 below.

exception is permitted for late objections, the burden rests on the objecting party to show that special circumstances justify it being heard late.[301]

147. The Defence therefore fails to demonstrate that the Trial Chamber made an error in identifying the relevant law when it ruled that the Defence's type 1 scope arguments were out of time and inadmissible.

7.2.3.2 The Defence's "miscarriage of justice" argument does not demonstrate an error in the exercise of the Trial Chamber's discretion

148. The Defence's alternative argument is framed in terms of preventing a "miscarriage of justice". As set out above, the relevant standard of appeal which the Defence must discharge is that the Trial Chamber exercised its discretion on the basis of a "patently incorrect conclusion of fact" or that its decision was "so unfair and unreasonable as to constitute an abuse of discretion."[302]

149. The Defence has demonstrated neither. It has pointed to no incorrect factual matters relied on by the Trial Chamber, and in fact maintains its silence on the factual matters which might have been relevant to the Trial Chamber's decision. As set out above, arguments that a Closing Order is defective could exceptionally be raised at the beginning of the trial stage where it is shown that (i) the party did not have the opportunity to raise the issue during the judicial investigation; or that (ii) it is necessary to safeguard the fairness of trial proceedings.[303]

150. Before the Trial Chamber, the Defence gave no explanation as to why its challenges to the scope of the judicial investigation were not brought during that investigation, at its conclusion, or at the beginning of the trial. No suggestion was made that the Defence did not have an opportunity to raise matters during the investigation. Neither was any reason given

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[301] Regarding the principles reflected in the *Šainović*, *Simić* and *Niyitegeka* cases (cited in **F54** Appeal Brief, footnote 556) and the related line of authorities, see below at para. 173. Regarding the decision from *Turinabo* (cited in **F54** Appeal Brief, fn. 555), the Lead Co-Lawyers consider that decision to offer little guidance on the circumstances in the present case. It concerned a request for a 20 day extension of time for preliminary objections during pre-trial proceedings. It has no bearing on the question of whether preliminary objections may validly be raised for the first time years later at the end of trial. See MICT *Prosecutor v Turinabo et al.*, MICT-18-116-PT, Decision on Motions for Extension of Time to File Preliminary Motions, 14 December 2018. *Attachment 3*

[302] **F36** Case 002/01 Appeal Judgment, para. 97; quoting ICC *Prosecutor v Joseph Kony et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009, para. 80; See Section 2.1.3, above at paras 31-33.

[303] **E306/5** Deportation Decision, para. 6.

as to why a late objection should be permitted to safeguard the fairness of the proceedings. No further explanation has been given in the appeal.

151. The Lead Co-Lawyers note that the burden falls on the Defence to demonstrate that the Trial Chamber erred in the exercise of this discretion. It is not for the Lead Co-Lawyers to demonstrate the contrary. Nonetheless, the Lead Co-Lawyers highlight factors which the Chamber should have in mind when considering the Defence's submissions.

152. Broadly, the Lead Co-Lawyers submit that the relevant assessment of fairness in the proceedings must balance the rights of the Parties,[304] therefore taking into account any potential prejudice not only to the Defence but also to the Civil Parties.

153. Additionally, the Lead Co-Lawyers highlight that any such assessment must bear in mind the extreme nature of the delay in bringing forward the arguments in question. The Introductory Submission was filed on 18 July 2007.[305] Most of the investigative steps which would have put the Defence on notice as to matters being investigated occurred during 2008 and 2009. Any remaining doubts about the scope of the investigation undertaken by the CIJs ended with the Closing Order, which was filed on 15 September 2010.[306] The Defence did appeal against the Closing Order, but failed to raise any of the arguments that the CIJs had exceeded their jurisdiction. Instead it waited until the end of trial to make those arguments in its Closing Brief, filed on 2 May 2017. By that time, the Defence had been aware for more than six and a half years of the facts on which it relies to argue these grounds. Numerous individuals had given their time to testify before the Court on the contested issues and considerable time had been expended by the Parties and Trial Chamber in studying and addressing the evidence on those issues.

154. Based on these factors, the Lead Co-Lawyers submit below that permitting the arguments to be raised at the end of trial for the first time (i) was not necessary in order to ensure that the proceedings are fair to the Defence, and (ii) would have actually *undermined* the fairness of the proceedings *vis-à-vis* the Civil Parties.

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[304] Internal Rule 21(1)(a) ("ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.").
[305] **D3** Introductory Submission, 18 July 2007.
[306] **D427** Closing Order, 15 September 2010.

7.2.3.2.1 Permitting late preliminary objections was not necessary to safeguard Defence fair trial rights

155. The Lead Co-Lawyers take particular issue with the Defence's suggestion that the Chamber must address its arguments pertaining to scope in the interests of "fundamental fairness and due process".[307] The scope of the case was not – or should not have been – a surprise. The Defence was made aware during the course of the judicial investigation of its scope and the matters under investigation, and had numerous procedural protections available to it at that stage, including the right to make applications for annulments of investigative actions,[308] to appeal refusals,[309] and to appeal against the Closing Order itself.[310] The Lead Co-Lawyers also note that the Defence *did* make some arguments at that stage concerning the scope of the case in respect of other areas of the investigation.[311] The Trial Chamber was justified in considering that the fair trial rights of the Defence had been fully protected by the mechanisms for objection and appeal which were open to it during the investigation phase.

7.2.3.2.2 Civil parties' rights to fair and certain proceedings would have been prejudiced by allowing the objections to be raised at the end of trial

156. A fair trial is not solely a matter of defence rights; civil parties are also entitled to a fair trial.[312] In ECCC proceedings, a balance must be preserved between the rights of the respective parties[313] and victims' rights must be respected throughout the proceedings.[314] Therefore, in assessing whether late objections should be heard in order to ensure a fair trial,

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[307] **F54** Appeal Brief, paras 347-350, esp. at para. 349.
[308] Internal Rule 74(3)(g).
[309] Internal Rule 74(3)(b).
[310] The Lead Co-Lawyers note the contrary position taken by the OCP on this point. However the Lead Co-Lawyers note the words "subject to any appeal" in Internal Rule 76(7). According to the Deportation Decision, the effect of Internal Rule 76(7) is to ensure that procedural defects in the investigation cannot be raised after the Closing Order. However since that is "subject to any appeal", it is clear that procedural defects can be raised in an appeal against the Closing Order.
[311] See **D97/16/1** Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 18 January 2010. See especially at para. 35 where the Defence refers to the scope of the investigation as being limited by both "the general jurisdiction of the ECCC" (the matter there under appeal) and the facts specified in the Introductory Submission (the matter now contested).
[312] **F26/2/2** Decision on Co-Prosecutors and Civil Party Lead Co-Lawyers' Request for Additional Time for Examination of SCW-5, 30 June 2015, para. 7 (civil parties "enjoy fair trial rights defined in Article 14(1) of the [International Covenant on Civil and Political Rights]" albeit having a "specific and limited role in the proceedings, as set out in the ECCC's Internal Rules").
[313] Internal Rule 21(1)(a).
[314] Internal Rule 21(1)(c).

it is also appropriate to consider the impact that this would have on the Civil Parties' fair trial rights.[315]

157. Internal Rule 21(1) mandates the protection of legal certainty and transparency in the ECCC's proceedings. Civil parties also have the right to "obtain a timely verdict",[316] which is necessarily dependent on proceedings taking place expeditiously (Internal Rule 21(1)). Ensuring legal certainty, transparency and expedition requires enforcement of timeframes. The parties must be able to rely on the scope of the case as having been established when no objections have been raised at the mandated points in time.

158. Certainty about the scope of the case is necessary not only for the Defence, but also for Civil Parties. Failing to object to issues in a timely manner has the consequence that time and resources are expended on matters which might ultimately be discarded. The opportunity is also thereby lost for the Trial Chamber to hear testimony which would not be challenged on this basis.

159. The Lead Co-Lawyers also note that Civil Parties and witnesses have given their time to testify and gone through what for some will have been a difficult psychological experience about the matters in question. Hearing these matters will also have extended the overall duration of the case, a matter of particular concern to Civil Parties, many of whom have not lived to see the Chamber's final judgment.[317] In the absence of objections from the Defence, the Trial Chamber proceeded to hear and consider the testimony of Civil Parties concerning the portions of the Closing Order which the Defence now argues to be defective.[318] The Civil Parties, or their surviving family members, have a legitimate expectation of a judicial determination on the facts upon which they testified.

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[315] ICC *Prosecutor v Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', ICC-02/04-01/15-1562, 17 July 2019, para. 147 ("whether motions that could have been presented prior to the commencement of trial may nonetheless be presented at a later stage always depends on the facts and circumstances of the case and *due regard must be given to fairness to the other parties and participants* and the statutory requirement of expeditiousness.") [*emphasis added*].

[316] **F49** Decision on KHIEU Samphân's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 20.

[317] The Lead Co-Lawyers have received information that 312 Civil Parties have died since the commencement of proceedings in Case 002. See para. 42 above.

[318] See for example Civil Party CHOU Koemlan, whose entire evidence related to events which occurred in Leay Bour commune in Tram Kak: **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party CHOU Koemlan), pp. 46-92; **E1/253.1** [Corrected 1] T., 27 January 2015 (Civil Party CHOU Koemlan), pp. 3-86.

7.2.3.3 Conclusion regarding type 1 scope arguments

160. For all the reasons set out above, the Lead Co-Lawyers submit that the Trial Chamber did not err when it rejected the Defence's type 1 scope arguments (aside from those concerning deportation) as inadmissible. The arguments were raised years out of time, and without justification for the delay. These circumstances suggest that the Trial Chamber's decision was entirely reasonable. The Defence has demonstrated no error in the exercise of the Trial Chamber's discretion.

7.3 Type 2: Grounds alleging defects in the Closing Order due to an insufficiency of evidence

161. In three grounds the Defence argues that the Closing Order is defective in some areas because they were inadequately supported by evidence. This argument is made in **ground 62** (deaths from hunger in the Tram Kak Cooperatives),[319] **ground 63** (discriminatory treatment of New People),[320] and **ground 64** (surveillance and disappearances of those associated with the former Khmer Republic).[321]

162. All three arguments were made for the first time in the Defence Closing Brief.[322] The Trial Chamber dismissed them as insufficiently particularised or substantiated, such that it was unable to discern the charges which were challenged.[323]

163. In **ground 61** the Defence challenges the Trial Chamber's summary rejection of these arguments, but without engaging with the Trial Chamber's application of the relevant legal principles.[324] However, the Defence's arguments here demonstrate no error by the Trial Chamber, they merely disagree with its ruling.

164. In any event, the Lead Co-Lawyers submit that if the Trial Chamber had not dismissed these arguments as unsubstantiated, they would have been dismissed for being out of time for the same reasons that the type 1 grounds were inadmissible. The Trial Chamber's statement regarding the type 1 grounds is equally applicable here, namely that "[a]ll the necessary information was available since 15 September 2010 when the Closing Order was issued.

[319] **F54** Appeal Brief, paras 445-447.
[320] **F54** Appeal Brief, paras 448-450.
[321] **F54** Appeal Brief, paras 451-457.
[322] **E457/6/4/1** Defence Closing Brief, paras 883-910, 924-931, 2282-2298.
[323] **E465** Trial Judgment, paras 179-180.
[324] **F54** Appeal Brief, paras 439-444.

Since then the Accused have been on notice of the scope of the charges against them but have failed to avail themselves of the opportunity to raise the matter before the Pre-Trial Chamber or before this Chamber in a preliminary objection."[325]

7.4 Types 3 and 4: Grounds alleging an erroneous interpretation of the Closing Order (grounds 65-81) or the Severance Decision (grounds 82 and 84)

165. In its type 3 and 4 scope arguments, the Defence argues that the Trial Chamber gave too wide an interpretation to the Closing Order, including a number of areas which the Defence says fall outside the scope of the case.

166. These arguments are raised in: **ground 65** (deaths other than from starvation in Tram Kak District),[326] **ground 66** (deaths due to starvation outside Samraong and Ta Phem in Tram Kak District),[327] **ground 67** (discrimination against the New People in Tram Kak District),[328] **ground 68** (political persecution of persons other than New People at Trapeang Thma Dam),[329] **ground 69** (deaths linked to 1st January Dam but occurring outside the worksite),[330] **ground 70** (accidental deaths at 1st January Dam Worksite),[331] **ground 71** (discrimination targeting former Khmer Republic officials at 1st January Dam Worksite),[332] **ground 72** (persecution on political grounds at Kampong Chhnang Airfield),[333] **ground 73** (discrimination against New People at Kraing Ta Chan),[334] **ground 74** (discrimination against former Khmer Republic officials at Kraing Ta Chan),[335] **ground 75** (three targeted groups at Kraing Ta Chan),[336] **ground 76** (persecution against political enemies at Au Kanseng),[337] **ground 77** and **ground 134** (persecution on political grounds at Phnom Kraol),[338] **ground 78** (execution of Cham people at Trea Village),[339] **ground 79** (persecution

[325] **E465** Trial Judgment, fn. 363.
[326] **F54** Appeal Brief, paras 458-470.
[327] **F54** Appeal Brief, paras 471-474.
[328] **F54** Appeal Brief, paras 475-481.
[329] **F54** Appeal Brief, paras 482-483.
[330] **F54** Appeal Brief, paras 484-486.
[331] **F54** Appeal Brief, paras 487-489.
[332] **F54** Appeal Brief, paras 490-492.
[333] **F54** Appeal Brief, paras 493-494.
[334] **F54** Appeal Brief, paras 495-499.
[335] **F54** Appeal Brief, paras 500-504.
[336] **F54** Appeal Brief, paras 505-510.
[337] **F54** Appeal Brief, paras 511-513.
[338] **F54** Appeal Brief, paras 514-516, 884-886.
[339] **F54** Appeal Brief, paras 517-518.

of Cham on political grounds through a Joint Criminal Enterprise),[340] **ground 80** (facts relating to Vietnamese in territorial waters),[341] **ground 81** (facts relating to former Khmer Republic soldiers and officials),[342] **ground 82** (political persecution and forced movement of the Cham other than in connection with religious persecution in MOP2),[343] and **ground 84** (enforced disappearances of Vietnamese people in Tram Kak district).[344]

167. The OCP has made submission on the merits of each of these grounds.[345] The Lead Co-Lawyers agree with those submissions and have no need to add to them.

168. However, the Defence has not dealt with the logically precedent question of whether these arguments were raised within time.[346] The Lead Co-Lawyers submit that a number of them were not. Specifically, seven of the objections are raised for the first time on appeal without justification or explanation. These are **ground 65** (deaths other than from starvation in Tram Kak District),[347] **ground 66** (deaths due to starvation outside Samraong and Ta Phem in Tram Kak District),[348] **ground 69** (deaths linked to 1st January Dam but occurring outside the worksite),[349] **ground 70** (accidental deaths at 1st January Dam Worksite),[350] **ground 71 (**discrimination targeting former Khmer Republic officials at 1st January Dam Worksite),[351] **ground 78** (execution of Cham people at Trea Village),[352] and **ground 84** (enforced disappearances of Vietnamese people in Tram Kak district).[353]

169. The Lead Co-Lawyers submit below that these arguments were required to be raised at the earliest opportunity, and that they may not be raised for the first time on appeal unless the

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[340] **F54** Appeal Brief, para. 519.
[341] **F54** Appeal Brief, paras 520-521.
[342] **F54** Appeal Brief, paras 522-530.
[343] **F54** Appeal Brief, paras 531-543. The term "MOP" refers to the Movement of Population; MOP2 refers to Phase 2. See Annex B: List of Abbreviations.
[344] **F54** Appeal Brief, paras 547-549.
[345] **F54/1** OCP Response Brief, paras 322-323 (**ground 65**), 324 (**ground 66**), 325-327 (**grounds 67, 71, 73, 74**), 328-337 (**grounds 68, 72, 75, 76, 77, 134**), 338 (**ground 69**), 339 (**ground 70**), 340 (**ground 78**), 341 (**ground 79**), 342 (**ground 80**), 343-345 (**ground 81**), 346, 349-350 (**grounds 82, 84**).
[346] The Defence's **ground 38** (**F54** Appeal Brief, paras 335-350) appears to only be directed at the questions of timeliness and admissibility in respect of its arguments concerning "facts not within the scope of the judicial investigation" (para. 334), that is, the type 1 arguments set out above.
[347] **F54** Appeal Brief, paras 458-470.
[348] **F54** Appeal Brief, paras 471-474.
[349] **F54** Appeal Brief, paras 484-486.
[350] **F54** Appeal Brief, paras 487-489.
[351] **F54** Appeal Brief, paras 490-492.
[352] **F54** Appeal Brief, paras 517-518.
[353] **F54** Appeal Brief, paras 547-549.

Defence demonstrates that inadequate notice of the charges materially impaired its ability to prepare a defence.

7.4.1 Requirement for the timeliness of objections concerning scope

170. Internal Rule 89 regulates the timing for preliminary objections. It provides the right for the accused to lodge preliminary objections on the basis of the jurisdiction of the Trial Chamber, issues requiring the termination of prosecution, and procedural defects arising after the indictment becomes final.[354] This must be done within 30 days of the Closing Order becoming final.[355] Should an accused fail to raise objections within the prescribed timeframes, those objections "shall be inadmissible."[356]

171. The ECCC Internal Rules do not explicitly address objections concerning the scope of the case which the Defence becomes aware of during the course of trial proceedings – for example where evidence is heard which the Defence believes to be outside the scope of the charges.[357] Internal Rule 91(3) permits the Parties to object to the hearing of evidence "if they consider that such testimony is not conducive to ascertaining the truth." It appears to require that the objection is made while the evidence is still being heard – not afterwards – since it states that the President "shall decide whether to take the testimony." The Internal Rules do not address the further question of objections to the Trial Chamber's underlying interpretation of the Closing Order. Despite this, the Lead Co-Lawyers submit that the position is clear, both from caselaw and fair trial principles: any such objections must be raised as soon as they are identified.

172. In Case 002/01, this Chamber ruled that the Trial Chamber was right to reject arguments about the scope of the Closing Order when these arguments were raised for the first time in closing submissions.[358] The Chamber noted that the Defence had been made aware, through judicial remarks during trial, of the Trial Chamber's approach to the scope of the case, and that it therefore could have raised the issue at an earlier point.[359]

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[354] Internal Rule 89.
[355] *Ibid*.
[356] Internal Rule 89(1).
[357] Internal Rule 91(3).
[358] **F36** Case 002/01 Appeal Judgment, para. 237.
[359] *Ibid*.

173. This approach reflects well-established doctrine from other international tribunals. A party identifying what it believes to be a procedural irregularity during trial must raise a formal objection.[360] Failure to do so, absent special circumstances, will be treated as a waiver of the right to raise the matter as a ground of appeal.[361] A Defendant will only be permitted to raise an alleged indictment defect for the first time on appeal if the appellant discharges the burden of demonstrating serious prejudice.[362] The rationale for permitting this exception to the principle of waiver is the accused's right to be informed of the charges against him,[363] thus making clear that the "serious prejudice" which must be demonstrated by a Defendant is that he was without adequate notice of the charges such that his ability to prepare his defence was materially impaired.[364]

174. Finally, regarding these legal principles, the Lead Co-Lawyers note that they apply to any objections regarding notice of which the Defence becomes aware during the course of trial. If the Defence was able to show that it was genuinely unable to raise any of its type 1 or 2 objections before trial, it was nonetheless required to raise them as soon as it became aware of them during the course of trial, as evidence was elicited on the areas now contested.

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[360] ICTY *Prosecutor v Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 223; ICTY *Prosecutor v Naletilić & Martinović*, IT-98-34-A, Judgement, 3 May 2006, para. 21; ICTY *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Accused's motion for relief from defects in the indictment, 30 September 2014, para. 18 (the objection "should be raised either at the pre-trial stage (in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced."). See also ICTR *Prosecutor v Bagosora et al.*, ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, paras 44-45.

[361] ICTY *Prosecutor v Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 223; ICTY *Prosecutor v Boškoski and Tarčulovski*, IT-04-82-A, Judgement, 19 May 2010, para. 185; ICTY *Prosecutor v Simić*, IT-95-9-A, Judgement, 28 November 2006, para. 25; ICTY *Prosecutor v Naletilić & Martinović*, IT-98-34-A, Judgement, 3 May 2006, para. 21; ICTY *Prosecutor v Blaskić*, IT-95-14-A, Judgement, 29 July 2004, para. 222; ICTY *Prosecutor v Mucić et al. ("Čelibići")*, IT-96-21-A, Judgement, 20 February 2001, para. 640. See also ICTR *Kambanda v Prosecutor*, ICTR-97-23-A, Judgement, 19 October 2000, para. 25.

[362] ICTY *Prosecutor v Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 224; ICTY *Prosecutor v Naletilić & Martinović*, IT-98-34-A, Judgement, 3 May 2006, fn. 76.

[363] ICTY *Prosecutor v Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 224; ICTY *Prosecutor v Simić*, IT-95-9-A, Judgement, 28 November 2006, para. 25. See also ICTR *Niyitegeka v Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, para. 200.

[364] ICTY *Prosecutor v Simić*, IT-95-9-A, Judgement, 28 November 2006, para. 25; ICTY *Prosecutor v Kvočka*, IT-98-30/1-A, Judgement, 28 February 2005, para. 35.

7.4.2 Application to the Defence's type 3 and 4 scope arguments

175. In the face of the well-established principles set out above, the Defence Appeal Brief remains silent on why it should be permitted to raise a number of arguments relating to scope for the very first time in its Appeal Brief.

176. It is noteworthy that on other issues, where the Defence identified that evidence was being elicited regarding matters which it considered to be outside of the scope, robust objections were made even during trial. For example, objections were made regarding evidence concerning the treatment of Khmer Krom people,[365] the Angk Roka prison,[366] Baray Choan Dek Pagoda,[367] an execution site near Trapeang Tham Dam,[368] events at Kamping Puoy Dam,[369] and the third population movement.[370] Arguments that certain matters fell outside the scope of the case based on an interpretation of the Closing Order were also included in the Defence's Closing Brief.[371]

177. In contrast, the Defence raised no objection while the subjects dealt with in **grounds 65, 66, 69, 70, 71, 78 and 84** were discussed at trial. Moreover, no discernible challenge on scope was made in the Defence Closing Brief on these specific issues. On some matters the Defence remained silent, on others the Defence Closing Brief is unclear, on some the Defence *accepted* as within the Closing Order the very facts which it now says are outside the Closing Order:

    (i) **Ground 65** argues that the Tram Kak section of the Closing Order should not be interpreted as including factual allegations about deaths due to "health problems and living conditions".[372] Without any acknowledgment the Defence has expanded the

[365] **E1/262.1** [Corrected 1] T., 12 February 2015, pp. 17-21 after [09.48.29] (the Defence endorsement of objection appears at p. 18 line 20 – p. 19 line 1 after [09.51.26]).
[366] **E1/289.1** [Corrected 1] T., 21 April 2015, p. 88 line 17 – p. 89 line 11 after [16.03.00].
[367] **E1/304.1** [Corrected 2] T., p. 103 line 16 – p. 105 line 10 after [15.38.20].
[368] **E1/352.1** [Corrected 1] T., 30 September 2015, p. 19 lines 1-15 before [09.48.19].
[369] **E1/364.1** [Corrected 1] T., 8 December 2015, p. 80 line 3 – p. 81 line 17 after [14.35.29].
[370] **E1/503.1** T., 20 November 2016 (Civil Party KHEAV Neab), p. 83 lines 12-20 after [15.42.57]; **E1/504.1** T., 30 November 2016 (Civil Party KHEAV Neab), p. 9 line 21 – p. 10 line 3 after [09.25.04], p. 11 line 21 – p. 13 line 6 after [09.28.28], p. 18 lines 2 -5 and 10-16 before [09.40.56]; **E1/504.1** T., 30 November 2016 (Civil Party PREAP Chhon), p. 101 line 4 – p. 102 line 4 after [15.42.51].
[371] See for example arguments about political persecution at certain sites: **E457/6/4/1** Defence Closing Brief, paras 883-910 (Tram Kak), paras 1120-1123 (Kampong Chhnang Airfield), 1254-1271 (Kraing Ta Chan), paras 1323-1325 (Au Kanseng), paras 1386-1389 (Phnom Kraol Security Centre).
[372] **F54** Appeal Brief, paras 465-470.

argument it made in its Closing Brief that paragraph 313 of the Closing Order did not include deaths "from health problems"[373] so that a broader argument concerning deaths due to "living conditions" is now made.

(ii) **Ground 66** argues that the factual allegations about deaths due to starvation in Tram Kak, found in paragraph 312 of the Closing Order, should be interpreted as geographically limited to Samraong and Ta Phem communes.[374] The Defence refers back to arguments in its Closing Brief.[375] However those arguments were different. Rather than arguing that the Closing Order was only intended to cover Samraong and Ta Phem communes, it clearly understood the Closing Order paragraph 213 as covering all of Tram Kak, and argued that the evidence to justify this was insufficient. That is a type 2 argument and should have been challenged by an appeal against the Closing Order. By attempting to reframe it now as an argument about the correct interpretation of the Closing Order, the Defence raises a new argument for the first time on appeal.

(iii) In **ground 69**, in relation to the 1st January Dam Worksite, the Defence argues that the Closing Order did not include deaths which resulted from living and working conditions at the worksite, but where the death itself occurred away from the site.[376] This appears to be a reference to the deaths which the Trial Chamber found occurred after "individuals who were seriously sick were sent back to their villages or to local clinics where they died when treatments failed."[377] However in its Closing Brief the Defence accepted that deaths resulting from living conditions, including health problems, fell within the scope of the case concerning extermination, without any suggestion that this excluded the cases where the dying were sent away from the worksite before their deaths.[378] That argument was made for the first time in this appeal.

(iv) **Ground 70** argues that the scope of the case did not encompass deaths caused by accidents at the 1st January Dam Worksite.[379] The Lead Co-Lawyers have been unable

[373] **E457/6/4/1** Defence Closing Brief, paras 859-860.
[374] **F54** Appeal Brief, paras 471-474.
[375] **F54** Appeal Brief, fn. 837; referring to **E457/6/4/1** Defence Closing Brief, paras 924-931.
[376] **F54** Appeal Brief, paras 484-486.
[377] **E465** Trial Judgment, para. 1629; **F54** Appeal Brief, paras 484, 486.
[378] **E457/6/4/1** Defence Closing Brief, paras 1056-1061.
[379] **F54** Appeal Brief, paras 487-489.

to identify any objection to evidence raised on this basis at trial, or any argument to this effect in the Defence Closing Brief.[380]

(v) In **ground 71** the Defence argues that the scope of the Closing Order should be interpreted as not including allegations of discrimination targeting former Khmer Republic soldiers and officials at the 1st January Dam Worksite.[381] In the Defence Closing Brief certain objections were raised concerning the charge of political persecution at 1st January Dam Worksite, which might be interpreted as covering political persecution against former Khmer Republic soldiers and officials.[382] However, that objection was founded on an argument that the CIJ had exceeded the scope of the Introductory Submission.[383] The arguments raised in **ground 71**, in contrast, are focused on the interpretation of the Closing Order. They were not included in the Closing Brief – to the contrary, the Defence appears to have expressly accepted that the Closing Order was intended to include a charge of political persecution of former Khmer Republic officials at 1st January Dam.[384]

(vi) In **ground 78** the Defence argues that the scope of Case 002 did not include "the facts of murder as a crime against humanity that occurred at the security office in Trea village."[385] In its Closing Brief, the Defence argued that the charge of murder as a crime against humanity was limited to killings at the Wat Au Trakuon security centre, but expressly accepted that the Closing Order charged KHIEU Samphân with "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".[386]

(vii) In **ground 84**, the Defence argues that although Case 002/02 included enforced disappearances in Tram Kak district, the severance decision excluded from the scope

[380] On deaths at 1st January Dam, see **E457/6/4/1** Defence Closing Brief, paras 1049-1061.
[381] **F54** Appeal Brief, paras 490-492.
[382] **E457/6/4/1** Defence Closing Brief, paras 1063-1068.
[383] See especially **E457/6/4/1** Defence Closing Brief, paras 1066-1067.
[384] **E457/6/4/1** Defence Closing Brief, paras 2261, 2270-2272. In arguing that the Closing Order went beyond the Introductory Submission, the Defence makes clear that it considered the Closing Order to include the persecution of former Khmer Republic officials: **E457/6/4/1** Defence Closing Brief, paras 1063 and 1066.
[385] **F54** Appeal Brief, paras 517-518.
[386] **E457/6/4/1** Defence Closing Brief, para. 1546.

any instances where the direct victims of such disappearances were Vietnamese.[387] In its Closing Brief the Defence accepted that the scope of the case included enforced disappearances in Tram Kak district, referring specifically to paragraph 1470 of the Closing Order, and made no claims that this excluded cases where the victim was Vietnamese.[388]

178. As set out above,[389] the burden to demonstrate prejudice to the Defence – by showing that the Defence did not have adequate notice of the Trial Chamber's interpretation of the charges – falls on the Defence. It is therefore not incumbent on the Lead Co-Lawyers to demonstrate the contrary. The Lead Co-Lawyers therefore limit themselves to the following brief observations.

179. First, the Defence has given no explanation for this delay. The only reference in the Appeal Brief to any reason for the delay is contained within **ground 2**, and only in relation to the arguments made in **ground 84**.[390] There the Defence attempts to explain its misunderstanding of the Additional Severance Decision,[391] and says that upon reaching its incorrect conclusion that crimes against Vietnamese people had been excised: "[w]hile the Defence did not understand why, it was certainly not going to complain about it".[392] This misses the point. The matter about which the Defence was required to "complain" was that evidence was being heard on matters which it believed (albeit erroneously) to fall outside the case. No reason has been given for the Defence's silence at that point. If anything the Defence's submissions in **ground 2** only serve to demonstrate that the Defence *did* have notice of the issue at an appropriate time, and therefore has not met the test of serious prejudice.

180. Secondly, in contrast to the lack of demonstrated prejudice to the Defence, there would be clear prejudice to Civil Party rights and interests if these objections were permitted out of time. Internal Rule 21(1)(a) demands that the rights of the Defence be balanced against those of other parties. This includes the rights of Civil Parties to a fair trial and to legal certainty.[393]

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[387] **F54** Appeal Brief, paras 547-549.
[388] **E457/6/4/1** Defence Closing Brief, para. 912.
[389] Esp. at para. 173.
[390] **F54** Appeal Brief, para. 114.
[391] *Ibid.*
[392] *Ibid.*
[393] See Section 3.2 above, at para. 43 *et seq*.

As detailed above in respect of the type 1 and 2 scope arguments,[394] Civil Parties have made heavy psychological investments in reliance on the scope of the case. Those who testified contributed not only their time but also subjected themselves to defence questioning and public scrutiny, sometimes on matters of great personal sensitivity. These contributions to the case were made by Civil Parties in the absence of any timely objection from the Defence. They should not now be lost by permitting the Defence to bring challenges out of time without due justification.

8 EVIDENCE AND ITS TREATMENT

8.1 Overview

181. In **grounds 11 to 37**[395] the Defence sets out its approach to the admission and use of evidence. Many of these arguments are not, strictly speaking, "grounds" of appeal in themselves, in that they do not appear to raise a point which would, on its own, invalidate the Trial Judgment; rather, they argue for a particular framework regarding evidence which is then applied later in the Appeal Brief. This section of the Lead Co-Lawyers' Response Brief addresses flaws in the framework set out by the Defence, and explains why the principles underpinning the Trial Chamber's approach to the treatment of evidence was correct.

182. Many of the Defence's arguments concerning evidentiary principles have been thoroughly addressed by the OCP[396] and do not require a separate response from the Civil Parties. The Lead Co-Lawyers agree with the OCP's responses, subject to the specific Civil Party perspectives which follow, relating to **ground 25** (reason to lie);[397] **ground 30** (written

[394] See paras 156-159.
[395] They are: **ground 11** (evidence from historians who did not testify); **ground 12** (admission of the S-21 Orange Logbook); **ground 13** (*intime* conviction versus beyond reasonable doubt); **ground 14** (distortion/misrepresentation of evidence); **ground 15** (double standard in the treatment of inculpatory and exculpatory evidence); **ground 16** (exculpatory evidence omitted); **ground 17** (burden of proof); **ground 18** (deductive approach/circumstantial evidence) **ground 19** (extrapolations/generalisations); **ground 20** (number of evidentiary items and probative value); **ground 21** (corroboration); **ground 22** (inconsistencies); **ground 23** (prior/subsequent statements); **ground 24** (review before appearance); **ground 25** (reason to lie); **ground 26** (cultural bias); **ground 27** (KHIEU Samphân's statements/publications); **ground 28** (evidence obtained through torture); **ground 29** (propaganda); **ground 30** (written statements); **ground 31** (out-of-court statements); **ground 32** (hearsay); **ground 33** (VIFs); **ground 34** (assessment of statements); **ground 35** (documents benefitting from presumptions); **ground 36** (documentary evidence and authenticity); and **ground 37** (experts). See Annex A of this Response Brief for paragraph references for each ground in **F54** Appeal Brief.
[396] See Annex A of this Response Brief for paragraph references for each ground in **F54/1** OCP Response Brief.
[397] **F54** Appeal Brief, para. 253.

statements);[398] **ground 31** (out-of-court statements);[399] **ground 32** (hearsay);[400] **ground 33** (VIFs)[401] and **ground 34** (assessment of statements).[402] The Lead Co-Lawyers also address in this section the Defence's use of a "statistical" analysis of evidence, principally found in **ground 163**,[403] **ground 165**,[404] **ground 170**,[405] **ground 173**,[406] and **ground 174**,[407] all relating to the regulation of marriage, but also referenced throughout that part of the Appeal Brief.

183. **Ground 23** regarding the disclosure of evidentiary material after the closure of the trial hearings without the reopening of the case is addressed in the section of this Brief dealing with alleged procedural violations.[408]

8.2 Civil Party evidence

184. Incorrect assertions concerning Civil Party evidence and how it should be assessed are found throughout the Appeal Brief. The Defence has primarily addressed questions of Civil Party evidence in **ground 33**[409] and **ground 34**,[410] but throughout the brief makes specific assertions on related points.[411] The following are consolidated submissions on these various arguments.

8.2.1 Civil Party testimony before the ECCC

185. In the Trial Judgment, the Trial Chamber explained that it had assessed Civil Party testimony on the same basis as that given by witnesses and experts, namely:

> …on a case-by-case basis in light of the credibility of the testimony and in consideration of factors such as the demeanour of the person testifying,

[398] **F54** Appeal Brief, paras 293-305.
[399] **F54** Appeal Brief, paras 306-311.
[400] **F54** Appeal Brief, paras 312-313.
[401] **F54** Appeal Brief, paras 314-316.
[402] **F54** Appeal Brief, paras 317-319.
[403] **F54** Appeal Brief, paras 1176-1188.
[404] **F54** Appeal Brief, paras 1196-1210.
[405] **F54** Appeal Brief, paras 1273-1280.
[406] **F54** Appeal Brief, paras 1324-1340.
[407] **F54** Appeal Brief, paras 1356-1360.
[408] See above at Section 6.3.2, at paras 102 *et seq*.
[409] **F54** Appeal Brief, paras 314-316.
[410] **F54** Appeal Brief, paras 317-319.
[411] See also related arguments made by the Defence at para. 308 (in **ground 31**), para. 1014 (in **ground 156**), para. 1095 (in **ground 159**), para. 1235 (in **ground 166**), paras 1383-1388 (in **ground 174**).

> consistencies and inconsistencies in relation to material facts, possible ulterior motivations, corroboration and all of the circumstances of the case.[412]

186. This was in accordance with the Trial Chamber's position as declared during the Case 002/01 trial proceedings.[413] This approach "allows the [Trial] Chamber to evaluate, in all the circumstances, the sufficiency and quality of the evidence and to use the testimony of Civil Parties in support of particular findings as appropriate".[414]

187. Throughout its Appeal Brief the Defence attempts to attack and diminish the evidence given by Civil Parties. The argument is made explicitly in **ground 25** and **ground 34**,[415] but also repeatedly raised in passing elsewhere.[416] At times, the argument is made that Civil Party evidence lacks value simply by virtue of the Civil Parties' status in the proceedings. The argument is made in two ways: (i) Civil Party evidence is inherently of lesser value because it was not given under oath; and (ii) such evidence must be treated with scepticism because Civil Parties have an interest in the proceedings. The Lead Co-Lawyers categorically refute both of these suggestions.

188. The Lead Co-Lawyers note that the Trial Chamber's approach has already been considered and affirmed by this Chamber as correct in the Case 002/01 Appeal Judgment.[417] As elaborated below, this is the correct approach and should be retained by the Chamber.

189. The legal position concerning Civil Party testimony and oaths is well-established. As parties to the proceedings, civil parties may not be questioned in the same manner as a "simple witness".[418] The Internal Rules do not require that civil parties take an oath, in contrast to

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[412] **E465** Trial Judgment, para. 49.
[413] **E267/3** Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure concerning Civil Parties' Statements on Suffering and related motions and responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2), 2 May 2013, *dispositif*: "when assessing the evidence for the verdict, the weight to be given to Civil Party testimony will be assessed on a case-by-case basis in light of the credibility of that testimony, and upon a reasoned assessment of this evidence any doubt as to guilt will be interpreted in the Accused's favour." See also para. 22 and **E336/3** Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, 9 October 2015, para. 22.
[414] **E336/3** Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, 9 October 2015, para. 22.
[415] **F54** Appeal Brief, paras 253 and 317-319.
[416] See for example **F54** Appeal Brief, para. 308 (**ground 31**), para. 1014 **(ground 156**), para. 1235 (**ground 166**), paras 1383-1385 (**ground 174**).
[417] **F36** Case 002/01 Appeal Judgment, paras 314-316. See also **E336/3** Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, 9 October 2015, para. 22.
[418] Internal Rule 23(4), reflecting Code of Criminal Procedure of Cambodia, Article 312, which provides that a "civil party cannot be interviewed as a witness".

witnesses and experts.[419] In Case 002/01 this Chamber rejected the argument that the absence of an oath leads to a blanket reduction in the probity of Civil Party evidence.[420] The Lead Co-Lawyers also note that the Accused, as a Party, is also not required to take an oath should he or she choose to give evidence.[421] Yet, it has not been suggested that an Accused's evidence could be called into question for this reason.[422] The practice of administering an oath is neither a prerequisite for truth, nor in itself a guarantee of truth. Even where an oath is taken, it does not supplant the need for judicial scrutiny.[423] The Lead Co-Lawyers consider that other procedural safeguards play a far more important role in encouraging truthful testimony and ensuring that the Court is able to assess the testimony which it hears. Foremost among these is the fact that testimony is subject to questioning by the parties and the judges.[424]

190. The Lead Co-Lawyers similarly refute the Defence assertion that Civil Party evidence must carry less weight than that of a witness because civil parties have an interest in the proceedings.[425]

191. It is not disputed that the Civil Parties have an interest in the proceedings. This is the very basis for their standing.[426] Nevertheless, it is wrong to assume that this interest amounts solely and simplistically to obtaining a conviction. The ECCC is not empowered to grant individual compensation to Civil Parties even in the event of a conviction.[427] While collective and moral reparations *are* available, they are not contingent on the outcome of the trial since

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[419] Internal Rules 24(1) and 31(2). See also **E74** Trial Chamber Memorandum entitled "Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 Following the Trial Management Meeting of 5 April 2011", 8 April 2011, p. 1; **E336/3** Decision on NUON Chea Defence Request Regarding Trial Chamber Practices when examining Civil Parties and Witnesses, 9 October 2015, para. 21.
[420] **F36** Case 002/01 Appeal Judgment, paras 314-315.
[421] **E313** Case 002/01 Trial Judgment, para. 27 fn. 68 referencing Internal Rule 90; **Case 001 – E188** Judgement, 26 July 2010 ("**Case 001 – E188** Trial Judgment"), para. 52 fn. 78; **E336/3** Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, 9 October 2015, para. 21.
[422] To the contrary, Internal Rule 87(5) requires that "[t]he Chamber shall give the same consideration to confessions as to other forms of evidence."
[423] **E336/3** Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses, 9 October 2015, paras 21-22.
[424] Internal Rule 91(2).
[425] See for example **F54** Appeal Brief, paras 253 and 317-319. See also para. 1383.
[426] However the Civil Parties only have standing for subjects which affect their interests. See **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests relating to the Appeals in Case 002/01, 26 December 2014, paras 11-14; **F36** Case 002/01 Appeal Judgment, para. 311.
[427] Internal Rule 23 *quinquies* (1) ("These benefits shall not take the form of monetary payments to Civil Parties").

the introduction of Internal Rule 23 *quinquies*(3)(b).[428] The implementation of reparation projects began before the verdict, and indeed some of them had been completed by then.[429]

192. Civil parties are not a homogeneous group: they have various motivations for participating in the Court's proceedings, and various desired outcomes. While a conviction is undoubtedly sought by many of them, Civil Parties have also expressed their desire for these proceedings to establish and reveal the truth about the crimes.[430] Thus, contrary to the Defence's submissions, the desire for truth and recognition could suggest that at least some civil parties may be *more* truthful than other evidentiary sources.

193. There is also no reason to suppose – as the Defence submissions implicitly do – that witnesses are without interests of their own in these proceedings. Witnesses may, for example, wish to diminish their own responsibility in respect of the events under consideration.[431] The risk of untruthful testimony could arise in respect of any evidentiary source.

194. For the above reasons, this Chamber should retain its existing approach, according to which Civil Party testimony is assessed individually in light of all relevant factors, in the same way as witness testimony.[432] The Trial Judgment reflects this approach, both in the statements of principle made by the Trial Chamber,[433] and its application to individual Civil Parties.[434] The Chamber should therefore reject the Defence's grounds of appeal which are based on a contention that lesser value is to be accorded to Civil Party evidence.

195. Elsewhere, the Defence argues that the Trial Chamber did not correctly *apply* its framework for the assessment of Civil Party evidence, by using Civil Party testimony to convict where

[428] See further below at para. 850.
[429] See below at para. 859 and fns 2118-2121.
[430] See generally **E457/6/2/3.4** Civil Party Lead Co-Lawyers' Amended Closing Brief in Case 002/02, Amended Annex E: Questions to the Accused, 2 October 2017.
[431] See for example **F36** Case 002/01 Appeal Judgment, paras 492-499.
[432] **F36** Case 002/01 Appeal Judgment, para. 314, citing **Case 001– F28** Case 001 Appeal Judgment, paras 42, 53.
[433] **E465** Trial Judgment, para. 49.
[434] See for example the Trial Chamber's assessment of Civil Party PREAP Chhon (**E465** Trial Judgment, fn. 13185). Further submissions regarding the correctness of the Trial Chamber's assessment of individual Civil Parties' evidence are made throughout this Brief.

the Defence say it should not have done so. These (including the specific examples cited in **ground 34**)[435] are responded to elsewhere in this Brief.[436]

8.2.2 Status of statements of harm

196. The Defence presents a series of confusing, contradictory and unsubstantiated arguments concerning the evidence given by Civil Parties about the harm they suffered.

197. By way of context, evidence on the harm suffered by Civil Parties appears throughout their documentary and testimonial evidence.[437] Civil Parties provided oral testimony during two types of hearings during the Case 002/02 trial proceedings.[438] Certain Civil Parties were selected by the Trial Chamber from lists of witnesses, experts and Civil Parties proposed by the Parties to testify during the hearings of substance or by virtue of a new evidence request.[439] These Civil Parties were invited by the Chamber to provide evidence on the facts at issue. They also had the opportunity to provide a statement of suffering at the end of their testimony on the facts.[440] Naturally, evidence of harm and suffering arose during their testimony on the facts as well, since the two are so closely linked.

198. Other Civil Parties were selected by the Lead Co-Lawyers to provide evidence on the harm suffered by the Civil Parties at impact hearings held at the end of each trial segment.[441] As harm is linked to the facts at issue, factual information was elicited during these hearings as

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[435] **F54** Appeal Brief, para. 319 and fn. 502.
[436] Regarding the individuals mentioned in **F54** Appeal Brief, para. 319 and fn 502: for Civil Party UCH Sunlay see below at paras 304-307; for Civil Party CHEA Deap see esp. below at paras 640, 644, 648 and Section 10.6 at paras 768-778; for Civil Party EM Oeun see below at Section at 10.13 at paras 832-841; and for Complainant PEOU Hong see below at para. 212.
[437] **E465** Trial Judgment, para. 4437.
[438] **E315/1** Trial Chamber Memorandum entitled "Information on (1) Key Document Presentation Hearings and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02", 17 December 2014, paras 7-9; **E365/2** Decision on Civil Party Lead Co-Lawyers' Request for Clarification on the Scope of In-Court Examination of Civil Parties, 20 November 2015, para. 6.
[439] **E365/2** Decision on Civil Party Lead Co-Lawyers' Request for Clarification on the Scope of In-Court Examination of Civil Parties, 20 November 2015, para. 9; **E459** Decision on Witnesses, Civil Parties and Experts Proposed to be heard during Case 002/02, 18 July 2017, paras 25, 43, 46, 48, 68, 71, 95, 97, 100, 148, 172; **E465.1** Trial Judgment, Annex I: Procedural History, paras 45, 47; **E465.3** Trial Judgment, Annex 3: Witnesses and Civil Parties who testified in Case 002/02.
[440] **E315/1** Trial Chamber Memorandum entitled "Information on (1) Key Document Presentation Hearings and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02", 17 December 2014, paras 7-9.
[441] For information on the hearings and the time allocations, see **E457/6/2/3** Civil Party Lead Co-Lawyers' Amended Closing Brief in Case 002/02, para. 23 and related footnotes. Note that one Civil Party (THANN Thim) testified in both manners.

well, with the safeguard that the Defence had the opportunity to put questions to the Civil Parties.[442]

199. In its section on the regulation of marriage, the Defence repeatedly makes a peculiar argument concerning statements of suffering. It claims that the Trial Chamber should have taken into account when testifying Civil Parties described the suffering they had experienced from forced marriage (or forced sexual intercourse), and to assign significance to when a Civil Party did not repeat it in their statement of suffering at the end of their evidence.[443] That assertion has no basis in law or principle. It draws arbitrary distinctions between different parts of Civil Party testimony. This ignores that many Civil Parties suffered manifold forms of harm during the DK period, and would understandably have wanted to use their statement of suffering to mention those they had not been given the opportunity to address previously. The Defence also strangely makes this argument in respect of some Civil Parties who appeared at a hearing on harm, and therefore did not make a statement of suffering.[444]

200. At another point in the Appeal Brief, the Defence argues that Civil Party testimony from impact hearings is of inherently low probative value. [445] The Defence provides no sources or reasoning for this assertion, other than a general allegation that a Civil Party is biased owing to his status in the proceedings.[446] As discussed above,[447] that view has been previously rejected by this Chamber. Indeed, the specific issue of reliance on victim impact testimony was dealt with in Case 002/01, with the Chamber ruling that the Trial Chamber in that case "did not err in relying on statements of suffering of victim impact testimony as material evidence."[448]

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[442] **E459** Decision on Witnesses, Civil Parties and Experts Proposed to be heard during Case 002/02, 18 July 2017, para. 16 ("While their statements are meant to focus on their sufferings, occasionally these Civil Parties give evidence on matters of fact. The Trial Chamber has therefore consistently given the Parties an opportunity to question them in relation to new facts or allegations against the Accused that emerged from their respective statements of suffering."). See also **F36** Case 002/01 Appeal Judgment, paras 320-321. See also **E365/2** Decision on the Civil Party Lead Co-Lawyers' Request for Clarification on the Scope of In-Court Examination of Civil Parties, 20 November 2015, para. 11.

[443] **F54** Appeal Brief, paras 1167, 1178, 1185, 1307 and fns 2175, 2177, 2211. The arguments concern Civil Parties EM Oeun, KUL Nem, NGET Chat, OM Yoeurn, SAY Naroeun, YOS Phal and MEY Savoeun.

[444] **F54** Appeal Brief, para. 1167 and fn. 2195 (referring to Civil Parties NGET Chat, SAY Naroeun, and KUL Nem); regarding Civil Party NGET Chat, see also fn. 2177.

[445] **F54** Appeal Brief, para. 1014 (relating to Civil Party UCH Sunlay).

[446] *Ibid*.

[447] See Section 8.2.1, at paras 185-195, esp. at para. 188.

[448] **F36** Case 002/01 Appeal Judgment, para. 324. The same safeguards applied during Case 002/02.

8.2.3 Collusion and contamination allegations concerning Civil Parties

201. At least twice in the Appeal Brief, the Defence alleges or implies that mutually corroborative evidence from Civil Parties is the result of collusion or contamination.[449]

202. First, the allegation is made (in **ground 21** and **ground 131**)[450] explicitly concerning two Civil Parties, UONG Dos and SOK El, both now deceased, who gave interviews to the OCIJ about Phnom Kraol Security Centre.[451] That allegation is addressed in detail below.[452] It suffices here to say that the Defence provides no evidence which actually shows contamination, much less collusion, and that the statements themselves have features which suggest its absence.

203. A similar situation applies in respect of the less direct suggestion of contamination made in respect of Civil Parties who testified on the regulation of marriage (**ground 166**).[453] Concerning eight of them,[454] the Defence argues that it was "a strange coincidence" that they gave consistent evidence about being told by *Angkar* to produce children.[455] The insinuation that these Civil Parties had influenced each other's evidence is entirely unsubstantiated and should be dismissed.

8.2.4 Victim Information Forms and Supplementary Information Forms

204. The Appeal Brief makes two types of arguments concerning the Trial Chamber's use of VIFs and other statements taken outside of the judicial context.

205. Firstly, throughout the trial, the Defence repeatedly focused on errors in VIFs, claiming that inconsistencies between these documents and in-court testimony undermined Civil Parties' credibility.[456] The Appeal Brief returns to this claim, arguing that the Trial Chamber committed errors by being "inclined to ignore the omissions and belated, last-minute

[449] **F54** Appeal Brief, paras 866 and 1228.
[450] **F54** Appeal Brief, paras 241-242 (**ground 21**) and paras 865-866 (**ground 131**).
[451] **F54** Appeal Brief, para. 866 and fn. 342 in para. 242 (which cross-references to para. 866).
[452] See Section 10.4 at paras 752-758.
[453] **F54** Appeal Brief, paras 1211-1242.
[454] Civil Parties PEN Sochan, PREAP Sokhoeurn, SAY Naroeun, KUL Nem, MOM Vun, NGET Chat, SOU Sotheavy and CHEA Deap.
[455] **F54** Appeal Brief, para. 1228.
[456] See, for example, **E1/116.1** T., 28 August 2012 (Civil Party EM Oeun), p. 15 line 15 – p. 53 line 18 after [09.39.54], p. 67 line 3 – p. 93 line 14 after [14.31.46]; **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates), p. 63 lines 4-20 after [13.59.09]; **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 58 line 22 – p. 60 line 6 before [14.02.11].

corrections to [Civil Party] statements on such vital points as alleged rape or the death of their loved ones."[457] The same point is made in several places in connection with specific Civil Parties whose evidence the Defence contests.[458]

206. As discussed above, testimony given by Civil Parties in judicial proceedings has been rightly assessed in the same way as that given by witnesses.[459] As described below, different considerations apply in respect of Civil Party VIFs and supplementary information forms (as well as other statements collected by third-party organisations such as DC-Cam). The Lead Co-Lawyers emphasize that the different status of these documents does not derive from the fact that their sources are Civil Parties, but rather from the weak procedures used for their creation.

207. The Trial Chamber has consistently held that it accords limited probative value to VIFs.[460] This is a specific application of the more general principle that "statements collected outside the framework of a judicial process"[461] are "of inherently low probative value."[462] Implicit in this approach is a recognition that in a judicial process, specialised procedures are used to maximise the reliability and credibility of statements.[463]

208. These factors not only justify treating VIFs and similar extra-judicial statements with caution; they are also relevant in determining the approach to be taken where such a statement is

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[457] **F54** Appeal Brief, para. 1386 (referring to Civil Party OM Yoeurn) and fn. 2616 (referring to Civil Party MOM Vun).

[458] **F54** Appeal Brief, fn. 3395 and fn. 2182 (regarding Civil Party EM Oeun) and para. 1234 (regarding Civil Party CHEA Deap). See also a similar argument made in respect of Civil Party NO Sates at para. 896 regarding a prior out-of-court statement.

[459] See Section 8.2.1, at paras 185-195.

[460] **E465** Trial Judgment, para. 73 (stating that they are "accorded little, if any, probative value"); **E319/14/2** Trial Chamber Memorandum entitled "Trial Chamber Guidelines on the Disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02", 24 August 2015, para. 4 ("the Chamber reminds the Parties that CPAs have much less probative value than [WRIs] and the Chamber has only relied on Case 002 CPAs in the Case 002/01 Trial Judgement for the limited purpose of corroborating other evidence.") See also **Case 002/01** – **E96/7** Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, 20 June 2012, para. 29.

[461] **F36** Case 002/01 Appeal Judgment, para. 296.

[462] *Ibid*., para. 90.

[463] For example: the statement is taken in a secure and private location; professional interpretation services are used; interviews are recorded and transcribed; qualified interviewers (investigators and lawyers) with knowledge of the case ask non-leading questions covering all relevant issues; a draft statement is reviewed by or read back to the statement-giver who is given an opportunity to correct or confirm its contents. In contrast, statements are sometimes taken outside judicial proceedings – for example by journalists or NGOs – in a manner which does not follow all (or sometimes any) of these procedures. In those instances there is good reason to treat the resulting statements as having less probative value.

inconsistent with testimony subsequently given before a judicial body. It is a well-established aspect of a trial chamber's discretion to make findings on inconsistencies between the testimony given before it and any prior statement including, where appropriate, by deciding to treat in-court testimony as reliable despite any apparent inconsistencies.[464] At the ICTY it has even considered that these may in certain circumstances "indicate truthfulness and the absence of interference with witnesses".[465]

209. In this process the Trial Chamber will be guided by the conditions in which the prior statement was created.[466] Accordingly, where inconsistencies are raised between Civil Party testimony and a VIF or similar document, the particularities of these documents, and the circumstances in which they are created, become relevant. In the present case, the Trial Chamber heard considerable information regarding the reasons why errors and omissions were made in many VIFs, supplementary information documents and DC-Cam statements. For example, some Civil Parties explained that the errors might have been introduced by interviewers, interpreters or transcribers.[467] Civil Party SEANG Sovida explained that her VIF statement had not been intended as a comprehensive statement of all her experiences:

> In my statement I did not put everything in it because I was told give a brief statement. Actually there were many other incidents such as lack of food, lack of gruel, etc., and I was asked about the 1st January Dam work so I made my statement in that document that I was there at the 1st January worksite for three months and in fact in addition to that information, <I have a lot more to testify.>[468]

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[464] See for example ICTY *Prosecutor v Kupreškić*, IT-95-16-A, Judgement, 23 October 2001, para. 156; ICTR *Prosecutor v Musema*, ICTR-96-13-A, Judgement, 16 November 2001, para. 89; ICTR *Prosecutor v Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 443; ICTR *Prosecutor v Kajelijeli*, ICTR-98-44A-A, Judgement, 23 May 2005, para. 96. The Trial Chamber is equally able to make the contrary finding according to its discretion. See for example **F36** Case 002/01 Appeal Judgment, para. 495. The Lead Co-Lawyers note that the Defence appears to agree with this general principle in its **ground 22**: **F54** Appeal Brief, para. 243.

[465] ICTY *Prosecutor v Furundžija*, IT-95-17-1-T, Judgement, 10 December 1998, para. 113.

[466] See for example ICTR *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 137 (where inconsistencies with prior statements were seen in the light of various factors relating to how those statements were taken, including "the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements. Moreover, the statements were not made under solemn declaration and were not taken by judicial officers.").

[467] See for example **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 43 lines 20 – p. 44 line 2 before [11.23.43], p. 61 lines 8-16 after [13.57.32], p. 65 lines 13-14, 17-19 after [14.11.22]; **E1/379.1** [Corrected 2] T., 20 January 2016 (Civil Party LACH Kry), p. 101 lines 14-22 after [15.53.08].

[468] **E1/308.1** [Corrected 1] T., 2 June 2015 (Civil Party SEANG Sovida), p. 61 line 21 – p. 62 line 2 after [13.38.10].

Others had not been fully aware of the range of subjects they could address in their VIFs,[469] and gave information in response to the specific questions asked, which may not have covered all aspects of their experiences.[470]

210. Factors of these kinds have been recognised at the ICC as reasons for discounting the significance of inconsistencies between victim application forms and in-court testimony:

> [T]he conditions of production of victim applications differ from those of formal witness statements, which are taken by a party, assisted by staff qualified to do so, and recorded after having been read back to the witness. Accordingly, the Chamber has generally attributed less weight to inconsistencies between a witness's testimony and a victim application, than to inconsistencies with a formal witness statement. Major identified inconsistencies have been assessed on a case-by-case basis, considering, *inter alia*, the nature and scope of the inconsistencies, the explanations provided by the witness in this regard, and the conditions of production of the application, including, in particular, whether the form was completed with the assistance of an intermediary or individuals formally connected to the Court.[471]

211. The Lead Co-Lawyers submit that the Trial Chamber was justified in taking a similar approach in the present case. This Chamber should likewise have in mind the circumstances in which civil parties provided prior statements when considering Defence arguments relating to inconsistencies. Usually, the result of this approach will be that a civil party's in-court testimony should not be impugned simply by virtue of inconsistencies with a VIF, supplementary information form or prior statement which was given without the use of proper procedures.

212. Finally, the Appeal Brief also includes a second and separate argument relating to VIFs, namely that the Trial Chamber made inappropriate or excessive use of them to found

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[469] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 58 line 10 – p. 59 line 3 before [11.34.00] ("When I applied as a civil party, I firstly focused about my suffering and my forced marriage and, later on, I learned that, as a victim, due to the loss of relatives during the regime I made another <subsequent> application to add that fact to it. In my first application, I made mention that I suffered from forced marriage. And, later on, through my discussion with some organizations to ask whether victims of the regime who lost their relatives what they could do, is it possible to add that fact to the previous application, so I consulted with other organizations since I did not understand the process that well. Then I made my supplementary application form.")

[470] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), p. 51 line 21 – p. 52 line 10 before [11.17.38] ("Allow me to clarify the discrepancy in those documents. In those documents, I only answered questions that I was asked, so for that reason, my response was precise and in a short form so that it's easier for the interviewer to conclude. But here, I am being asked to speak in details, so I speak about everything.")

[471] ICC *Prosecutor v Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 85.

convictions (**ground 33**).[472] The Lead Co-Lawyers note that the Appeal Brief does not fully substantiate this ground. Although it suggests repeated errors whereby the Trial Chamber "was unafraid to rest convictions" on VIFs,[473] only one purported "example" of this is actually given.[474] In that "example", the Defence argues that the Trial Chamber impermissibly relied on (former Civil Party)[475] PEOU Hong's VIF as the sole evidence for KHIEU Samphân's conviction regarding the deportation of Vietnamese people from Angkor Yos village in Prey Veng province.[476] However, the charge and conviction related to Prey Veng province as a whole. The Trial Chamber noted the limited probative value of PEOU Hong's VIF and explicitly indicated that it was relied on only insofar as it "corroborates the existence of a pattern of displacements of Vietnamese in Prey Veng province in 1975."[477] The Trial Chamber's limited use of a VIF for this corroboration is entirely in accordance with the principles set out above. Moreover, given the other evidence referred to by the Trial Chamber in reaching its finding concerning the deportation of Vietnamese from Prey Veng,[478] its reference to this one VIF in any event was clearly not "critical to the verdict reached".[479]

8.3 Evidence not subject to questioning

213. Throughout the Appeal Brief the Defence asserts that the Trial Chamber placed undue reliance on evidence from persons who were not subject to questioning during the trial. These arguments are framed in various ways by the Defence: at times the evidence is criticised as "hearsay" (**ground 32**),[480] at others specific reference is made to the fact that the material in question took the form of a written statement (**ground 30**),[481] or evidence heard orally during a previous ECCC trial (**ground 7**).[482] All are ultimately concerned with the same question,

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[472] **F54** Appeal Brief, paras 315-316, and see also paras 978-979 in (**ground 151**), cross-referenced to **ground 33** through fns 495, 498 and 1798.
[473] **F54** Appeal Brief, para. 315.
[474] **F54** Appeal Brief, para. 316 and fns 495 and 498 cross-referencing to paras 978-980.
[475] The Lead Co-Lawyers note that although PEOU Hong was originally admitted as a Civil Party he renounced this status on 29 April 2009, see **E3/7165a** Victim Information Form (Complainant PEOU Hong), 14 November 2007, ERN (Kh) 00502679.
[476] **F54** Appeal Brief, para. 316 and fns 495 and 498 cross-referencing to paras 978-980.
[477] **E465** Trial Judgment, para. 3432.
[478] **E465** Trial Judgment, para. 3505.
[479] See above Section 2.1.2 at paras 28-30, esp. at para. 30.
[480] **F54** Appeal Brief, paras 312-313.
[481] **F54** Appeal Brief, paras 293-305.
[482] **F54** Appeal Brief, paras 158-174.

namely the extent to which the Trial Chamber was entitled to rely on evidence from persons who had not been questioned before it in this trial.

214. The Civil Parties have a particular interest in ensuring that the material before the Court is wider than the extremely limited amount of evidence able to be tested by questioning in oral hearings.[483] For some individual Civil Parties, this is in part because the Trial Chamber has relied on their written statements, thereby providing recognition of their experiences and the sense of having played a role in the Court's work. More broadly, the Civil Parties have an interest in ensuring that the Court is in a position to correctly ascertain the truth, and also that a lasting historical record is created which will outlive the Court.[484] For this to be meaningfully achieved, it is necessary to include the accounts of those who did not, or could not, testify in person.

215. Although the Accused's right to examine witnesses is recognised in Internal Rules 84(1) and 87(2) as well as Article 297 of the Cambodian Code of Criminal Procedure[485] (reflecting Article 14(3)(e) of the International Covenant on Civil and Political Rights (ICCPR)),[486] this Chamber has explained that these provisions do not establish a right that is without limitations; "rather, they allow for restrictions in the interest, in particular, of the expeditiousness of the proceedings".[487] The fact that evidence has not been subject to questioning is taken into account in assessing that evidence. Such evidence "must generally be afforded lower probative value than the evidence of a witness testifying before the [Trial] Chamber."[488]

8.3.1 General principles applicable to hearsay evidence

216. Throughout its Appeal Brief, the Defence misapplies the term "hearsay" as well as wrongly claims that hearsay evidence should not have been relied on by the Trial Chamber. Hearsay is evidence of a statement, other than one made in the proceedings in question, which is

[483] The limitations on the Trial Chamber's ability to hear evidence orally were recognised by this Chamber in **F36** Case 002/01 Appeal Judgment, para. 286.
[484] See Section 3.2 above, at para. 43 *et seq*., esp. at para. 50.
[485] Code of Criminal Procedure of Cambodia, Article 297.
[486] **F36** Case 002/01 Appeal Judgment, para. 286.
[487] **F36** Case 002/01 Appeal Judgment, para. 287.
[488] *Ibid*., para. 296.

tendered to prove the truth of its contents.[489] This concept is derived from common law systems, which restrict the admissibility of hearsay evidence in criminal trials.

217. Even in common law criminal proceedings, some types of hearsay evidence are admissible.[490] And in international criminal law proceedings, it is well-established that no general prohibition exists regarding the use of hearsay evidence.[491] In the context of the ECCC, this Chamber has previously confirmed that hearsay evidence is admissible where it is sufficiently relevant and probative.[492]

218. In its Judgment the Trial Chamber correctly articulated this settled approach, relying on this Chamber's Case 002/01 Judgment:

> In assessing the probative value of hearsay evidence, the Chamber takes into account the fact that the source of the hearsay has not been cross-examined as well as "the infinitely variable circumstances which surround [the] hearsay evidence". Hearsay evidence is therefore approached with caution.[493]

219. The Defence expressly endorsed this approach to hearsay evidence from the Trial Chamber.[494] Nonetheless, it repeatedly seeks to argue in its Appeal Brief that the Trial Chamber erred simply by stating that evidence relied on was hearsay.

220. These arguments from the Defence are based on two errors of reasoning:

(i) In some parts of the Appeal Brief the Defence appears to misunderstand the concept of hearsay evidence, leading it to characterise as hearsay matters which are in fact direct evidence;[495]

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[489] Hearsay is defined in the United States Federal Rules of Evidence, Rule 801(c) as a "statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." A widely accepted definition in the British and Commonwealth systems is "any statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion stated." See Roderick Munday, *Cross & Tapper on Evidence*, (Oxford University Press, 13th ed.), p. 563. *Attachment 4*

[490] See Mark Lucraft, *Archbold: Criminal Pleading, Evidence and Practice 2021*, (Sweet and Maxwell UK), 2020, Chapter 11, Part V, Sections 1-9. *Attachment 5*

[491] See for example recently: MICT *Prosecutor v Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, para. 598 and fn. 1624. More generally: ICTR *Karera v Prosecutor*, ICTR-01-74-A, Judgement, 2 February 2009, para. 39; ICTR *Prosecutor v Nahimana* et al., ICTR-99-52-A, Judgement, 28 November 2007, para. 509; ICTY *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15; ICTR *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 136.

[492] **F36** Case 002/01 Appeal Judgment, para. 302; **Case 001 – E188** Trial Judgment, para. 43.

[493] **E465** Trial Judgment, para. 63 citing **F36** Case 002/01 Appeal Judgment, at para. 302.

[494] **F54** Appeal Brief, para. 312.

[495] See examples in paras 222-223 and fn.502 below.

(ii) More generally, the Defence frequently argues simply from the fact that material is hearsay that the Chamber erred in relying on it.[496] These arguments at times misconceive the principles as set out by the Trial Chamber in relation to hearsay.

221. Tackling these difficulties in turn: the Lead Co-Lawyers note that not every recounting by a witness of a statement made by a third person will amount to hearsay; this depends on the use which is made of the statement. One example of where recounting a third person's statement will *not* amount to hearsay is where it is used to prove its impact on the mental state of the testifying witness who heard it. The classic explanation of this principle in the British and Commonwealth system was given in *Subramaniam v Public Prosecutor*.[497] There it was held to be permissible for the accused to testify about threatening statements made to him by terrorists which he claimed caused him to fear death if he did not cooperate:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.[498]

222. In the present case, a parallel can be seen in the evidence of Civil Party DOUNG Oeurn. In her testimony she said that she had heard "information that Vietnamese…had to return to Vietnam", and went on to explain that having heard this she "urged [her] husband to go together, but he refused to go. He said to live or die, he would remain in Cambodia."[499] Civil Party DOUNG Oeurn's statement is not hearsay to the extent that it is used to prove that Vietnamese people living in Cambodia were made aware of threats that they must go to Vietnam or face dire consequences. Her evidence is direct evidence that: (i) such threats were

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[496] For example, in respect of Civil Party evidence see: **F54** Appeal Brief, paras 703, 781, 977, 1044.
[497] *Subramaniam v Public Prosecutor* [1956] WLR 965. *Attachment 6*
[498] *Ibid*., p. 970.
[499] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn.), p. 10 line 24 – p. 11 line 4 after [09.30.16], p. 56 lines 13-18 after [13.51.40].

heard by Vietnamese people living in Cambodia at that time (such as her husband) and their families; (ii) she was inclined to respond to the threat by going to Vietnam; and (iii) that although her husband was determined to stay in Cambodia he also understood that he might die as a result. Used in this way Civil Party DOUNG Oeurn's evidence was direct evidence of the coercive nature of Vietnamese people's movement (part of the Trial Chamber's finding that "Vietnamese living in Prey Veng province were ordered to go to Vietnam").[500] None of these uses of Civil Party DOUNG Oeurn's evidence amounts to hearsay, contrary to what is posited in the Defence Appeal Brief.[501]

223. Similar errors are made by the Defence in respect of a number of other Civil Parties, whose evidence is incorrectly characterised in the Appeal Brief as hearsay.[502]

224. In any event, as set out above, even where material *is* hearsay, this does not bar the Trial Chamber from considering the evidence and according it probative value. The fact that less weight *may* be assigned to hearsay evidence, does not follow that it *must* be. This was articulated at the ICTY as follows:

> The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.[503]

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[500] **E465** Trial Judgment, para. 3433.

[501] **F54** Appeal Brief, paras 313 and 977.

[502] This is most frequently done where a Civil Party or witness gave evidence that other people had disappeared, presumed killed. The Defence labels such evidence as "hearsay", presumably on the basis that the person giving the evidence did not see the killing, but rather learned some details of it from another source. However the Defence's approach oversimplifies and ignores the Civil Party or witness's direct evidence that the persons in question never returned, as well as direct evidence of the psychological impact that this had on the Civil Party or witness testifying (a material fact in respect of disappearances). See for example **F54** Appeal Brief, para. 800 (Civil Party HUN Sethany), para. 888 (Civil Party UONG Dos and Witness CHAN Tauch), paras 1003-1005 (Civil Party PRAK Doeun), and para. 1014 (Civil Party UCH Sunlay). A similar error is made where a Civil Party or witness gave evidence that as a cadre he or she was instructed in certain ways. Although the instructions or policy briefings were "heard" from another source, and might be classified as hearsay regarding, for example, the ultimate source of the policy or its objectives, the evidence is nonetheless direct concerning the fact that cadres were directed in certain ways, which is relevant in establishing the existence of a policy. See for example **F54** Appeal Brief, para. 1095 (Civil Party HENG Lai Heang). Several of these instances are discussed elsewhere in this Brief. See paras 304-307 (Civil Party UCH Sunlay); paras 289, 293 and 394-401 (Civil Party HUN Sethany); paras 301-303 (Civil Party PRAK Doeun); paras 722-726 (Civil Party HENG Lai Heang).

[503] ICTY *Prosecutor v Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

Accordingly, hearsay evidence that is voluntary, truthful and trustworthy may be considered reliable evidence.[504]

225. This Chamber has confirmed that:

> [A] trial chamber has broad discretion to consider and rely on hearsay evidence, though this must be done with caution; it is for the appealing party to demonstrate that no reasonable trier of fact could have relied upon it in reaching a specific finding.[505]

226. Significantly, this Chamber ruled as follows in response to arguments similar to many of those now brought before it again:

> KHIEU Samphân also merely asserts that the Trial Chamber erred in relying on hearsay, but provides no specific references to support this assertion. Mere assertions of error without further substantiation do not meet the standard of appellate review. *Although the Trial Chamber has an obligation to provide a reasoned opinion, it is not required to articulate every step of its reasoning in detail, and it is presumed to have properly evaluated all the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence.* The Supreme Court Chamber notes that, throughout his appeal brief, KHIEU Samphân points to Trial Chamber's factual findings [as] improperly based, in his averment, on hearsay evidence. As such, where the Accused has developed allegations of error more fully elsewhere in their respective appeal briefs, the Supreme Court Chamber will consider them accordingly. However, the argument that the Trial Chamber generally misapplied the standard for the treatment of hearsay evidence must be rejected.[506] [*emphasis added*]

227. It is well-established that, at the appellate stage, an appeals chamber should defer to the judgement of a trial chamber on issues of credibility.[507] In the ECCC context, this Chamber has held that "it is for the appealing party to demonstrate that no reasonable trier of fact could have relied upon it in reaching a specific finding."[508]

228. The Lead Co-Lawyers submit that the Defence has demonstrated no error in the overall approach taken by the Trial Chamber to hearsay evidence. The particular application of these

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[504] ICTY *Prosecutor v Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para. 16.
[505] **F36** Case 002/01 Appeal Judgment, para. 302.
[506] **F36** Case 002/01 Appeal Judgment, para. 304.
[507] See for example ICTY, *Prosecutor v Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 37; ICC *Prosecutor v Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, paras 23-26; SCSL *Prosecutor v Taylor*, SCSL-03-01-A, Judgment, 26 September 2013, para. 26.
[508] **F36** Case 002/01 Appeal Judgment, para. 302.

principles to the evidence of individual Civil Parties is addressed throughout this Response. The more specific question of hearsay evidence taking the particular form of written statements is addressed in the following section.

8.3.2 Specific rules regarding reliance on written statements

229. Written statements of persons who do not appear to testify before the Trial Chamber are a type of hearsay evidence. ECCC caselaw has established that such written statements are admissible, and indeed essential to a fair trial in the international criminal law context as:

> …an entirely unfettered right to examine witnesses against the accused would bear the risk of compromising a court's ability to render justice in cases of the size and complexity as the case at hand: the court would have to choose between calling a high number of witnesses to testify before it, which could make the trial unmanageable and overly lengthy, or refraining from relying on a substantive amount of evidence, which – though perhaps not central to the case – may be important to shed light on the context and breadth of the case.[509]

230. The admission of such evidence is not without procedural protections to safeguard the rights of the accused. For example, Internal Rule 87(2) provides that "[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination."[510] To this end, each party had the opportunity to put documents to witnesses, experts, and Civil Parties who testified before the Chamber, and had the opportunity to read out portions of relevant documentary evidence during Key Document Hearings held at the end of each trial segment, thereby subjecting documents – including written statements – to adversarial debate.[511]

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[509] **F36** Case 002/01 Appeal Judgment, para. 286

[510] Internal Rule 87(3) further provides that "[t]he Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court."

[511] See **E315/1** Trial Chamber Memorandum entitled "Information on (1) Key Document Presentation Hearings in Case 002/02 and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02", 17 December 2014, paras 2-6. The Parties also had the opportunity to object to the documents proposed by other Parties via written submissions: **E305/17** Decision on Objections to Documents Proposed to be put before the Chamber in Case 002/02, 30 June 2015, para. 5. See also **E465** Trial Judgment, paras 55-56, 58-59. For an example of discussion at these hearings regarding documents the use of which is now contested by the Defence, see in respect of the WRIs of Civil Parties SOK El and UONG Dos: **E1/456.1** T., 12 August 2016, p. 22 line 19 – p. 26 line 25 after [09.41.54]; **E1/458.1** T., 16 August 2016, p. 6 line 25 – p. 8 line 9 after [09.13.45]. The Lead Co-Lawyers note that the arguments now made by the Defence were not raised in that hearing.

231. Another protection is that, with limited exceptions, the content of written statements is generally not admissible regarding "proof of the acts and conduct of the accused". In Case 002/01 this Chamber explained the approach taken by the Trial Chamber:

> …the Trial Chamber recalled that, absent the opportunity for examination, it excluded statements going to proof of the acts and conduct of the Accused, except where the witness was deceased, though, in such cases, "it would not base any conviction decisively thereupon". The Trial Chamber also stated that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence."[512]

That approach was upheld by this Chamber as correct.[513]

232. Despite the clarity of the law on this subject, and the consistency of the Trial Chamber's approach throughout Case 002, the Defence Appeal Brief now raises a number of arguments linked in various ways to the Trial Chamber's use of written statements. The core arguments, which the Lead Co-Lawyers address below, appear to be the following:

(i) First, the Appeal Brief appears to argue (in **ground 30**) that the Trial Chamber erred by applying the established legal framework applicable to written statements, rather than modifying it in light of what the Defence claims to be relevant jurisprudence from other international courts;[514]

(ii) Secondly, the Appeal Brief appears to argue (in **ground 30**) that even if the existing legal framework remained valid, the Trial Chamber did not correctly apply it because undue weight was given to written statements,[515] including statements created outside judicial proceedings (in **ground 31**);[516]

(iii) Thirdly, a number of arguments are raised about the Defence's inability to cross-examine witnesses who provided a large number of written statements admitted under

[512] **F36** Case 002/01 Appeal Judgment, para. 280.
[513] **F36** Case 002/01 Appeal Judgment, paras 287, 290, 294, 299.
[514] **F54** Appeal Brief, paras 296-300.
[515] **F54** Appeal Brief, paras 293-295 (cross-referencing paras 863-873, 842-847, 1055), paras 301-304 (cross-referencing paras 842-847, 863-873, 899-910, and 1055), paras 303-305.
[516] **F54** Appeal Brief, paras 306-311 (cross-referencing paras 731, 1044-1045, 1429-1430, 1525).

Internal Rule 87(4) (in **ground 9**);[517] including documents linked to the Cases 003 and 004 investigations (**ground 10**).[518]

8.3.2.1 The correct legal framework

233. The Lead Co-Lawyers have found it difficult to precisely discern the Defence's arguments concerning the legal framework applicable to the admission and use of written statements.

234. In one place the Appeal Brief appears to claim that in Case 002/01 this Chamber disagreed with the Trial Chamber's approach and established a different framework.[519] However this Chamber repeatedly ruled in Case 002/01 that the legal standards articulated by the Trial Chamber in relation to written statements were appropriate.[520] In one instance it ruled that those standards had not been correctly applied;[521] but nowhere did it critique the Trial Chamber's framework, or articulate an alternative framework.

235. It is therefore difficult to see how the Trial Chamber could be faulted for applying the same legal principles in the present case. However the Defence appears to argue that it should be, saying that the Trial Chamber "erred in establishing such an analytical framework for written statements".[522] They refer to "international practice" and specifically two "recent decisions" of the ICC and MICT as supporting a different approach.[523]

236. Only one of the cases cited by the Defence, the MICT Appeal Judgment in *Karadžić*,[524] postdates this Chamber's Case 002/01 Judgment. It does not support the Defence's argument for a more restricted use of written evidence. A more complete quote from the paragraph referenced by the Defence makes clear that the decision in fact supports the Trial Chamber's approach:

> The Appeals Chamber recalls that Article 21(4)(e) of the ICTY Statute guarantees the right of the accused to examine or have examined the witnesses against him. However, this right is not absolute and may be limited, for instance, in accordance with Rule 92 *bis* of the ICTY Rules. In this respect, a decision to

[517] **F54** Appeal Brief, paras 189-197.
[518] **F54** Appeal Brief, paras 198-215.
[519] **F54** Appeal Brief, para. 294 ("The Supreme Court…thus established a more particularised framework than the [Trial] Chamber").
[520] **F36** Case 002/01 Appeal Judgment, paras 287, 290, 296.
[521] **F36** Case 002/01 Appeal Judgment, para. 430.
[522] **F54** Appeal Brief, para. 300.
[523] **F54** Appeal Brief, para. 299.
[524] MICT *Prosecutor v Karadžić*, MICT-13-55-A, Judgement, 20 March 2019.

> accept evidence without cross-examination is one which trial chambers should arrive at only after careful consideration of its impact on the rights of the accused. As with any issue regarding the admission or presentation of evidence, trial chambers enjoy broad discretion in this respect.[525]

237. The other "recent decision" cited by the Defence is a decision of the ICC Appeals Chamber from 2011.[526] Not only does it pre-date this Chamber's Case 002/01 Judgment which upheld the Trial Chamber's approach as correct, it is not an accurate reflection of current ICC law on this issue. In 2013 the ICC's Rule 68 was substantially amended in order to *widen* the scope at that institution for reliance on written statements.[527]

238. In any event, the Lead Co-Lawyers agree with the OCP concerning the limited relevance of comparative international practice on this issue.[528] This is not only because the ECCC has not adopted an equivalent of the ICC's Rule 68 or the ICTY's Rule 92*bis*,[529] but also because the broader procedural context of ECCC proceedings is materially different. Although the Court's *sui generis* procedural law has incorporated some aspects of adversarial trial proceedings,[530] several procedural features remain inquisitorial which reduces the imperative of having witnesses or civil parties questioned on behalf of an accused. Evidence is called by the Trial Chamber, not the parties, with a view to "ascertaining the truth"; there is therefore no case or evidence "against" the accused in the same way as occurs in a truly adversarial

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[525] *Ibid.*, para. 162. In paras 163-166 the MICT Appeals Chamber went on to reject Karadžić's ground of appeal concerning the use of a particular witness' written statement without the opportunity for cross-examination.

[526] ICC *Prosecutor v Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386, 3 May 2011.

[527] Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Resolution ICC-ASP/12/Res.7, ASP 12th Session Resolution 7, 27 November 2013, p. 52-53. The amendment was "aimed at allowing the judges of the Court to reduce the length of Court proceedings and streamline the presentation of evidence by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused". See ICC-ASP/12/20, Official Records, Volume I, 28th November 2013, p. 71. See also ICC-ASP/12/44, Report of the Working Group on Amendments, 24 October 2013, paras 8 and 10.

[528] **F54/1** OCP Response Brief, para. 226.

[529] Concerning the admissibility of written statements: ICC Rules of Procedure and Evidence, (Rev.2), 2013, rule 68; ICTY Rules of Procedure and Evidence, (Rev.50), 8 July 2015, rule 92*bis*.

[530] **E163/5/1/13** Decision on the Co-Prosecutor's Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, para. 42. In particular, Internal Rules 87(1) and 91 *bis* have introduced certain specific limited adversarial features including a burden of proof falling on the OCP and the possibility for party-led questioning. See further Sergey Vasiliev, "Trial Process at the ECCC: The Rise and Fall of the Inquisitorial Paradigm in International Criminal Law?" in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia*, (Springer), 2016. *Attachment 7*

system.[531] More significantly still, at the ECCC the veracity of a witness's or civil party's evidence will very often have been assessed by an impartial judicial investigation before coming before the Trial Chamber.[532]

239. The Chamber should therefore dismiss the Defence's arguments that the legal framework used by the Trial Chamber for admitting and assessing written statements was in error.

8.3.2.2 Correct application of the legal framework

240. The Lead Co-Lawyers support the OCP's response to **ground 30**[533] and make the following limited submissions with respect to the written statements of Civil Parties that are raised by the Defence.

241. The Defence refers to specific instances in which it says the Trial Chamber relied unduly on written statements to reach its conclusions without sufficient reasoning.[534] The Lead Co-Lawyers note that among the examples given there are the Written Records of Interview ("WRIs") which were provided by deceased Civil Parties SOK El and UONG Dos.[535] Elsewhere in the Appeal Brief the Defence criticises the Trial Chamber's use of a non-judicial statement given by Civil Party NEOU Sarem.[536] The Lead Co-Lawyers agree with the responses made by the OCP concerning these Civil Party statements.[537] On the specific question of the Defence's allegation of wrongful collusion or contamination between Civil Parties SOK El and UONG Dos, the Lead Co-Lawyers add brief submissions below.[538]

8.3.3 Case 002/01 evidence

242. The Defence argues that the Trial Chamber erred in its approach to testimony heard in Case 002/01. The Defence submits that the Trial Chamber should not have relied on the testimony of witnesses and Civil Parties heard in Case 002/01 without having recalled them for questioning during the Case 002/02 trial or adequately taking into account that they had only

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[531] **F36** Case 002/01 Appeal Judgment, para. 248.
[532] **E162** Trial Chamber Memorandum entitled "Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158", 31 January 2012, para. 3.
[533] **F54** Appeal Brief, paras 293-305; **F54/1** OCP Response Brief, paras 219-230.
[534] **F54** Appeal Brief, paras 295 (cross referencing to paras 863-873, 842-847, 1055), 304.
[535] *Ibid*., paras 863-873.
[536] *Ibid*., paras 1894, 2025, 2075.
[537] **F54/1** OCP Response Brief, paras 137-138, 863-864 and 868-870 (Civil Parties SOK El and UONG Dos); para. 1169 (Civil Party NEOU Sarem).
[538] See Section 10.4 at paras 752-758.

been questioned on matters relevant to Case 002/01 (**ground 7**).[539] The Lead Co-Lawyers have understood the Defence's contention in this ground to be concerned with the appropriate weight to be given to Case 002/01 evidence, rather than with its admissibility.[540] The Lead Co-Lawyers largely agree with the submissions made by the OCP on this question,[541] subject to the following submissions.

243. The OCP has correctly explained that the evidence heard before the effective severance of Case 002/01 on 23 July 2013 was formally part of the entirety of Case 002.[542] However, this is a matter of admissibility rather than of weight. Although the testimony heard before 23 July 2013 was certainly before the Trial Chamber in Case 002/02, it is also true that this evidence must be assessed in light of questioning which was permitted during those hearings. The Defence is right to note that a number of witnesses and Civil Parties heard even before the date of severance were not permitted to be questioned on matters outside the (at that stage anticipated) scope of Case 002/01.[543]

244. To be clear, the restricted scope of the questioning undertaken by the Parties for these experts, witnesses and civil parties does not mean that the Trial Chamber could not consider their evidence. It merely required the Trial Chamber to weigh the evidence in light of the extent of the questioning which had been permitted. In this respect, this evidence is not significantly different from other evidence before the Chamber which had not involved in-court questioning at all. Indeed, evidence from Case 002/01 must have *at least* as much value as written statements. Even where the Parties were unable to question on some matters, the source of the evidence did appear before the Trial Chamber, which was therefore able to some extent to assess general demeanour and credibility and to regulate the manner of such questioning as did occur.

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[539] **F54** Appeal Brief, paras 160-174.
[540] While paragraph 163 of the Appeal Brief uses language which suggests a reference to admissibility, paragraphs 160-161 establish that the Defence has accepted the admissibility of this evidence but challenge its value.
[541] **F54/1** OCP Response Brief, paras 53-62.
[542] **F54/1** OCP Response Brief, para. 56, referring to **E301/9/1/1/3** Decision on KHIEU Samphân's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, paras 74-75.
[543] See for example Civil Parties OR Ry and CHAU Ny: **E1/146.1** T., 23 November 2012 (Civil Party OR Ry), p. 12 line 12 – p. 13 line 9 after [09.36.11]; **E1/146.1** T., 23 November 2012 (Civil Party CHAU Ny), p. 77 line 18 – p. 78 line 1 after [14.00.54].

245. The Lead Co-Lawyers submit that the Trial Chamber entirely complied with the required approach. It was alive to the possibility that the severance would impact the way oral evidence was subject to questioning – the Trial Chamber explicitly addressed this issue in February 2014, stating that it would "consider whether the parties were prevented or did not have an opportunity to fully examine an individual they intended to recall in court, because of the limited scope of Case 002/01."[544] The Trial Judgment's approach is consistent with this, making clear that Case 002/01 evidence was re-evaluated, with the Trial Chamber open to reaching new conclusions, including on evidence and matters commonly relevant to Cases 002/01 and 002/02.[545] The Trial Chamber made clear when evaluating material from Case 002/01 in relation to issues in Case 002/02 that it would satisfy itself that the right to full adversarial debate had been preserved.[546] The Defence has identified no instance in which the Trial Chamber failed to implement this approach in respect of Case 002/01 evidence.

246. In addition to having demonstrated no error by the Trial Chamber in the application of these principles, the Defence has also not demonstrated any prejudice that it has suffered. It is noteworthy that the inability to question on matters outside the scope of Case 002/01 did not only affect the Defence. Indeed, in most of the instances which the Lead Co-Lawyers have been able to identify in which questioning was precluded, this involved an objection from counsel for KHIEU Samphân or NUON Chea preventing questioning by the OCP or the Lead Co-Lawyers.[547] It is therefore clear that potentially *inculpatory* material on subjects relevant to Case 002/02 was excluded as a result of this approach.

247. Moreover, while the Defence complains in its Appeal Brief of the Trial Chamber's use of Case 002/01 evidence in relation to the treatment of Buddhists,[548] including the evidence of

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[544] **E302/5** Trial Chamber Memorandum entitled "Clarification Regarding the use of evidence and the procedure for recall of witnesses, civil parties and experts from Case 002/01 in Case 002/02", 7 February 2014, para. 8.
[545] **E465** Trial Judgment, para. 36.
[546] *Ibid*.
[547] See for example **E1/206.1** [Corrected 1] T., 12 June 2013 (Witness Sim Hao), p. 104 line 8 – p. 105 line 11 before [15.56.19]; **E1/152.1** T., 12 December 2012 (Witness PHAN VAN), p. 38 line 21 – p. 39 line 11 after [10.55.53]; **E1/159.1** [Corrected 1] T., 11 January 2013 (Witness CHHAOM SE), p. 105 line 1 – p. 106 line 4 before [16.01.07]; **E1/187.1** [Corrected 1] T., 2 May 2013 (Witness LIM Sat), p. 59 line 10 – p. 61 line 16 after [14.00.14]; **E1/218.1** T., 4 July 2013 (Witness SUM Alat), p. 49 lines 3-18 before [11.44.47]; **E1/136.1** T., 22 October 2012 (Civil Party CHUM Sokha), p. 49 line 11 – p. 59 line 3 after [11.39.56], p. 61 line 4 – p. 62 line 8 after [13.34.49]; **E1/138.1** [Corrected 1] T., 24 October 2012 (Civil Party LAY Bony), p. 35 line 14 – p. 36 line 22 after [10.31.36].
[548] **F54** Appeal Brief, para. 164.

Civil Parties EM Oeun and SOPHAN Sovany, the Lead Co-Lawyers highlight that the Defence did not request the recall of any of these persons.[549]

248. The Defence has demonstrated no error by the Trial Chamber in relation to evidence from Case 002/01 used in Case 002/02.

8.4 Admission of evidence under Internal Rule 87(4), including Case 003 and 004 material

249. The Defence argues that the Trial Chamber erred by taking an excessively liberal approach to the admission of new evidence during the trial, claiming that this approach caused prejudice to the Defence (**ground 9**).[550] Some, though not all, of the new evidence in question was material which had been disclosed from the investigations in Cases 003 and 004.[551] Although the Lead Co-Lawyers largely agree with the OCP response to this ground,[552] the following additional submissions are advanced on behalf of the Civil Parties.

250. Despite the confusion in the Defence submissions, the applicable law is in fact straightforward: Rule 87(4) permits the Trial Chamber to admit new evidence during the course of the trial, where it deems that evidence conducive to ascertaining the truth, subject to the general criteria for the admissibility of evidence set out in Rule 87(3). This provides, in particular, that the Chamber may reject a request for evidence where it finds that it is "irrelevant or repetitious".[553] Furthermore, it must be demonstrated that the new evidence was not available prior to the opening of the trial and/or could not have been discovered earlier with the exercise of reasonable diligence.[554] If a request for admission of evidence is untimely, the Chamber may nonetheless admit the requested evidence in the interests of justice.[555] The Trial Chamber has expanded on the circumstances in which the interest of justice may require admission following a late request, in particular: where the evidence is

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[549] **E305/5** *Témoins et experts proposés par la Défense de M. KHIEU Samphân pour le procès 002/02*, 9 May 2014 and **E305/5.2** Annex III – Updated summaries of the testimonies of witnesses and experts not seeking any protective measures, 9 May 2014.
[550] **F54** Appeal Brief, paras 182-197.
[551] This Brief has addressed above (in Section 6.3.1 at paras 95-101) the arguments made by the Defence regarding to the timely disclosure of that evidence.
[552] **F54/1** OCP Response Brief, paras 71-78
[553] **F36** Case 002/01 Appeal Judgment, para. 284.
[554] **E190** Decision Concerning New Documents and Other Related Issues, 30 April 2012, paras 17, 23, 28, 38.
[555] **E276/2** Trial Chamber Memorandum entitled "Response to the Internal Rule 87 (4) requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, E276/1)", 10 April 2013, para. 2; **E367/8** Decision on NUON Chea's Rule 87(4) Requests for Admission of 29 Documents Relevant to the Testimony of 2-TCE-95, 5 May 2016, para. 11.

exculpatory and requires evaluation in order to avoid a miscarriage of justice;[556] where it closely relates to material already before the Trial Chamber and the interest of justice requires that the sources be evaluated together; or where the other parties do not object to the evidence.[557]

251. In its Appeal Brief, the Defence appears to posit an additional requirement: namely that late requests for the admission of evidence could only be granted where it is "strictly necessary".[558] Such a requirement is nowhere to be found in the Internal Rules and the Defence provides no reference to caselaw which refers to it. In contrast to this suggestion from the Defence, and as noted by the OCP,[559] Internal Rule 87(4) is both flexible and discretionary.[560]

252. This flexible and discretionary approach is appropriate. A narrow approach to Internal Rule 87(4) would be contrary to the imperative to ascertain the truth, which is particularly in the interests of the Civil Parties. The need for a broad approach was also particularly clear in light of certain unusual features of the case:

253. First, a considerable period of time elapsed between the conclusion of the judicial investigation on 14 January 2010 and the beginning of the Case 002/02 trial. Some of the witnesses and Civil Parties who had provided evidence to the OCIJ died in the intervening period.[561] The focus of the trial had also been narrowed as a result of the two severances.[562]

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[556] **E307/1** Trial Chamber Memorandum entitled "Decision on Parties' Joint Request for Clarification regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3)", 11 June 2014, para. 3; **E190** Decision Concerning New Documents and Other Related Issues, 30 April 2012, para. 36; **E289/2** Decision on Civil Party Lead Co-Lawyers' Internal Rule 87(4) request to put before the Chamber new evidence (E289) and KHIEU Samphân's response (E289/1), 14 June 2012, para. 3.

[557] **E434/2** Trial Chamber Memorandum entitled "Decision on NUON Chea Defence Internal Rule 87(4) Requests E434 and E435", 3 November 2016, para. 3; **E190** Decision Concerning New Documents and Other Related Issues, 30 April 2012; **E289/2** Decision on Civil Party Lead Co-Lawyers' Internal Rule 87(4) request to put before the Chamber new evidence (E289) and KHIEU Samphân's response (E289/1), 14 June 2012, para. 3.

[558] **F54** Appeal Brief, para. 190

[559] **F54/1** OCP Response Brief, para. 73

[560] **E319/7** Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, 24 December 2014, para. 8.

[561] See for example **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 133. For example see further below in paragraph 258 regarding the decision to hear oral testimony from Civil Party SUN Vuth following the death of Civil Parties SOK El and AUM Mol.

[562] **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013; **E301/9/1** Additional Severance Decision, 4 April 2014.

It was therefore entirely understandable that the available evidence as well as the Parties' appreciation of it had evolved during that period.

254. Secondly, in parallel to Case 002, the investigations in Cases 003 and 004 were ongoing. This unavoidably led to the collection and generation of new material relevant to Case 002. Where this material was conducive to ascertaining the truth, it was entirely appropriate for the Trial Chamber to admit it pursuant to Internal Rule 87(4). No error in the exercise of the Trial Chamber's discretion has been identified by the Defence.[563]

255. The Defence complains that the witnesses and Civil Parties identified through this process as sources of evidence were, at that point, "completely new".[564] However, this is precisely the situation that Internal Rule 87(4) is intended for: that is, where completely new material comes to light.[565] The fact that the material was previously unknown or unavailable is the general requirement for its admission under Internal Rule 87(4), not an exclusory factor.

256. In **ground 10** the Defence attacks the Trial Chamber's decisions to hear oral evidence from two Civil Parties, PREAP Sokhoeurn and SUN Vuth.[566] The Defence have made no attempt to demonstrate that the admission of this evidence affected the verdict. Nor have they clearly articulated an error in the exercise of the Trial Chamber's discretion, such as would be required for these rulings to be overturned.[567]

257. The Trial Chamber raised the question of hearing oral evidence from Civil Party PREAP Sokhoeurn *proprio motu*[568] on 8 September 2016,[569] and indicated its decision to hear her through an email sent to the Parties the following day.[570] It is unclear whether the error

[563] **F54** Appeal Brief, para. 211. It is unclear whether the Defence submission is that the material admitted was, in fact, not conducive to ascertaining the truth, but if so, it has in any event not been explained how the Trial Chamber's decision involved an appealable error in the exercise of its discretion. On the relevant standard of appeal concerning the Trial Chamber's discretion on procedural issues, see Section 2.1.3, above at paras 31-33.
[564] **F54** Appeal Brief, para. 212. See also para. 211 where the same complaint is made in different words.
[565] **E307/1** Trial Chamber Memorandum entitled "Decision on Parties' Joint Request for Clarification regarding the Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3)", 11 June 2014, para. 5.
[566] **F54** Appeal Brief, paras 211-212.
[567] See Section 2.1.3, above at paras 31-33.
[568] The Defence also notes that this question was raised by the Trial Chamber's own motion, so it is unclear why the Appeal Brief refers to the Civil Party as being "for the Prosecution" (**F54** Appeal Brief, para. 211). The Civil Party is a party independent of the Prosecution and in any event witnesses, civil parties and experts in ECCC proceedings are not called by and do not appear "for" a particular party.
[569] **E1/471.1** T., 8 September 2016, p. 1 lines 18-25 after [09.02.35] and p. 63 line 15 – p. 68 line 8 after [11.27.00].
[570] **F54.1.29** Appeal Brief, Attachment 29 (Email from the Trial Chamber to the Parties regarding Scheduling for the Week of 19 September 2016, dated 9 September 2016).

alleged by the Defence is the lack of detailed reasons provided by the Trial Chamber, or the content of the decision itself. If the latter, no clear error is alleged: the Defence merely indicates that it found the Civil Party's evidence unfavourable, and that it was late in the trial process.[571] However Internal Rule 87(4) is no less applicable towards the end of trial than at the beginning of it. The Defence's references to the Civil Party being "completely new"[572] are uncompelling. As indicated above, this is the very rationale of Internal Rule 87(4). In any event, Civil Party PREAP Sokhoeurn's account was not new to the Defence, even if her inclusion in the hearing lists was. A WRI given by her was disclosed to the parties in March 2015.[573] The OCP requested its admission onto the Case File in November 2015,[574] and that request was granted in May 2016.[575] The Defence's arguments again merely indicate a disagreement with the Trial Chamber's decision, and reveal no error in the exercise of its discretion. Regarding the lack of reasons for the decision, since the Defence failed to demonstrate any impact on the verdict flowing from this, or indeed from the admission of Civil Party PREAP Sokhoeurn's evidence, this cannot succeed as a ground of appeal.

258. The Defence also complains about the decision to hear Civil Party SUN Vuth.[576] His appearance was requested by the OCP on 16 March 2016.[577] The request was well justified: On 5 February 2016 the Parties were informed of the death of 3 of the 6 persons whom the OCP had proposed to testify in the Phnom Kraol segment.[578] Two of those deceased were

[571] **F54** Appeal Brief, para. 212.
[572] *Ibid*.
[573] See **E319/19/1** [Confidential] Notice of KHIEU Samphan, NUON Chea, Civil Party Lead Co-Lawyer, and Standby Counsel Acceptance of Documents Disclosed Relevant to Case 002 Pursuant to E319/19, 20 March 2015; **E319/19.3** [Confidential] International Co-Prosecutor's Disclosure of Documents […], Annex K, 20 March 2015, p. 25.
[574] **E319/36** [Confidential] International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) & 87(4) and to Call Four Additional Witnesses for Upcoming Case 002/02 Segments, 11 November 2015; **E319/36.2** [Confidential] Annex J – New Witness Statements Relevant to Case 002/02, 11 November 2015, p. 39.
[575] **E319/36/2** [Confidential] Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) & (4) and To Call Four Additional Witnesses for Upcoming Case 002/02 Segments, 25 May 2016; **E319/36/2.1** [Confidential] Decision on International Co-Prosecutor's Request to Admit 95 Documents and Call Four Additional Witnesses – Confidential – ANNEX, 25 May 2016, p. 10.
[576] **F54** Appeal Brief, para. 211. The Lead Co-Lawyers note that this is raised by the Defence in the context of **ground 10**, dealing with disclosures from Case 003 and 004. However, the Lead Co-Lawyers note that Civil Party SUN Vuth was not linked to those disclosures.
[577] **E390** Co-Prosecutors' Request to Call Additional Witnesses During the Phnom Kraol Security Centre Trial Segment, 16 March 2016.
[578] **E390** Co-Prosecutors' Request to Call Additional Witnesses During the Phnom Kraol Security Centre Trial Segment, 16 March 2016, para. 2; **E390/1.1.1** [Confidential] Email from the Trial Chamber to the Parties (Phnom Kraol Security Centre Witness List and Time Allocations), 5 February 2016.

Civil Parties SOK El and AUM Mol.[579] The OCP noted that the only proposed evidence concerning Phnom Kraol Prison had been from Civil Party SOK El and the already deceased Civil Party UONG Dos, and therefore proposed that the Trial Chamber hear from the one surviving Civil Party prisoner who had been imprisoned there, Civil Party SUN Vuth.[580] The Trial Chamber determined that although Civil Party SUN Vuth's evidence had been available for some time, it was in the interests of justice to hear him given the deaths of Civil Parties SOK El and AUM Mol.[581] No error in that decision has been demonstrated.

259. The Lead Co-Lawyers add that, contrary to the claim made in the Appeal Brief, Civil Party SUN Vuth was not "completely unknown to the Defence".[582] As the Trial Chamber identified, his VIF had been on the Case File since 2010.[583] Moreover, both his VIF and a subsequent supplementary information form were included on the list of documents admitted by Trial Chamber at the start of Case 002/02.[584]

8.5 The Defence's "statistical" analysis of the evidence

260. In portions of its Brief which related to the regulation of marriage the Defence relies on what it calls a "statistical"[585] approach to challenge a number of the Trial Chamber's findings– namely, the Trial Chamber's finding that victims did not consent to their marriages;[586] that the CPK had a policy of forcing people to marry;[587] that couples were caused serious suffering as a result of being forced to marry;[588] that newly married couples were monitored

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[579] **E390** Co-Prosecutors' Request to Call Additional Witnesses During the Phnom Kraol Security Centre Trial Segment, 16 March 2016, para. 6; **E390/1.1.1** [Confidential] Email from the Trial Chamber to the Parties (Phnom Kraol Security Centre Witness List and Time Allocations), 5 February 2016.
[580] **E390** Co-Prosecutors' Request to Call Additional Witnesses During the Phnom Kraol Security Centre Trial Segment, 16 March 2016, para. 7.
[581] **E390/3** Trial Chamber Memorandum entitled "Decision on Co-Prosecutors' Rule 87(4) Request to Call an Additional Witness and an Additional Civil Party During the Phnom Kraol Security Centre Trial Segment", 11 July 2016, paras 5-6; **E1/408.1** T., 24 March 2016, p. 3 lines 5-9 after [09.09.10].
[582] **F54** Appeal Brief, para. 211.
[583] **E390/3** Trial Chamber Memorandum entitled "Decision on Co-Prosecutors' Rule 87(4) Request to Call an Additional Witness and an Additional Civil Party During the Phnom Kraol Security Centre Trial Segment", 11 July 2016, para. 5.
[584] **E305/17.2** [Confidential] Decision on Objections to Documents Proposed to Be Put before the Chamber in Case 002/02: Annex B: Documents Proposed by the Civil Parties Lead Co-Lawyers Put before the Chamber, 30 June 2015, p. 18; **E305/17.5** [Confidential] Decision on Objections to Documents Proposed to Be Put before the Chamber in Case 002/02: Annex E: Documents Cited in the Closing Order, 30 June 2015, p. 41.
[585] **F54** Appeal Brief, para. 1273.
[586] **F54** Appeal Brief, paras 1197-1208.
[587] **F54** Appeal Brief, paras 1273-1278.
[588] **F54** Appeal Brief, paras 1176-1188.

to ensure that they consummated their marriages;[589] and that CPK authorities routinely made speeches at wedding ceremonies urging couples to have sexual intercourse.[590] This approach is primarily seen in **ground 163**,[591] **ground 165**,[592] **ground 170**,[593] **ground 173**,[594] and **ground 174**,[595] but references to it are also made in the other grounds relating to the regulation of marriage. The Defence attaches 9 annexes purporting to support this analysis.[596]

261. In this section of the Response Brief, the Lead Co-Lawyers examine two overarching flaws in the Defence's analysis. First, the Defence misunderstands the role of a Trial Judge in evaluating Civil Party and witness evidence, and the relevance of a quantitative analysis to that role. Secondly, the attempt at a meaningful "statistical" analysis is undermined by fundamental methodological errors, which render the conclusions it proposes unreliable.

262. The Civil Parties have a clear interest in this issue. The Defence's arguments in these parts of its Appeal Brief are built on the persistent mischaracterisation of testimony given by Civil Parties, including through blanketing characterisations that ignore the nuance, depth, and complexity of Civil Party evidence. The Lead Co-Lawyers submit that this type of analysis would serve to diminish the value of Civil Party involvement, both to the Court and to the Civil Parties themselves, and succeed only in obfuscating the issues to be decided by this Chamber.

8.5.1 Trial judges' role in evaluating testimony and the permissibility of relying on statistics

263. It is well-established that a trial judge's work is not quantitative.[597] When hearing testimony, trial judges must do more than count the number of witness statements supporting any given conclusion:[598] they must approach Civil Party and witness evidence on a case-by-case basis,

[589] **F54** Appeal Brief, paras 1356-1360.
[590] **F54** Appeal Brief, paras 1228-1232.
[591] **F54** Appeal Brief, paras 1176-1188.
[592] **F54** Appeal Brief, paras 1196-1210.
[593] **F54** Appeal Brief, paras 1273-1280.
[594] **F54** Appeal Brief, paras 1324-1340.
[595] **F54** Appeal Brief, paras 1356-1360.
[596] See **F54.1.2** – **F54.1.10** Appeal Brief, Annexes B1-B9, 27 February 2020. (The Lead Co-Lawyers hereinafter refer to these annexes by their document number and annex number).
[597] **F36** Case 002/01 Appeal Judgment, para. 419.
[598] **F36** Case 002/01 Appeal Judgment, 419, cited in **E465** Trial Judgment, para. 40: it is not the case 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".

and make nuanced judgements about probative value and credibility by considering such matters as demeanour, possible ulterior motives, and corroboration with other evidence.[599]

264. Although the number of accounts supporting a particular conclusion will inevitably inform a trial judge's deliberations, a quantification of testimony could not displace a trial judge's role in evaluating the weight of evidence. A trial judge is required to form conclusions about complex evidence taking account of all of its contradictions, inconsistencies and omissions. It would be impossible, and undesirable, to reduce this evaluation exercise to a categorisation based on a single word or phrase, as the Defence seeks to do.[600] This Chamber should reject the Defence's approach outright.

265. The Lead Co-Lawyers submit that it is at least in part because a trial judge's process is so multifaceted that there is a presumption, operative in appeal proceedings, that the Trial Chamber properly evaluated all of the evidence before it.[601] That presumption can certainly be overturned. To do so, however, the Defence was required to have done more than assert that a simple tally of Civil Party and witness accounts led it to different conclusions to those reached by the Trial Chamber.

8.5.2 The Defence's methodological failures in attempting to apply a "statistical" analysis

266. The Defence's approach has little relationship to the study of statistics.

267. Tainting the entirety of the Defence's approach is its failure to adopt a concrete methodology, or to comply with the basic requirements for quantitative or qualitative data analysis. Instead, the Defence appears to have developed an approach whereby: it issues blanketing classifications to Civil Party and witness evidence about marriage and forced sexual intercourse, and then proceeds to add up the results of its classification exercise to reach quantitative conclusions. The problems with the Defence's approach are several.

268. At the outset, the Defence offers no explanation for its proposition that marriages under the DK fell into six distinct categories (forced, non-forced, arranged, various experiences, not specified, and out of temporal scope).[602] Nor does the Defence explain how it came to decide

[599] **E465** Trial Judgment, para. 49; **F36** Case 002/01 Appeal Judgment, para. 314.
[600] **F54.1.2-F54.1.10** Appeal Brief, Annexes B1-B9.
[601] **F36** Case 002/01 Appeal Judgment, paras 304, 352.
[602] **F54.1.6-F54.1.10** Appeal Brief, Annexes B5-B9.

the questions about marriage on which it would perform its quantitative analysis: some of the matters addressed in Annexes B5-B9 to the Defence brief are peripheral to the Trial Chamber's conclusions[603] or outright irrelevant[604] and, even if established, would not result in the judgment being overturned. Not only has the Defence failed to demonstrate an error, but it alleges errors on matters which are not "critical to the verdict reached".[605]

269. More fundamentally, the Defence fails to explain the criteria it uses to determine that evidence should fall into one category rather than another. Notably, this failure extends to its classification of testimony about marriages as "arranged", rather than "forced" – an important distinction given the Defence's extended argument that marriages "arranged" by the CPK could not amount to crimes against humanity.[606] The Defence's method becomes more problematic with the categories "various experiences" and "not specified" – it consistently applies these categories to the evidence of Civil Parties and witnesses who testified about being forced to marry, but who also mentioned the theoretical possibility of consensual marriage.[607] In this way, the Defence removes these Civil Parties and witnesses from its count of forced marriages.[608] The Defence's failure to define its categories also leads it to issue classifications based on Civil Parties' and witness' feelings about their experiences throughout their marriages – whether marriages were long-lasting and happy (and so "arranged" or "non-forced"), or traumatic (and therefore "forced").[609] The fact that Civil

[603] This is the case for the question of whether couples testified about hearing speeches during their marriage ceremonies about the importance of population growth. See **F54.1.6-F54.1.10** Appeal Brief, Annexes B5-B9.
[604] This is the case for the Defence's breakdown of whether or not Civil Parties and witnesses addressed marriage and forced sexual intercourse in their statements of suffering. See **F54.1.6-F54.1.8** Appeal Brief, Annexes B5-B7. The irrelevance of this is addressed above at para. 199.
[605] **Case 001– F28** Appeal Judgment, para. 19; **F36** Case 002/01 Appeal Judgment, para. 99. See also Section 2.1.2 at paras 28-30, esp. at para. 30.
[606] See below at paras 556-560, 654-663, 673. For example, the Defence classifies Civil Party PHUONG Yat's evidence as relating to "arranged" marriage, despite her clear account of her sister having fled her marriage ceremony and being chased by soldiers who, had they caught her, would have killed her for refusing to comply with the order to marry. See **F54.1.2** Appeal Brief, Annex B1, p. 6; See **E1/455.1,** T., 11 August 2016 (Civil Party PHUONG Yat) p. 59 lines 1-10 after [13.42.09].
[607] See for example **F54.1.10** Appeal Brief, Annex B9 (Civil Parties CHHAO Chat, KEO Theary, KHET Sokhan, MEAS Saran, SREY Soeum, VA Lim Hun). The Defence also fails to maintain consistency within its own annexes: in **F54.1.9** Appeal Brief, Annex B8, ERN (En) 01652621 it lists Civil Party ROMAM Yun as part of the 5% of Civil Parties and witnesses who gave evidence about an unspecified type of marriage, while in **F54.1.8** Appeal Brief, Annex B7, ERN (En) 01652594 the Defence states that Civil Party ROMAM Yun gave evidence of consensual marriage.
[608] The Lead Co-Lawyers also note that some of the Defence's "statistical" conclusions do not appear to include the category "various experiences". This category is not included in the pie charts in Annex B3 or in the percentage breakdowns found in paragraph 1277 or 1275 of the Appeal Brief, see **F54.1.4** Appeal Brief, Annex B3 (Statistics of witnesses and civil parties who were married under the regime), and **F54** Appeal Brief, paras 1275 and 1277.
[609] See, for example, **F54.1.9** Appeal Brief, Annex B8 (Civil Parties HENG Lai Heang, YOS Phal).

Parties and witnesses might have later found happiness with their spouses is irrelevant to the legal questions at hand.[610] Without defining the labels it applies or explaining its classification process, the conclusions that the Defence purports to draw from this process cannot be relied upon.

270. Further, the Defence applies labels to evidence that contradict the Trial Chamber's findings about marriage (issuing the labels "non-forced", "various experiences", and "not specified" to testimony about marriage; or "no" to evidence about whether couples were instructed, during their marriage ceremonies, to have sexual intercourse), even in cases where Civil Parties and witnesses did not testify directly about the aspects of their marriage that the Defence relies on.[611] The Lead Co-Lawyers submit that such firm conclusions cannot be drawn from omissions or silences in testimony.[612] Adding to the methodological problems underlying the Defence's approach is the fact that Civil Parties and witnesses were asked different questions at different stages of the investigation and trial. Issuing a simple negative classification to their evidence suggests a methodological rigour that does not exist.

271. In light of such fundamental methodological failings, it is unsurprising that the Defence's quantitative analysis is replete with errors. The Lead Co-Lawyers will not refute every claim underlying the Defence's arguments. Instead, the next section will consider just two of the Defence's arguments – that couples were not forced to marry throughout the country, and that newlywed couples were not consistently instructed by CPK authorities to consummate their marriages – and address the errors contained in the individual categorisations underpinning them, insofar as they relate to Civil Parties.[613] The Lead Co-Lawyers submit that close consideration of even one of the Defence's claims is sufficient to dispel any lingering belief that the Defence's approach is reliable.

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[610] See below at paras 657 *et seq*.

[611] For example, to argue that there was no consistent practice of speeches directing couples to have children given by the DK during marriage ceremonies, the Defence categorises as "no" the evidence of Civil Parties and witnesses who did not testify about, and were not asked about, what was said during their marriage ceremonies: **F54.1.3, F54.1.7, F54.1.19, F54.1.10** Appeal Brief, Annexes B2, B6, B8, B9; see below, in Section 8.5.2.2 at paras 274 *et seq*. Similarly, the Defence issues the classification "various experiences" to the evidence of Civil Parties and witnesses who testified clearly about having been forced to marry and the often devastating impact that it had on their lives, but who also mentioned having heard of others who were not forced or were able to have some say in who they were forced to marry: **F54.1.2** Appeal Brief, Annex B1 and **F54.1.6** Appeal Brief, Annex B5.

[612] See also para. 687 below.

[613] The Lead Co-Lawyers note that a number of individuals have been identified in the Defence annexes as civil parties, although they are not Civil Parties in Case 002.

8.5.2.1 Example 1: The Defence's analysis of the uniformity and reach of forced marriages

272. The Defence argues that no consistent practice of forcing couples to marry existed under the DK.[614] It uses its quantitative approach to attempt to show that outside of the marriage segment of the trial, Civil Parties and witnesses did not testify consistently to non-consensual marriages.[615] In the Defence's view, this shows that the evidence that the Trial Chamber relied on to make its findings was not representative of people's experiences of marriage under the regime.[616]

273. Leaving aside the legal and methodological problems with this argument,[617] the Lead Co-Lawyers note that the individual categorisations of particular Civil Parties, which underpin the Defence's tallies, are riddled with errors.

(i) The marriage segment: The Defence argues that although 100% of the Civil Parties and witnesses who gave evidence in the marriage segment testified to being forced to marry, 50% of them also mentioned marriages consented to by others.[618] Of the five Civil Parties who fall within the Defence's calculation of 50%,[619] three did not in fact testify about marriages that had been consented to by others.[620] Moreover, neither of

[614] **F54** Appeal Brief, paras 1191-1210.
[615] **F54** Appeal Brief, paras 1273-1278.
[616] **F54** Appeal Brief, paras 1273 and 1278.
[617] See Section 9.6.4.3.3.3 at paras 691-694.
[618] **F54** Appeal Brief, para. 1274.
[619] Civil Parties OM Yoeurn, YOS Phal, SENG Soeun, CHEA Deap, HENG Lai Heang.
[620] Civil Party OM Yoeurn denied any general experience of consensual relationships under the regime. When the Defence asked her "based on what you said, can I say that the man and the woman can ask each other first whether they love each other or not and, if yes, they could propose through Angkar?", Civil Party OM Yoeurn replied "No, it's not like that. The man proposed to the chief of the women, and the chief of the women would ask the woman. It was not like they – – both of them had relationship first". See **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 28 lines 10-16 before [10.39.31]. Civil Party OM Yoeurn then clarified that she had witnessed "only one case" in which such an arrangement was respected and conversely, testified to "many cases" in which people who protested their marriages disappeared. See **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 28 line 18 – p. 30 line 15 after [10.39.31], **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 96 line 17 – p. 97 line18 after [15.47.01].The Defence here falls into the error of concluding that marriages were consensual where people had *some* say about their partner: it remains that such choice was subject to the approval of authorities, and that victims had no choice about *whether* to marry. Civil Party YOS Phal, in the passage of his testimony quoted by the Defence, says that he "had no idea whether any men or women had prior relationships", but knew of some who had good biographies who had a degree of choice. Subsequently, he testified that "if the man and the woman did not have any of their relatives smashed then they could marry one another. However, if their biographies mentioned that some family members have been smashed, then the person could not marry the one that the family members had not been smashed." See **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 28 lines 2-11 after [10.38.59], p. 38 line 11 – p. 39 line 3 after [11.08.57]. Again, Civil Party YOS Phal testifies only to certain cases in which people had some choice in who they married (as opposed to whether they married), and their choice was still subject to approval by the authorities.

the remaining two Civil Parties considered consensual marriage to be a serious possibility.[621]

(ii) Other segments of Case 002/02: The Defence argues that 19% of the Civil Parties and witnesses who testified in other trial segments and married under the regime were forced to marry; 55% testified to having consented to marriage; 13% were in arranged marriages, and 13% did not specify.[622] In this calculation, two Civil Parties are considered by the Defence to fall within the 55% of Civil Parties and witnesses who consented to marriage.[623] That characterisation is not supported by either of their testimonies.[624] Further, of the two Civil Parties who the Defence considers to have been in "arranged" marriages,[625] at least one testified to having been forced to marry.[626]

The Defence appears to recognise that Civil Party CHEA Deap was forced to marry in **F54.1.6** Appeal Brief, Annex B5 (though that is at odds with its later argument that her marriage was not forced. See **F54** Appeal Brief, para. 1269, fn. 2421). The only evidence that Civil Party CHEA Deap gave about the possibility of consensual marriages was the statement that if couples fell in love and "behaved well", then they would not be separated and punished despite having committed moral misconduct. There would be a wedding ceremony organised for them, though such a ceremony was held at night. See **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 92 lines 1-6 after [15.10.18]. This could not be taken as evidence that couples consented to marriage.

[621] Civil Party SENG Soeun testified to "a couple or two" being permitted to marry where they were already in love, perhaps legitimizing the Defence's characterization. See **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 77 lines 14-18 after [15.01.55]. However, he went on to testify about two instances of couples who did not report their relationships to the upper echelons being killed, again demonstrating that marriages were not consensual. See **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 79 lines 5-20 after [15.06.45]. The balance of his testimony does not suggest that consent to marriage was a realistic possibility. While he did say that some couples had "withdraw[n]" from marriage, he immediately followed with "I did not know if they faced other issues later on". See **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 24 lines 2-24 before [10.04.26]. Civil Party HENG Lai Heang did describe situations where couples had already been matched by their families, and were able to seek permission to marry. She did not elaborate further, see **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 52 lines 15-21 after [13.42.02].

[622] **F54** Appeal Brief, para. 1275.

[623] **F54.1.4** Appeal Brief, Annex B3, ERN (En) 01638878 and **F54.1.7** Appeal Brief, Annex B6, ERN (En) 01652537 and 01652579 (Civil Parties OUM Suphany and YUN Bin).

[624] Civil Party OUM Suphany's testimony only confirms the Trial Chamber's findings that people were forced to marry – she and her husband pretended that they were already married and married in a hurry to avoid being forced to marry under the regime. See **E1/251.1** [Corrected 1] T., 23 January 2015 (Civil Party OUM Suphany), p. 104 lines 7-24, after [15.49.56]. Civil Party YUN Bin was married secretly at home: his situation was not one in which the authorities accepted a consensual marriage, he married in private to avoid being forced to marry a stranger and contrasted his marriage with the "collective marriage" which 20 couples were required to undergo. See **E1/457.1** T., 15 August 2016, (Civil Party YUN Bin), p. 27 line 21 – p. 28 line 15 before [10.35.54], p. 34 line 8 – p. 35 line 3 after [10.51.48].

[625] Civil Parties MEAN Loeuy and HIM Man. See **F54.1.7** Appeal Brief, Annex B6, 27 February 2020, ERN (En) 01652562 and 01652564.

[626] Civil Party MEAN Loeuy clearly described being forced to marry, although the Defence appears to consider him to have testified to an arranged marriage based on his use of the word "arranged" during his testimony. The quote that the Defence relies on is "<So, I thought that even though we did not know each other before, or we were arranged by Angkar, we had to love each other>". See **E1/340.1** [Corrected 2] T., 2 September 2015 (Civil Party MEAN Loeuy), p. 68 lines 22-24 after [14.14.51]. Even though Civil Party HIM Man was matched with his fiancée, he did not have

(iii) Case 002/01: No Civil Parties are involved in the Defence's claim that 71% of the Civil Parties and witnesses who testified about marriage in Case 002/01 consented to their marriages.[627]

(iv) Written statements supporting the Closing Order: The Defence argues that 34% of the Civil Parties and witnesses whose statements were used to support the Closing Order testified to their marriages being forced, as compared to 29% who consented, 30% whose marriages were arranged,[628] 5% who were in marriages of an unspecified nature,

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any say in that decision and is unaware, to this day, of whether it was a coincidence. See **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party HIM Man) p. 17 lines 18-21 after [09.45.48].
The Lead Co-Lawyers also observe that **F54.1.7** Appeal Brief, Annex B6 contains additional false classifications of Civil Party evidence as concerning "arranged marriage" rather than "forced marriage." For example, the Defence states that Civil Party PHUONG Yat testified about her sister's "arranged" marriage (**F54.1.7** Appeal Brief, Annex B6, ERN (En) 01652577). In fact, Civil Party PHUONG Yat gave evidence that her sister refused the marriage and ran away, and was pursued by two soldiers. She managed to escape them by running to a village, and hiding. See **E1/455.1** T., 11 August 2016 (Civil Party PHUONG Yat), p. 59 lines 1-10 after [13.42.09]. Nor did Civil Party RY Pov testify to an arranged marriage, as the Defence claims in **F54.1.7** Appeal Brief, Annex B6, ERN (En) 01652540. See **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 27 line 13 – p. 29 line 18 after [10.11.45]. Civil Party SEN Sophon (appearing at **F54.1.7** Appeal Brief, Annex B6, ERN (En) 01652557) testified that the men and women in the marriage that he witnessed did not love each other when they were paired up. See **E1/323.1** [Corrected 1] T., 27 July 2015 (Civil Party SEN Sophon), p. 79 lines 10-15 before [15.49.35]. The Defence here appears to derive the suggestion of an arrangement from the fact that couples were asked to make a commitment that they would get married (**E1/323.1** [Corrected 1] T., 27 July 2015 (Civil Party SEN Sophon), p. 79 line 17 – p. 80 line 3 after [15.49.35]), a statement incapable of suggesting consent given the overwhelming coercion characterising marriages under the DK.

[627] **F54** Appeal Brief, para. 1277 referring to **F54.1.4** Appeal Brief, Annex B3 and **F54.1.8** Appeal Brief Annex B7. However, one Civil Party identified in Annex B7 to having testified about a "non-forced" marriage, Civil Party ROMAM Yun, testified to there not having been any marriages at all during the DK period – a statement entirely at odds with the rest of the evidence before the Trial Chamber. See **F54.1.8** Appeal Brief, Annex B7, (ERN (En) 01652594) citing **E1/18.1** [Corrected 2] T., 7 December 2011 (Civil Party ROMAM Yun), p. 45 line 20 – p. 46 line 1 after [11.51.48].

[628] Although no Civil Parties in this case are included in this calculation, the Lead Co-Lawyers note the Defence's inaccuracy in classifying as "arranged" the testimony of Civil Parties SOT Sem, SENG Chon and MAUNG Ret in **F54.1.9** Appeal Brief, Annex B8, ERN (En) 01652616, 01652617 and 01652619. Civil Party SOT Sem did not state that marriage was arranged under the CPK, and he already was married by the time the regime came to power. In the single statement he made on the subject, he answered the question "In the Khmer Rouge, did you know about the forced marriage" by explaining that in his cooperative, "the wedding was conducted for 20 to 30 couples at one time. Later on, some of them did not live as husband and wife. Most of them were from mobile unit". See **E3/4654** Written Record of Interview (Civil Party SOT Sem), 15 October 2009, ERN (En) 00400469, 00400461. Civil Party SENG Chon testified clearly to seeing couples being forced to marry. In response to the question "Did you know that newly wedded bride and groom were satisfied with this marriage?", Civil Party SENG Chon said that nobody dared to reject their marriages. See **E3/5562** Written Record of Interview (Civil Party SENG Chon), 16 December 2009, ERN (En) 00400458. Civil Party MAUNG Ret gave evidence about an announcement made to people being transferred from her village to Pursat Province that the CPK would arrange marriages for those with daughters, who would be then required to follow their new husbands. See **E3/5592** Written Record of Interview (Civil Party MAUNG Ret), 29 December 2009, ERN (En) 00434942. The claim that such marriages, which involved families being separated in the midst of a forcible transfer, were consensual is baseless.

and 2% were married outside the temporal scope.[629] Of the three Civil Parties who the Defence classifies as having consented to marriage,[630] there is no evidence to support two of those classifications.[631]

(v) Written statements in Cases 003 and 004: No Civil Parties fall into the Defence's calculations about witnesses and Civil Parties who provided statements in Cases 003 and 004, and who consented to marriage or had their marriages arranged.[632]

8.5.2.2 Example 2: Speeches instructing people to have children

274. The Defence also challenges the Trial Chamber's finding that newlywed couples routinely heard speeches during marriage ceremonies in which they were instructed to consummate their marriages and contribute to growing the population.[633] Here again, the Defence makes a series of errors that undermines the conclusion it purports to reach.

(i) Marriage segment: The Defence asserts that 57% of Civil Parties and witnesses in the marriage segment testified to hearing speeches encouraging population growth during their marriage ceremonies, and that 48% of Civil Parties and witnesses in that segment gave testimony described by the Defence as "absence of mention of speeches".[634] It is unclear how the Defence calculated a total of 105%. Of the four Civil Parties who the Defence asserts did not give evidence about having heard a speech about population

[629] **F54** Appeal Brief, para. 1277 referring to **F54.1.4** Appeal Brief, Annex B3, ERN (En) 01638880 (Civil Parties CHHUM Sokha and KAO San) and **F54.1.9** Appeal Brief**,** Annex B8, ERN (En) 01652616 (Civil Party CHHUM Sokha), ERN (En) 01652618 (Civil Party KAO San).
[630] Civil Parties CHHUM Sokha, KAO San, SENG Soeun. The Lead Co-Lawyers observe that the Defence appears to have inconsistently labelled Civil Party SENG Soeun as having had a "forced" marriage in **F54.1.4** Appeal Brief, Annex B3, ERN (En) 01638877 and a "non-forced" marriage in **F54.1.9** Appeal Brief**,** Annex B8, ERN (En) 01652627.
[631] Civil Party KAO San stated that the Khmer Rouge arranged her marriage (though her husband's mother spoke to her mother). She said that she had never spoken to her husband, and that she did not want to get married but agreed because she "did not know what would have happened" if she had refused. See **E3/5585** Written Record of Interview (Civil Party KAO San), 13 December 2009, A.14 at ERN (En) 00421056. Civil Party SENG Soeun was forced to marry despite his position in the CPK, and testified to having done so out of fear of his boss. See **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 28 lines 16-25 after [10.14.35].
[632] **F54** Appeal Brief, para. 1277; **F54.1.4** Appeal Brief, Annex B3, and **F54.1.10** Appeal Brief, Annex B9. The Lead Co-Lawyers note that CHUON Pheap is not a Civil Party in this case.
[633] **F54** Appeal Brief, para. 1230.
[634] **F54** Appeal Brief, para. 1230 fn. 2320, referring to **F54.1.2, F54.1.6, F54.1.7** Appeal Brief, Annexes B1, B5 and B6.

growth,[635] the Lead Co-Lawyers note that none of them was asked any questions about what was said at their marriage ceremonies.[636]

(ii) Other segments of Case 002/02: The Defence asserts that 5% of Civil Parties and witnesses in other segments of the trial testified to having heard speeches about population growth during ceremonies, while 95% did not.[637] Of the nineteen Civil Parties falling within that 95%,[638] eighteen were not asked any questions about what they heard or were told at marriage ceremonies.[639] Six did not testify to having attended

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[635] Civil Parties OM Yoeurn, YOS Phal, SENG Soeun and HENG Lai Heang.

[636] Civil Party OM Yoeurn was asked about her marriage ceremony at length, but was not asked any questions about the speeches that were made. See **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 97 line 20 – p. 100 line 5 after [15.50.40]. At no point was she asked what was said at the ceremony, though she made clear that she understood that she was required to consummate her marriage. See **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 4 lines 7-24 after [09.07.54]. Civil Party YOS Phal was not asked any questions about what was said at his marriage ceremony, and was required to say that he would follow whatever *Angkar* required him to do. After the ceremony, the chiefs of the male and female units instructed the couples to go together and find a place to sleep. See **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 23 line 22 – p. 24 line 2, after [10.02.27]. Civil Party SENG Soeun was married in a small ceremony of three couples, and was not asked any questions about what was said. See **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 26 line 7 – p. 28 line 4 after [10.07.40]. Civil Party HENG Lai Heang was not asked any questions about what was said at her marriage ceremony, though the Lead Co-Lawyers note that she was not able to answer a question about the purpose of the marriages. See **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 54 line 23 – p. 55 line 5 after [13.47.19].

[637] **F54** Appeal Brief, para. 1230, fn. 2320. The Defence claim here is difficult to understand, the text of fn. 2320 reads: "Transcripts 002/02: Occurrence of speeches on child production, four people or 5%; no mention of speech, 76 people or 95%".

[638] Civil Parties OUM Suphany, CHOU Koemlan, RY Pov, SEANG Sovida, CHAO Lang, CHUM Samoeurn, SEN Sophon, MEAN Loeuy, SOS Min, HIM Man, PRAK Doeun, SIENG Chanthy, KHUOY Muoy, UCH Sunlay, SUN Vuth, CHHAE Heap, PHUONG Yat, YUN Bin, MEY Savoeun.

[639] Civil Party OUM Suphany: **E1/251.1** [Corrected 1] T., 23 January 2015 (Civil Party OUM Suphany), p. 103 line 10 – p. 105 line 8 after [15.47.14], **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party OUM Suphany), p. 21 line 14 – p. 23 line 1 before [9.59.39]; Civil Party CHOU Koemlan: **E1/252.1** [Corrected 2], T., 26 January 2015 (Civil Party CHOU Koemlan), p. 68 line 17 – p. 72 line 13 after [13.45.22]; Civil Party RY Pov: **E1/262.1** [Corrected 1] T, 12 February 2015 (Civil Party RY Pov), p. 27 line 13 – p. 29 line 18, after [10.11.45], p. 61 line 1 – p. 63 line 10, before [13.54.40]; Civil Party SEANG Sovida: **E1/308.1** [Corrected 1] T., 2 June 2015 (Civil Party SEANG Sovida), p. 46 line 8 – p. 48 line 9 after [11.07.23] ; Civil Party CHUM Samoeurn: **E1/321.1** [Corrected 1] T., 24 June 2015 (Civil Party CHUM Samoeurn), p. 64 line 3 – p. 68 line 1 before [14.34.47]; Civil Party SEN Sophon: **E1/323.1** [Corrected 1] T., 27 July 2015 (Civil Party SEN Sophon**)**, p. 79 line 10 – p. 80 line 5 before [15.51.40]; Civil Party MEAN Loeuy**: E1/340.1** [Corrected 2] T., 2 September 2015 (Civil Party MEAN Loeuy), p. 67 line 15 – p. 70 line 5 before [14.19.10]; Civil Party SOS Min: **E1/343.1** [Corrected 1] T., 8 September 2015 (Civil Party SOS Min), p. 103 lines 1-100 before [15.55.25]; Civil Party HIM Man: **E1/351.1** [Corrected 1] T., 28 September 2015 (Civil Party HIM Man), p. 15 line 19 – p. 18 line 22 before [09.50.17]; Civil Party PRAK Doeun: **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 97 line 4 – p. 101 line 5 after [15.50.44]; Civil Party SIENG Chanthy: **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 22 line 15 – p. 25 line 6 after [09.53.00]; Civil Party KHUOY Muoy: **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party KHUOY Muoy), p. 56 line 14 – p. 57 line 1 after [13.33.05]; Civil Party UCH Sunlay: **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party UCH Sunlay), p. 97 line 16 – p. 98 line 18, after [15.40.37], **E1/395.1** [Corrected 4] T., 2 March 2016 (Civil Party UCH Sunlay), p 24 line 9 – p. 29 line 22, after [09.53.53]; Civil Party SUN Vuth: **E1/411.1** T., 30 March 2016 (Civil Party SUN Vuth), p. 79 line 1 – p. 80 line 7 before [14.43.30]; Civil Party CHE Heap: **E1/455.1** T., 11 August 2016 (Civil Party CHE Heap), p. 11 lines 6-9 before [09.25.36]; Civil Party PHUONG Yat: **E1/455.1,** T., 11 August 2016 (Civil Party PHUONG

a marriage ceremony at all, and were testifying about marriage practices that they had heard about through other people.[640]

(iii) Case 002/01: The Defence argues that of the Civil Parties and witnesses heard in Case 002/01, 6% testified to having heard a speech instructing child production, and 94% did not mention any such speeches.[641] Three Civil Parties fall into the 94% of Civil Parties and witnesses who the Defence classifies as having made no mention of speeches instructing population growth.[642] Of them, none was asked any questions about what was said during marriage ceremonies,[643] and two had not attended a marriage ceremony at all.[644]

(iv) Written statements supporting the Closing Order: The Defence states that 1% of Civil Parties and witnesses who made written statements supporting the closing order testified to hearing speeches on child production, and classifies the testimony of the remaining 99% as "absence of mention of speeches".[645] Twenty-three Civil Parties fall within the 99% identified by the Defence.[646] Contrary to the Defence's assertion, two of those Civil Parties – SOU Sotheavy and TES Ding – testified explicitly to hearing

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Yat) p. 66 lines 5-15, after [14.00.56], p. 71 line 18 – p. 75 line 6 before [14.23.11]; Civil Party YUN Bin: **E1/457.1** T., 15 August 2016 (Civil Party YUN Bin), p. 28 lines 1-15 before [10.35.54]; Civil Party MEY Savoeun: **E1/459.1** T., 17 August 2016 (Civil Party MEY Savoeun), p. 61 line 4 – p. 64 line 10 before [14.15.36].

[640] Civil Party SEANG Sovida: **E1/308.1** [Corrected 1] T., 2 June 2015 (Civil Party SEANG Sovida), p. 46 line 8 – p. 48 line 9 after [11.07.23]; Civil Party RY Pov: **E1/262.1** [Corrected 1] T, 12 February 2015 (Civil Party RY Pov), p. 27 line 13 – p. 29 line 18, after [10.11.45], p. 61 line 1 – p. 63 line 10, before [13.54.40]; Civil Party KHUOY Muoy: **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party KHUOY Muoy), p. 56 line 14 – p. 57 line 1 after [13.33.05]; Civil Party SUN Vuth: **E1/411.1** T., 30 March 2016 (Civil Party SUN Vuth), p. 79 line 1 – p. 80 line 7 before [14.43.30]; Civil Party CHE Heap: **E1/455.1** T., 11 August 2016 (Civil Party CHE Heap), p. 11 lines 6-9 before [09.25.36]; Civil Party YUN Bin: **E1/457.1** T., 15 August 2016 (Civil Party YUN Bin), p. 28 lines 1-15 before [10.35.54].

[641] **F54** Appeal Brief, para. 1230 fn. 2321 referring to **F54.1.3** Appeal Brief, Annex B2 and **F54.1.8** Appeal Brief, Annex B7.

[642] Civil Parties EM Oeun, ROMAM Yun, and YOS Phal.

[643] Civil Party EM Oeun**: E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 103 line 21 – p. 105 line 3, after [15.53.21]; Civil Party ROMAM Yun: **E1/18.1** [Corrected 2] T.,7 December 2011 (Civil Party ROMAM Yun), p. 45 line 20 – p. 46 line 1 after [11.51.48]; Civil Party YOS Phal: **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 20 line 13 – p. 26 line 15 after [09.55.13].

[644] Civil Party EM Oeun**: E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 103 line 21 – p. 105 line 3, after [15.53.21]; Civil Party ROMAM Yun: **E1/18.1** [Corrected 2] T.,7 December 2011 (Civil Party ROMAM Yun), p. 45 line 20 – p. 46 line 1 after [11.51.48].

[645] **F54** Appeal Brief, para. 1230, fn. 2323, referring to **F54.1.3** Appeal Brief, Annex B2, 27 February 2020 and **F54.1.9** Appeal Brief, Annex B8.

[646] MAOT Voeurn, SUONG Sim, MOUR Setha, KHEM Lang, CHHUM Sokha, SOT Sem, HORNG Orn, KHIEV Horn, TES Ding, MAO Kroeurn, SENG Chon, SNGUON Tai Ren, KAO San, KIM Dav, KONG Vach, HONG Savat, MAUNG Ret, ROMAM Yun, LAY Bony, SENG Soeun, SOU Sotheavy, HENG Lai Heang, YOS Phal.

speeches or instructions to produce children during their marriage ceremonies.[647] Of the remaining 21 Civil Parties identified by the Defence as testifying to an "absence" of mention of speeches, none of them was asked any questions about what was said during marriage ceremonies.[648] Six Civil Parties had not attended a ceremony at all.[649]

(v) Statements filed in Cases 003 and 004: The Defence argues that 5% of statements filed in Cases 003 and 004 mention speeches on child production, while 95% made no mention of those speeches.[650] Twenty-five Civil Parties are included in the Defence's

[647] Civil Party SOU Sotheavy testified to having been required to make a vow or pronouncement stating her gratitude for *Angkar*, and that she and her wife would produce children as required by *Angkar*. See **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 81 lines 18-23, after [15.11.15]. Civil Party TES Ding was instructed to "get along" with his wife, or risk re-education. See **E3/5560** Written Record of Interview (Civil Party TES Ding), 10 September 2009, ERN (En) 00377171, see also ERN (En) 00377170 – during his marriage ceremony, he was instructed that if he "did not get along with our mates, *Angkar* would tell us that they would take us for re-education" (see also the testimony of his wife. See **E3/5561** Written Record of Interview (Civil Party MAO Kroeurn), 10 September 2009, ERN (En) 00384790.

[648] **E3/5560** Written Record of Interview (Civil Party MAO Kroeurn), 10 September 2009, ERN (En) 00377170; **E3/5299** Written Record of Interview (Civil Party MAOT Voeurn), 16 February 2009, ERN (En) 00285572; **E3/5558** Written Record of Interview (Civil Party HORNG Orn), 9 September 2009, ERN (En) 00381009, 00381010; **E3/5559** Written Record of Interview (Civil Party KHIEV Horn), 9 September 2009, ERN (En) 00377369, 00377370; **E3/5592** Written Record of Interview (Civil Party MAUNG Ret), 29 December 2009, ERN (En) 00434942; **E1/18.1** [Corrected 2] T., 7 December 2011 (Civil Party ROMAM Yun), p. 45 line 20 – p. 46 line 1 after [11.51.48]; **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 26 line 7 – p. 28 line 4 after [10.07.40]; **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 20 line 13 – p. 26 line 15 after [09.55.13]. Civil Party HENG Lai Heang was not asked any questions about what was said at her marriage ceremony, though the Lead Co-Lawyers note that she was not able to answer a question about the purpose of the marriages. See **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 54 line 23 – p. 55 line 5 after [13.47.19]. Civil Party LAY Bony did not testify about, and was not asked about, marriage during her oral testimony. See **E1/137.1** T., 23 October 2012 (Civil Party LAY Bony) and **E1/138.1** [Corrected 1] T., 24 October 2012 (Civil Party LAY Bony); **E3/3958** Written Record of Interview (Civil Party LAY Bony), 26 August 2009, ERN (En) 00379164; **E3/5539** Written Record of Interview (Civil Party KHEM Leng), 28 August 2009, ERN (En) 00380129; **E3/5561** Written Record of Interview (Civil Party MAO Kroeurn), 10 September 2009, ERN (En) 00384790 (though she did testify that the authorities ordered her and her husband (Civil Party TES Ding) to have sexual intercourse, without specifying where or how this instruction was communicated; **E3/4657** Written Record of Interview (Civil Party SUONG Sim), 9 July 2009, ERN (En) 00353706; **E3/5311** Written Record of Interview (Civil Party MOUR Setha), 19 August 2009, ERN (En) 00373370; **E3/5788** Written Record of Interview (Civil Party CHUM Sokha), 2 September 2009, ERN (En) 00380717; **E3/4654** Written Record of Interview (Civil Party SOT Sem), 15 October 2009, ERN (En) 00400469; **E3/5564** Written Record of Interview (Civil Party SNGUON Tai Ren), 24 November 2009, ERN (En) 00414579; **E3/5585** Written Record of Interview (Civil Party KAO San), 13 December 2009, ERN (En) 00421056; **E3/5589** Written Record of Interview (Civil Party KIM Dav), 15 December 2009, ERN (En) 00421079; **E3/5590** Written Record of Interview (Civil Party KONG Vach), 17 December 2009, ERN (En) 00426479, 00426480; **E3/5591** Written Record of Interview (Civil Party HONG Savat), 18 December 2009, ERN (En) 00426489.

[649] **E1/18.1** [Corrected 2] T., 7 December 2011 (Civil Party ROMAM Yun), p. 45 line 20 – p. 46 line 1 after [11.51.48]; **E3/3958** Written Record of Interview (Civil Party LAY Bony), 26 August 2009, ERN (En) 00379164; **E3/5592** Written Record of Interview (Civil Party MAUNG Ret), 29 December 2009 ERN (En) 00434942; **E3/5539** Written Record of Interview (Civil Party KHEM Leng), 28 August 2009, ERN (En) 00380129; **E3/5311** Written Record of Interview (Civil Party MOUR Setha), 19 August 2009, ERN (En) 00373370; **E3/5564** Written Record of Interview (Civil Party SNGUON Tai Ren), 24 November 2009, ERN (En) 00414579.

[650] **F54** Appeal Brief, para. 1231, fn. 2325, referring to **F54.1.3** Appeal Brief, Annex B2 and **F54.1.10** Appeal Brief, Annex B9.

95% figure.[651] Of them, 21 were not asked any questions about what was said during marriage ceremonies,[652] and four had not attended a ceremony at all.[653]

275. The Lead Co-Lawyers request that the Chamber reject the "statistical" approach which the Defence proposes in relation to evidence on the regulation of marriage. For all the reasons given above, this approach would not assist in the ascertainment of the truth. It is also harmful to the Civil Parties concerned: it not only attempts to reduce their evidence to numbers, but misrepresents its content. The Lead Co-Lawyers return later in this Brief to respond to specific incorrect claims about errors of fact which the Defence has made based on this approach.[654]

9 GROUNDS CONCERNING THE CRIMES AND FACTUAL FINDINGS

276. This section of the Brief responds to arguments from the Defence which are directed at the Trial Chamber's factual findings and legal characterisations.

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[651] CHECH Sopha, CHHAO Chat, CHHIM Srorn, HENG My, HEM Chhany, KEO Theary, KHET Sokhan, KHOEUN Choem, LACH Sem, LY Lonn, MEAS Saran, MECH Nhanh, MOM Sroeurng, NAT Hoeun, OEM Pum, PEOU Sinoun, PHAN Saray, SENG Kheang, SORM Vanna, SREY Soeum, TUM Nga, VA Lim hun, VAN Chauk, YIM Sovann, YIN Teng.

[652] **E3/9831** Written Record of Interview (Civil party CHECH Sopha), 13 October 2014, ERN (En) 01050637; **E3/9562** Written Record of Interview (Civil Party CHHAO Chat), 18 December 2014, ERN (En) 01059959, 01059960; **E3/9827** Written Record of Interview (Civil Party CHHIM Srorn), 11 March 2014, ERN (En) 00985094, 00985095; **E3/9800** Written Record of Interview (Civil Party HENG My), 25 May 2015, ERN (En) 01117696; **E3/9657** Written Record of Interview (Civil Party IEM Chhany), 9 May 2014, ERN (En) 01032983; **E3/9662** Written Record of Interview (Civil Party KEO Theary), 8 December 2014, ERN (En) 01057763-01057766; **E3/9830** Written Record of Interview (Civil Party KHET Sokhan), 27 November 2014, ERN (En) 01077080-01077084; **E3/9795** Written Record of Interview (Civil Party LACH Sem), 9 May 2014, ERN (En) 01055591; **E3/9769** Written Record of Interview (Civil Party LY Lonn), 30 May 2014, ERN (En) 01034987, 01034988; **E3/9736** [Corrected 1] Written Record of Interview (Civil Party MEAS Saran), 29 December 2014, ERN (En) 01057618, 01057619; **E3/9786** Written Record of Interview (Civil Party MECH Nhanh), 18 September 2014, ERN (En) 01034112; **E3/9810** Written Record of Interview (Civil Party NAT Hoeun), 23 March 2012, ERN (En) 00797024; **E3/9510** Written Record of Interview (Civil Party OEM Pum), 4 February 2014, ERN (En) 00981775; **E3/9515** Written Record of Interview (Civil Party PEOU Sinoun), 10 October 2013, ERN (En) 00979978; **E3/9789** Written Record of Interview (Civil Party PHAN Saray), 25 February 2014, ERN (En) 00986703; **E3/9763** Written Record of Interview (Civil Party SENG Kheang), 15 February 2015, ERN (En) 01079343; **E3/9825** Written Record of Interview (Civil Party SORM Vanna) 17 October 2014, ERN (En) 01050681; **E3/9469** Written Record of Interview (Civil Party TUM Nga), 13 May 2014, ERN (En) 01055608; **E3/9756** Written Record of Interview (Civil Party VA Lim Hun), 15 September 2014, ERN (En) 01046943; **E3/9794** Written Record of Interview (Civil Party VAN Chauk), 4 February 2014, ERN (En) 00981757; **E3/9785** Written Record of Interview (Civil Party YIM Sovann), 3 November 2014, ERN (En) 01053857.

[653] **E3/9657** Written Record of Interview (Civil Party IEM Chhany), 9 May 2014, ERN (En) 01032983; **E3/9510** Written Record of Interview (Civil Party OEM Pum), 4 February 2014, ERN (En) 00981775; **E3/9789** Written Record of Interview (Civil Party PHAN Saray), 25 February 2014, ERN (En) 00986703; **E3/9763** Written Record of Interview (Civil Party SENG Kheang), 15 February 2015, ERN (En) 01079343-01079344.

[654] See generally Section 9.6.4 at paras 627 *et seq*.

277. Where relevant, arguments concerning the correct formulation of the legal elements of the crimes, and arguments concerning legality, are included for each crime. An overarching question arises as to the correct approach to determining legality. In **ground 85** the Defence argues that the Trial Chamber erred by following and applying this Chamber's statement of the principle from Case 002/01.[655] The Lead Co-Lawyers agree with the OCP's response to this ground[656] and need not elaborate further.

9.1 Crime Against Humanity of Murder

9.1.1 Overview

278. Regarding the crime against humanity of murder, the Lead Co-Lawyers agree with the OCP's submissions including those concerning *dolus eventualis*[657] and culpable omissions.[658] The Lead Co-Lawyers also agree with and do not need to add to submissions made by the OCP on **ground 128** (murder of Vietnamese at Au Kanseng),[659] **ground 152** (murder of Vietnamese in Svay Rieng),[660] **ground 153** (murder of Vietnamese at sea)[661] and **ground 155** (murder of Vietnamese at Wat Khsach).[662]

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[655] **F54** Appeal Brief, paras 550-574. The Chamber's articulation of the principle of legality is found at: **F36** Case 002/01 Appeal Judgment, paras 761-762, see also paras 763-765 for the Chamber's application of those principles to the crimes charged in Case 002/01. In following that approach, the Trial Chamber correctly observed that "the principle of legality requires that the offences and modes of responsibility charged must have been recognized under Cambodian or international law (including customary international law) as it existed between 17 April 1975 and 6 January 1979, and were sufficiently foreseeable and accessible": **E465** Trial Judgment, para. 21.

[656] **F54/1** OCP Response Brief, paras 29-37.

[657] **Grounds 86-93** (**F54** Appeal Brief, paras 575-640; **F54/1** OCP Response Brief, para. 376), **ground 100** (**F54** Appeal Brief, paras 676-677; **F54/1** OCP Response Brief, para. 769-772), **ground 102** (**F54** Appeal Brief, paras 683-685; **F54/1** OCP Response Brief, paras 773-776), **ground 113** (**F54** Appeal Brief, paras 758-762; **F54/1** OCP Response Brief, paras 826-833), **grounds 115-117** (**F54** Appeal Brief, paras 768-786; **F54/1** OCP Response Brief, paras 800-811); **ground 123** (**F54** Appeal Brief, paras 814-824; **F54/1** OCP Response Brief, paras 836-841); **ground 132** (**F54** Appeal Brief, paras 870-879; **F54/1** OCP Response Brief, paras 866-872).

[658] **Ground 99** (**F54** Appeal Brief, paras 672-675; **F54/1** OCP Response Brief, paras 763-768), **ground 113** (**F54** Appeal Brief, paras 758-762; **F54/1** OCP Response Brief, paras 826-833) **ground 115** (**F54** Appeal Brief, paras 768-771; **F54/1** OCP Response Brief, paras 800-802); **ground 123** (**F54** Appeal Brief, paras 814-824; **F54/1** OCP Response Brief, paras 836-841).

[659] **F54** Appeal Brief, paras 841-847; **F54/1** OCP Response Brief, paras 600-603.

[660] **F54** Appeal Brief, paras 987-992; **F54/1** OCP Response Brief, paras 596-599.

[661] **F54** Appeal Brief, paras 993-1002; **F54/1** OCP Response Brief, paras 616-620.

[662] **F54** Appeal Brief, paras 1006-1013; **F54/1** OCP Response Brief, paras 604-607.

279. The Lead Co-Lawyers have made submissions elsewhere in this brief relevant to **ground 131** (murder at Phnom Kraol),[663] **ground 136** (murder at Trea village),[664] and otherwise agree with the OCP's response.[665]

280. As the Civil Parties contributed crime-base evidence relating to murder, particularly on deaths from conditions at cooperatives and worksites, as well as regarding the treatment of the Cham and the Vietnamese, the Lead Co-Lawyers make submissions in response to the following grounds where Civil Party evidence is challenged in Defence arguments: **ground 101** (murder through living conditions at the Tram Kak Cooperatives),[666] **ground 116** (murder through working and living conditions at 1st January Dam),[667] **ground 137** (murder at Wat Au Trakuon),[668] **ground 154** (murder of Vietnamese people in Kampong Chhnang),[669] and **ground 156** (murder of Vietnamese people in Kratie).[670]

9.1.2 Murder through conditions of life at Tram Kak District

281. The Trial Chamber found that the crime against humanity of murder was established in respect of deaths in Tram Kak District which resulted from malnutrition, overwork and sickness.[671] In **ground 101** the Defence challenges that conclusion arguing that the Trial Chamber erred in finding that deaths resulted from living conditions.[672]

282. The Lead Co-Lawyers agree with the OCP that the Trial Chamber had considerable evidence before it to support this finding.[673] Regarding the Trial Chamber's findings referred to by the OCP, the Lead Co-Lawyers note that a considerable amount of this material was provided by Civil Parties, who spoke expansively about the conditions which were likely to, and did,

[663] **F54** Appeal Brief, paras 862-869, see Section 10.4 at paras 752-758.
[664] **F54** Appeal Brief, paras 892-898, see Section 10.5 at paras 759-767.
[665] **F54/1** OCP Response Brief, paras 861-865 (**ground 131)**, paras 497-502 (**ground 136)**.
[666] **F54** Appeal Brief, paras 678-682; **F54/1** OCP Response Brief, paras 777-786.
[667] **F54** Appeal Brief, paras 772-782; **F54/1** OCP Response Brief, paras 803-808.
[668] **F54** Appeal Brief, paras 899-910; **F54/1** OCP Response Brief, paras 503-509.
[669] **F54** Appeal Brief, paras 1003-1005; **F54/1** OCP Response Brief, paras 613-615.
[670] **F54** Appeal Brief, paras 1014-1017; **F54/1** OCP Response Brief, paras 608-612.
[671] **E465** Trial Judgment, paras 1142-1145.
[672] **F54** Appeal Brief, paras 678-682.
[673] **F54/1** OCP Response Brief, para. 777-786.

cause deaths – namely, hunger,[674] illness and lack of medical treatment,[675] and overwork[676] in Tram Kak District.

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[674] See **E465** Trial Judgment, paras 1011, 1012, 1014-1016, 1195. All of the Civil Parties who testified about the cooperatives in this trial segment spoke about hunger: **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party YEM Khonny), p. 10 lines 18-21 after [09.28.45] ("At that time we overworked, we were so skinny, sometimes we fell on the ground because of the exhaustion and because of the lack of nutrition in the food. And so for us we looked so bony, we could only see our knee caps."); **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 57 lines 16-24 before [13.47.54] ("…we ate those leaves because we were so starving"); **E1/250.1** [Corrected 4] T., 22 January 2015 (Civil Party OUM Suphany), p. 78 lines 4-5 before [14.33.08] ("…the food was insufficient."); **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party CHOU Koemlan), p. 81 line 25 after [14.17.48] ("Sometimes we faced hunger."); **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party EAM Yen), p. 61 lines 22-23 after [15.16.19] ("I was so hungry at that time that is why <> I went to steal the cassava."); **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 31 lines 12-24 after [13.32.58], p. 40 line 13 before [13.58.48] ("the food ration was not enough."); **E1/287.1** [Corrected 1] T., 2 April 2015 (Civil Party BENG Boeun), p. 66 lines 20-25 after [14.27.43] ("…there was not enough food."); **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 15 lines 22-25 before [09.45.19], p. 42 line 23 – p. 43 line 3 before [11.09.02] ("In my <youth> mobile unit at Ou <Krouch>, there were two members who died from starvation."); **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party LOEP Neang), p. 98 lines 19-22 after [15.48.31] ("I never ate my fill"); **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 42 lines 14-18 after [11.07.09] ("I was deprived food"); **E1/289.1** [Corrected 1] T., 21 April 2015 (Civil Party THANN Thim), p. 26 lines 5-6 before [10.32.48] ("We did not have enough food to eat."); **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 11 lines 13-21 after [09.34.24] ("When I was hungry, I went to steal a cassava…").

[675] See **E465** Trial Judgment, paras 1020, 1050, 1197. See also **E1/253.1** [Corrected 1] T., 27 January 2015 (Civil Party CHOU Koemlan), p. 35 lines 10–12 after [10.58.05], **E1/252.1** [Corrected 1] T., 26 January 2015 (Civil Party CHOU Koemlan), p. 50 lines 1-3 after [11.23.40] ("However, there was no proper hospital and there was no proper medicine…"); **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 59 lines 14-23 before [13.52.32] ("And I went to seek for some medicine and I was not given any except just a powder from cassava… I was beaten up while I was seriously ill."); **E1/251.1** [Corrected 1] T., 23 January 2015 (Civil Party OUM Suphany), p. 62 lines 2-7 before [13.42.53] ("She was seriously sick, and she had an infection on her foot.… She died at the hospital."); **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 34 lines 12-17 before [10.48.01] ("So there was no clinic, no treatment at Kbal Pou. … <If we told them that we were sick, they would say that we were mentally sick, and if that was the case, the Angkar already reserved a place for these kinds of people.>"), p. 34 line 22 – p. 35 line 1 after [10.48.01] ("In the youth unit, I don't think I see any medication or medicines for the sick people, because no one from my unit was sent to any clinic or any hospital. There were no treatments in any clinic or hospital, so anyone who fell sick or -- later died of starvation."); **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 22 lines 1-8 before [09.59.26] ("I had malaria at that time in 1976. I was seriously sick. I was put in Leay Bour Hospital and the hospital was named Hospital 17 <>…I received IV injection and I was given the medicine made up -- made from cassava. The IV was made from coconut juice. <It was injected into my leg. It made my leg become handicapped and I have not walked properly since.>"); **E1/289.1** [Corrected 1] T., 21 April 2015 (Civil Party THANN Thim), p. 26 lines 8-12 after [10.32.48];]; **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party LOEP Neang), p. 94 line 23 – p. 95 line 4 after [15.37.47] ("My> elder brother and sister were sick and they were taken <to the hospital>, and they disappeared since <then>. I was told they were taken to the hospital, but I never see them returned…They had fever and dysentery.").

[676] See **E465** Trial Judgment, paras 1018, 1020, 1196. See also **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party EAM Yen), p. 57 lines 12-19 before [15.05.41], p. 61 lines 9-10 before [15.15.15] ("We were only asked to work at day time and night time"); **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 35 lines 1-6 before [10.48.05] ("We had to work very hard, we had to get up early in the morning <at around 6 a.m.> and we had to work <until 11 a.m., and we resumed> at around 1 o'clock and then we would finish at 5 o'clock in the afternoon, so all this in exchange for one bowl of rice porridge. No, that was not enough <compared to the workload we were required to do>."); **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 56 line 23 – p. 57 line 5 before [13.46.00] ("We were assigned to carry earth, starting from 6 o'clock in the morning until 11.30 at noon and if we didn't complete the work planned, then we would be deprived of food."); **E1/288.1** [Corrected 1] T. 3 April 2015 (Civil Party LOEP

283. Moreover, the Lead Co-Lawyers note that the Defence do not appear to contest that Civil Party CHOU Koemlan's child died of starvation in Leay Bour commune.[677] It is unclear how this is consistent with their position that the *actus reus* of murder was not established.

284. The Defence contention that the Trial Chamber's findings were not justified must be rejected.

9.1.3 Murder through working and living conditions at 1st January Dam

285. In addition to finding that the crime against humanity of murder was committed at 1st January Dam through executions at Baray Choan Dek Pagoda,[678] the Trial Chamber also found that it was committed with respect to deaths resulting from living and working conditions at the worksite.[679] These deaths were specified as including (i) six to ten workers who died as a result of "hard labour, starvation rations, and inhospitable conditions, including an unhygienic environment and insufficient and ineffective medicine"[680] and (ii) a number of deaths from worksite accidents "wherein embankments of dirt fell upon and buried workers".[681]

286. The Defence contends that the Trial Chamber erred in establishing the deaths which underpinned these findings of murder in **ground 116**.[682]

9.1.3.1 Deaths from living and working conditions

287. The Defence argues that the evidence before the Trial Chamber did not support a finding of deaths resulting from living and working conditions at the 1st January Dam worksite.[683] The Defence selectively attacks some of the sources of evidence relied on by the Trial Chamber as being insufficient to establish deaths occurring at the worksite – and appears to argue that

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Neang), p. 101 lines 2 -7, after [15.53.02] ("And if we could not finish it by the time the work was over, we had to continue digging through the night time until it was completed."); **E1/250.1** [Corrected 4] T., 22 January 2015 (Civil Party OUM Suphany), p. 67 lines 9-16 before [14.07.02] ("During the harvest season, I worked almost the day and night, and sometime I slept on the grass. And for those who had energy, they continued their work, and we worked almost 24 hours."); **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 6 lines 6-8 after [09.19.04] ("I was forced to work hard, day and night to dig canals, to build damns and to spin water wheels and I was deprived of food and I was not given sufficient clothing."); **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 30 lines 17-18 before [13.31.10] ("I did not dare to rest as I was forced to work. Everybody did not dare to take any rest.").

[677] **F54** Appeal Brief, para. 680.
[678] **E465** Trial Judgment, para. 1666.
[679] **E465** Trial Judgment, paras 1670-1673.
[680] **E465** Trial Judgment, para. 1670.
[681] *Ibid*.
[682] **F54** Appeal Brief, paras 773-778 (on conditions), 779-781 (on accidents).
[683] **F54** Appeal Brief, para. 773-778.

because sick workers were evacuated back to their villages or the hospital their deaths had not been established.[684] The Defence asserts that the evidence of Civil Parties UN Rann[685] and SEANG Sovida[686] were distorted or of low probative value. The Trial Chamber relied on evidence from both Civil Parties that people who had become sick at the worksite were sent away,[687] and on Civil Party UN Rann's testimony that two such people never returned to the worksite.[688] The Defence's challenges to this evidence, as well as similar evidence from others, misses the point.

288. The Trial Chamber's reasoning encompasses three sets of findings: (i) living and working conditions at the worksite were such that people became ill;[689] (ii) those who became seriously ill were sent away from the worksite;[690] and (iii) some of those who were sent away died as a result of their illnesses.[691] Civil Parties UN Rann and SEANG Sovida provided evidence as to the second finding. Other witnesses provided evidence on the third point, including Witnesses KE Pich Vannak and MEAS Laihour.[692]

289. Civil Party HUN Sethany also gave such evidence. She described a man from the worksite who fell ill and was returned to his village.[693] Because she lived in the same village and was there at the time, Civil Party HUN Sethany was able to give direct evidence concerning his death.[694] She knew him personally and spoke of having grieved when he died.[695] The Defence has not challenged Civil Party HUN Sethany's evidence. In light of the totality of evidence, the Defence has not demonstrated that the Trial Chamber's conclusions regarding these deaths were unreasonable.

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[684] **F54** Appeal Brief, para. 773.
[685] **F54** Appeal Brief, para. 774.
[686] **F54** Appeal Brief, para. 775.
[687] **E465** Trial Judgment, para. 1629 fn. 5543.
[688] **E465** Trial Judgment, para. 1629 fn. 5543.
[689] **E465** Trial Judgment, paras 1586, 1588, 1597, 1601, 1606, 1607, 1670.
[690] **E465** Trial Judgment, paras 1607, 1609, 1610, 1625, 1626, 1629 and fn. 5543, 1670.
[691] **E465** Trial Judgment, paras 1624, 1626, 1629 and fn. 5543, 1670.
[692] **E465** Trial Judgment, para. 1624, fn. 5543.
[693] **E465** Trial Judgment, para. 1626; **E306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 60 line 9 – p. 62 line 11 after [14.09.11].
[694] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 9 lines 18-19 before [09.26.16], p. 60 line 9 – p. 62 line 11 after [14.09.11] relied on by the Trial Chamber at **E465** Trial Judgment, para. 1626.
[695] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 9 lines 18-21 before [09.26.16].

9.1.3.2 Deaths from workplace accidents

290. The Lead Co-Lawyers support the OCP Response with respect to the Defence argument that the Trial Chamber erred in fact by finding that several deaths occurred through accidents whereby embankments of dirt fell and buried workers at 1st January Dam.[696] The Lead Co-Lawyers respond to the extent that the Defence misinterprets and reads Civil Party testimony out of context and incorrectly applies evidentiary principles.

291. The Lead Co-Lawyers note that the Defence's fragmented challenges to evidence distract from the combined value of the evidence evaluated by the Trial Chamber. The Trial Chamber's findings did not rest on the testimony of one particular Civil Party or witness, but rather the combined evidence of Civil Party NUON Narom, Civil Party HUN Sethany, Civil Party UN Rann, Witness MEAS Laihour, and Witness UTH Seng.

292. The Defence has not demonstrated that it was unreasonable to rely – in part – on Civil Party NUON Narom's direct observation that workers were injured as a result of soil collapses, even if she did not testify to those workers dying.[697] Her evidence is relevant to the existence of soil collapses at the 1st January Dam worksite and the Trial Chamber was entitled to rely upon it for that purpose.

293. The Defence also challenges the testimony of Civil Party UN Rann and Civil Party HUN Sethany, arguing that their evidence on soil collapses was hearsay and could not be used as corroborating evidence with regard to deaths caused by accidents.[698] As discussed elsewhere in this Brief,[699] there is no prohibition on the use of hearsay evidence. In addition, the Defence fails to consider the extent to which the direct personal observations of the Civil Parties demonstrate the dangerous conditions of the worksite, which precipitated the fatal soil collapses. The Defence fails to consider that Civil Party UN Rann testified that the steps into and out of the pit were steep,[700] that the workers kept digging in heavy rain[701] and that it was

[696] **F54** Appeal Brief, paras 779-781; **F54/1** OCP Response Brief, paras 806-807.
[697] The Lead Co-Lawyers note that there is no contradiction in the Civil Party's evidence. See **E1/339.1** [Corrected 1] T., 1 September 2015 (Civil Party NUON Narom), p. 40 lines 7-14 before and after [11.16.12] ("Q. Just now, Madam Civil Party, on a question from the Prosecution, you said that no one died, at least to what you have been able to observe, at the dam. Did you observe anybody being – or getting injured by an accident? A. Yes, I did. The youth were digging the ground, and actually they made a hole under the ground and the soil collapsed. And I actually saw that.").
[698] **F54** Appeal Brief, para. 781.
[699] See Section 8.3.1 above at paras 216-228.
[700] **E1/307.1** [Corrected 1] T., 28 May 2015 (Civil Party UN Rann), p. 22 lines 17-20 after [09.57.48].
[701] **E1/307.1** [Corrected 1] T., 28 May 2015 (Civil Party UN Rann), p. 10 lines 20-23 after [09.25.40].

slippery,[702] and that no measures were taken in terms of safety or to prevent the workers slipping.[703] Similarly, the Defence fails to consider that even though Civil Party HUN Sethany did not personally observe the landslide, she was able to describe the location of the landslide and its cause. She explained, based on her own observation, that the workers were not allowed to be idle and were forced to compete with each other leading them to drill and dig into the soil quickly, thereby causing the soil to collapse.[704] The Defence has therefore not demonstrated that the Trial Chamber acted unreasonably in relying upon Civil Party NUON Narom, Civil Party UN Rann and Civil Party HUN Sethany's evidence, in combination with other witnesses and Civil Parties' evidence, to find that several accidents involving landslides precipitated by conditions and competition at the worksite, buried workers and killed a number of them.

9.1.4 Murder of Cham people at Wat Au Trakuon

294. In **ground 137** the Defence contests the Trial Chamber's findings that a large number of people, the majority Cham, were brought to Wat Au Trakuon and executed there.[705]

295. These arguments are unclear. The Defence does not specify whether it considers the Trial Chamber erred in finding that people were killed at Wat Au Trakuon; or whether it only claims that the Trial Chamber erred in finding that the executions were targeted against Cham people. Repeated reliance by the Defence on evidence that at least some Khmer were also killed at Wat Au Trakuon[706] suggests that they accept that killings took place, but dispute the ethnicity of the victims. It has not demonstrated an error on the part of the Trial Chamber.

296. The Lead Co-Lawyers address below, in the context of the crime of persecution, the reasons why the evidence supported the Trial Chamber's finding that the killings were targeted against Cham people and constituted discrimination.[707] However, even if the Trial Chamber had not found systematic discrimination, a finding of murder within the scope of the case was open to it, as long as it could conclude that any Cham people were among those killed

[702] **E1/307.1** [Corrected 1] T., 28 May 2015 (Civil Party UN Rann), p. 9 lines 20-25 after [09.23.18], p. 61 line 18 – p. 62 line 3 after [14.16.41].
[703] **E1/307.1** [Corrected 1] T., 28 May 2015 (Civil Party UN Rann), p. 11 lines 3-14 before and after [09.27.45].
[704] **E1/305.1** [Corrected 1] T., 26 May 2015 (Civil Party HUN Sethany), p. 94 line 25 – p. 95 line 23 after [15.44.13]; **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 4 lines 20-24 after [09.09.15].
[705] **F54** Appeal Brief, paras 899-910.
[706] **F54** Appeal Brief, paras 903, 906, 908.
[707] See para. 462.

at Wat Au Trakuon.[708] The allegation that Khmer people were killed alongside them is in no way exculpatory.

297. The Defence appears to question the probative value of the evidence of Civil Party HIM Man, and whether it was corroborated by other sources.[709] The Lead Co-Lawyers respond elsewhere in this Brief to the Defence's assertions regarding his evidence.[710] Based on that analysis the Lead Co-Lawyers submit that no error in the use of that evidence has been demonstrated.

298. The Lead Co-Lawyers agree with the OCP that the evidence before the Trial Chamber was compelling that Cham people were systematically rounded-up and executed at Wat Au Trakuon.[711] No error in this finding has been shown by the Defence.

9.1.5 Murder of Vietnamese

299. The Trial Chamber found that the crime against humanity of murder was established in several of the locations listed in the Closing Order's section on the treatment of the Vietnamese. The Defence has raised no argument that demonstrates an error of fact or law, or which, in any event, would have an impact on the verdict. The Lead Co-Lawyers support the submissions of the OCP,[712] and respond only to factual challenges concerning Civil Party PRAK Doeun, with respect to the murder of his family members in Kampong Chhnang Province; and concerning Civil Party UCH Sunlay, with respect to the murder of his family members in Kratie.

300. They also observe that, even if the Defence were to succeed on its arguments about the scope of the case regarding the treatment of Vietnamese outside Prey Veng and Svay Rieng, the Trial Chamber's factual findings on these matters remain relevant to the establishment of a policy and pattern of conduct regarding the Vietnamese.

9.1.5.1 Murder of Vietnamese people in Kampong Chhnang

301. The Trial Chamber concluded that the crime against humanity of murder had been committed in Kampong Chhnang Province. Its findings encompassed the killings recounted by Civil

[708] **D427** Closing Order, paras 1373 and 776-783.
[709] **F54** Appeal Brief, para. 907, see also para. 903.
[710] See Section 10.2 below at paras 739-747.
[711] **F54/1** OCP Response Brief, paras 503-509.
[712] **F54/1** OCP Response Brief, paras 596-620.

Party PRAK Doeun.[713] The Defence challenges this finding in **ground 154** on the basis that the Civil Party did not witness the executions, and that his evidence was not corroborated.[714]

302. Civil Party PRAK Doeun testified that among his unit at Ta Mov there were seven families where one of the spouses was Vietnamese.[715] One night, these seven families were gathered by the cadres who said they would "send those people back",[716] and were made to march.[717] Civil Party PRAK Doeun was among the group, along with his wife, his mother-in-law, and one of his children.[718] After walking for some distance the group was divided into two, with the Vietnamese people separated from Khmer people.[719] Civil Party PRAK Doeun was later told that those in the Vietnamese group – which included his wife, mother-in-law and child as well as the Vietnamese members of six other families – had been "smashed".[720]

303. The Lead Co-Lawyers agree with the OCP that the Trial Chamber was entitled to rely on this evidence.[721] The Lead Co-Lawyers emphasise that in making claims about hearsay, the Defence unreasonably discounts Civil Party PRAK Doeun's direct evidence regarding the events preceding and following the killings, especially the separation of Khmer from Vietnamese people;[722] and the fact that none of the Vietnamese people were seen again.[723] These aspects of Civil Party PRAK Doeun's direct observations are entirely consistent with the explanation given to him that his family and the other Vietnamese people had been killed.

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[713] **E465** Trial Judgment, para. 3471.
[714] **F54** Appeal Brief, paras 1003-1005.
[715] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 60 line 7 – p. 61 line 10 before [13.59.48] referred to at **E465** Trial Judgment, para. 3466.
[716] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 72 line 12 after [14.26.45]; **E465** Trial Judgment, para. 3466.
[717] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 72 lines 14-19 before [14.28.51].
[718] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 75 lines 1-3 after [14.35.14].
[719] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 75 line 24 – p. 76 line 6 before [14.39.10].
[720] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 86 line 21 – p. 88 line 5 after [15.21.36]; **E1/362.1** [Corrected 2] T., 3 December 2015 (Civil Party PRAK Doeun), p. 36 lines 12-24 after [10.49.49] relied on by the Trial Chamber at **E465** Trial Judgment, para. 3467.
[721] **F54/1** OCP Response Brief, paras 613-615. The Lead Co-Lawyers also agree with the OCP that the reference to "children" in paragraph 3417 of the Trial Judgement appears to be a clerical error, in light of the clear consideration of the facts set out in paragraphs 3466 and 3467 recognising that only one of Civil Party PRAK Doeun's children was among those killed at Ta Mov. See **F54/1** OCP Response Brief, para. 615.
[722] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 72 line 23 – p. 73 line 10 after [14.28.51], p. 75 line 10 – p. 76 line 6 before [14.39.10] relied on by the Trial Chamber at **E465** Trial Judgment, para. 3466.
[723] **E1/361.1** [Corrected 2] T., 2 December 2015 (Civil Party PRAK Doeun), p. 88 lines 17-22 after [15.28.02], p. 90 lines 18-21 before [15.34.12] relied on by the Trial Chamber at **E465** Trial Judgment, para. 3467.

Moreover, other parts of his testimony, while perhaps hearsay, are nonetheless compelling, particularly in the overall context. The Trial Chamber highlighted that Civil Party PRAK Doeun's unit chief "blamed him for marrying a Vietnamese woman and suggested that he ask *Angkar* to remarry a Khmer woman."[724] As discussed below, the Trial Chamber was entitled to rely on the evidence of a single party.[725] The Defence has failed to demonstrate that the Trial Chamber erred in establishing the murders Civil Party PRAK Doeun provided evidence on.

9.1.5.2 Murder of Vietnamese people in Kratie

304. In respect of Kratie Province, the Trial Chamber made findings of the crime against humanity of murder based on the testimony of Civil Party UCH Sunlay.[726] He testified that in September 1978, he was sent away with some other men to collect bamboo from a place two nights travel away.[727] On returning they were informed by the cooperative chief that their family members had been taken away and that they had fulfilled a great task for *Angkar* by cleansing themselves and riding themselves of rotten flesh.[728]

305. The Defence argues (in **ground 156**) that Civil Party UCH Sunlay's evidence was biased and mere hearsay.[729] The Lead Co-Lawyers agree with the OCP submissions, including that the apparent error in the number of Civil Party UCH Sunlay's family members who were killed is not material.[730]

306. The Lead Co-Lawyers strongly object to the suggestion from the Defence that Civil Party UCH Sunlay's evidence carries less value because it was given in a hearing of Civil Party statements of harm.[731] That argument has been addressed earlier in this Brief.[732]

307. Likewise the Lead Co-Lawyers reject the Defence submission that the Trial Chamber should have discounted Civil Party UCH Sunlay's evidence because parts of it (regarding the

[724] **E465** Trial Judgment, para. 3467.
[725] **F36** Case 002/01 Appeal Judgment, para. 424.
[726] **E465** Trial Judgment, paras 3496-3497 and 3488.
[727] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party UCH Sunlay), p. 94 lines 4-9 after [15.33.57], relied on by the Trial Chamber at **E465** Trial Judgment, para. 3483.
[728] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party UCH Sunlay), p. 94 line 10 – p. 95 line 1 before [15.37.50] relied on by the Trial Chamber at **E465** Trial Judgment, paras 3485 and 4449.
[729] **F54** Appeal Brief, paras 1014-1017.
[730] **F54/1** OCP Response Brief, para. 612.
[731] **F54** Appeal Brief, para. 1014.
[732] See para. 200 above.

moment of the killings) was hearsay. His evidence was precise and consistent. Moreover the information which Civil Party UCH Sunlay received from others about the killing of his family is corroborated by matters which he observed directly himself before and thereafter: the "ugly trick" of sending the husbands away when the operation was to be carried out; [733] the sentiments expressed by the cooperative chief demonstrating an intent to rid the cooperative of Vietnamese people; [734] the receipt by others in his cooperative of his family's clothes; [735] and the fact that his wife and children were never seen again.[736] The Defence has failed to demonstrate unreasonableness on the part of the Trial Chamber in finding that the crime of murder was established.

9.2 Crime Against Humanity of Deportation

9.2.1 Deportation from Prey Veng

308. The Trial Chamber found that the crime against humanity of deportation was committed against Vietnamese people in Prey Veng.[737] In doing so it relied on, among other sources, the evidence of Civil Party DOUNG Oeurn, and numerous VIFs. The Defence argues that this finding was the result of factual errors (in **ground 151**).[738] However as the OCP has already responded, the Appeal Brief has demonstrated no error by the Trial Chamber.[739] The Lead Co-Lawyers agree with the OCP submissions, and limit their response to matters concerning evidence sourced from Civil Parties on this issue.

309. The Defence has misrepresented and diminished the evidence of Civil Party DOUNG Oeurn,[740] and misapplies the concept of hearsay. Civil Party DOUNG Oeurn testified that during the DK period she heard that Vietnamese people had to go to Vietnam, and that she had "urged" her husband to go but he refused.[741]

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[733] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party UCH Sunlay), p. 103 line 17 – p. 104 line 3 after [15.53.08] relied on by the Trial Chamber at **E465** Trial Judgment, para. 3483.
[734] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party UCH Sunlay), p. 94 lines 10-18 before [15.36.03] relied on by the Trial Chamber at **E465** Trial Judgment, para. 3485.
[735] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party UCH Sunlay), p. 95 lines 15-24 after [15.37.50] relied on by the Trial Chamber at **E465** Trial Judgment, para. 3484.
[736] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party UCH Sunlay), p. 97 lines 12-13 after [15.40.37] and p. 100 lines 9-12 before [15.47.45].
[737] **E465** Trial Judgment, para. 3507, see also paras 3502-3506.
[738] **F54** Appeal Brief, paras 966-986; see also para. 313 in **ground 32** regarding hearsay.
[739] **F54/1** OCP Response Brief, paras 560-569.
[740] Other Defence submissions regarding Civil Party DOUNG Oeurn are addressed at para. 495.
[741] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 10 line 24 – p. 11 line 4 after [09.30.16].

> He <said, he> refused to go. He said that he would not go. He said that he <was> willing to die in Cambodia to die with me and my child. <I advised him to go back.> He would not go back alone. I told him that, "Everyone went back. Why didn't you go back?" And he said that he would not go. He <said, he could not leave the wife and the child. He> would prefer to die in Cambodia<>.[742]

310. She testified that one Vietnamese family in her village, Pou Chentam, did return to Vietnam:

> There were Ta Ki and Yeay Min and their children. The whole family actually went to Vietnam. And the man actually returned to Cambodia and, later on, he died. … It was after the collapse of Khmer Rouge that he returned to Cambodia.[743]

311. The Defence has pointed to no reason why the Trial Chamber should not have relied on this evidence other than the claim that it was hearsay and did not include details about the manner in which the deportation occurred.[744] The latter point was explicitly acknowledged and thus taken into account by the Trial Chamber.[745] It does not undermine the relevance and probity of the evidence on the matters that it does address. The accusation of hearsay is an oversimplification, as has been explained above.[746] Civil Party DOUNG Oeurn's testimony is direct (and uncontradicted) evidence that Vietnamese people in Pou Chentam were pressured to return to Vietnam, and that they were fearful and aware that the consequence of remaining in Cambodia might be death. The Defence overlooks this evidence in arguing that there was no evidence to support a finding that deportations were forced in Prey Veng.[747]

312. Civil Party DOUNG Oeurn's testimony was also direct evidence that Tak Ki and Yeay Min and their children left Pou Chentam, and that the man returned after the DK period. It is true that her knowledge that he had gone to Vietnam in the intervening period was second-hand. However it was reasonable for the Trial Chamber to rely on it, particularly when it is considered together with the other evidence.

313. Indeed, the Defence also disregard that the specific events in Prey Veng were corroborated by evidence relating to a nationwide policy. The Trial Chamber assessed a considerable body

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[742] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 56 lines 13-18 after [13.51.40].
[743] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 11 lines 8-15 after [09.30.16].
[744] **F54** Appeal Brief, para. 977.
[745] **E465** Trial Judgement, para. 3431.
[746] See Section 8.3.1 above at paras 216-228.
[747] **F54** Appeal Brief, para. 984.

of evidence establishing that policy, including the accounts of eleven Civil Parties, all of which corroborate the existence of a national policy to deport Vietnamese people.[748]

9.2.2 Deportation from Tram Kak

314. The Trial Chamber also found that deportation as a crime against humanity had been committed in Tram Kak.[749] In **ground 103**, **ground 104**, and **ground 105** the Defence argues that in reaching that conclusion that the Trial Chamber erred by finding that Vietnamese people had crossed the border into Vietnam, and regarding the element of intent.[750]

315. In these grounds the Defence does not appear to question the Trial Chamber's findings that: (i) "large numbers of Vietnamese were gathered up in Tram Kak district from late 1975 into early 1976"; (ii) "[t]he Vietnamese people involved lacked any genuine choice"; and (iii) "Vietnamese persons vanished and disappeared from Tram Kak district."[751] It questions only whether the Vietnamese people in question crossed the border into Vietnam; and whether the intent for them to cross that border had been proved.

316. Curiously, the Defence attempts to introduce doubt concerning those two issues by specifically relying on the possibility that the Vietnamese victims might have been systematically (and intentionally) killed rather than forced into Vietnam.[752] Thus, the Defence seems to argue that the Vietnamese were not deported, but rather disappeared. It appears to believe that if there is doubt about whether the victims were deported or killed, KHIEU Samphân must be acquitted. That is not the case. Intentionally gathering large numbers of people through coercive means and causing them to disappear (factual findings which the Defence appear to accept) would remain criminal. This case contains charges of

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[748] **E465** Trial Judgement, fn. 11572; **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), pp. 6, 32-33 73-74, 86, 98; **E3/9780** Written Record of Interview (Civil Party VEN Van), 27 February 2014, ERN (En) 00986175-00986183; **E3/5588** Written Record of Interview (Civil Party TROENG Yang), 15 December 2009, ERN (En) 00421059-00421063; **E3/5587** Written Record of Interview (DOU Yang Aun), 15 December 2009, ERN (En) 00426465-00426467; **E3/5238** Written Record of Interview (Civil Party EAR Sophal), 13 January 2009, ERN (En) 00270671-00270672; **E1/363.1** [Corrected 1] T., 7 December 2015 (Civil Party CHOEUNG Yaing Chaet), pp. 34, 39, 41-42, 57-60 and **E3/5631** Supplementary Information Form (Civil Party CHOEUNG Yaing Chaet), 21 December 2010, ERN (En) 00678292-00678293; **E3/6934** Transcript of Voice America Khmer Service Oral History Interview with Civil Party NEOU Sarem, "Return from France: A story of Reconciliation and Loss," 30 December 2008, ERN (En) 01003411; as well as VIFs and Supplementary Information Forms from Civil Parties PHAI Srung, LE Yang Sour, NGUYEN Thi Tyet and NGVIENG Yang An.

[749] **E465** Trial Judgment, paras 1157-1159.

[750] **F54** Appeal Brief, paras 686-718.

[751] **E465** Trial Judgment, para. 1157.

[752] **F54** Appeal Brief, paras 690, 717.

the other inhumane acts by enforced disappearances in Tram Kak district. Despite arguments to the contrary from the Defence, those charges include disappearances whose direct victims were Vietnamese people.[753]

317. The Lead Co-Lawyers note the response of the OCP on these grounds.[754] They agree that there was considerable and reliable evidence of various kinds, all of which supported the Trial Chamber's conclusion that Vietnamese people were intentionally forced across the border into Vietnam. They therefore join the OCP in submitting that the Trial Chamber's findings concerning deportation from Tram Kak be upheld.

318. However, the Lead Co-Lawyers also note that even if the Defence were to succeed on this argument, the result would not be exculpatory. Therefore, the Lead Co-Lawyers make the alternative request, if the finding of deportation is overturned, that the Chamber use the Trial Chambers other (unchallenged) factual findings to determine that the crime against humanity of other inhumane acts (through enforced disappearances) is made out by these facts.

9.3 Crime Against Humanity of Torture

319. The Trial Chamber found that Cham men taken to Trea Village were lined up at the riverfront, "tied up, beaten and asked repeatedly if they were Muslims",[755] and concluded that this conduct amounted to the crime against humanity of torture.[756] In **ground 140** the Defence challenges this, claiming that the evidence was insufficient to establish that the beatings happened and that it did not support a conclusion that beatings had the purpose of obtaining information about whether the detainees were Cham.[757]

320. The Lead Co-Lawyers agree with the OCP response on these issues.[758] They add that the Trial Chamber's finding that steps were taken to verify that the men were Cham once they arrived in Trea Village was also supported by the evidence of Civil Party NO Sates and Witness MATH Sor. They both testified that prior to executions, the women who had been

[753] See paras 177(vii) and 179 above.
[754] **F54/1** OCP Response Brief, paras 570-588.
[755] **E465** Trial Judgment, para. 3276.
[756] **E465** Trial Judgment, paras 3318-3319.
[757] **F54** Appeal Brief, para. 925.
[758] **F54/1** OCP Response Brief, paras 520-523.

brought to Trea Village and detained separately from the men were also questioned about their ethnicity, with those who claimed to be Khmer being spared.[759]

9.4 Crime Against Humanity of Enslavement

321. The Trial Chamber found that the crime against humanity of enslavement was established at Phnom Kraol Security Centre.[760]

322. The Defence in **ground 133** challenges that finding by arguing that the scope of the case only included events at K-11 (and that therefore facts relating to K-17 and Phnom Kraol Prison should not have been considered); and by seeking to diminish the weight of the evidence given in relation to K-11 by Civil Parties KUL Nem and AUM Mol.[761]

323. The Lead Co-Lawyers agree with the OCP's response on the first of these points.[762] The Trial Chamber was right to take into account evidence from K-17 and Phnom Kraol Prison.[763] Furthermore, the Defence arguments also misrepresent the value of the evidence concerning K-11.

324. Although Civil Party AUM Mol died before the hearings on Phnom Kraol Security Centre,[764] she had been interviewed by the OCIJ. In her WRI she described how, while a prisoner at K-11, she was made to undertake labour transplanting rice or building dams.[765] These were the only times when she was unshackled, but her hands remained tied with hammock strings.[766] She ascribed a miscarriage and a chronic hip injury to the conditions in which she was forced to work.[767]

325. Civil Party KUL Nem testified that the suffering he experienced from forced hard labour at K-11 was his primary motivation for joining these proceedings.[768] The Trial Chamber relied

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[759] See for example **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 59 lines 5-14 after [14.16.35], p. 65 lines 16-23 after [14.34.18]. See para. 463 and also Section 10.5 at paras 759-767.
[760] **E465** Trial Judgment, paras 3121-3123, 3125-3126.
[761] **F54** Appeal Brief, paras 880-883.
[762] **F54/1** OCP Response Brief, paras 858-860.
[763] **E465** Trial Judgment, paras 3103-3106.
[764] **E459** Decision on Witnesses, Civil Parties and Experts Proposed to be heard during Case 002/02, 18 July 2017, para. 103.
[765] **E3/7700** Written Record of Interview (Civil Party AUM Mol), 29 October 2008, ERN (En) 00239533.
[766] **E3/7700** Written Record of Interview (Civil Party AUM Mol), 29 October 2008, ERN (En) 00239533.
[767] **E3/7700** Written Record of Interview (Civil Party AUM Mol), 29 October 2008, at ERN (En) 00239533.
[768] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 89 line 25 – p. 90 line 2 before [14.26.27]; p. 90 lines 15-17 before [14.27.44].

on his account of being forced to undertake hard labour which he could not refuse, and which caused him and his wife extreme hardship.[769] The Defence makes the unjustified claim that the value of Civil Party KUL Nem's testimony should be discounted because it was given "only during his statement of harm… i.e. after the parties had examined him" and that "the Defence was therefore unable to examine him on this matter."[770] The Lead Co-Lawyers note that Civil Party KUL Nem's entire testimony was a statement of suffering, heard in an impact hearing.[771] He spoke about K-11 in his very first answer, and again at several points in his testimony before being questioned by the counsel for KHIEU Samphân.[772] There is no question that the Defence had an opportunity to question Civil Party KUL Nem on these matters.

9.5 Crime Against Humanity of Persecution

9.5.1 Overview

326. This section of the Brief addresses Defence arguments concerning the Trial Chamber's findings on the crime against humanity of persecution. Civil Parties contributed significant evidence in respect of these findings. Many of the arguments raised by the Defence have been responded to sufficiently by the OCP, and the Lead Co-Lawyers agree with those submissions subject to the further points below.

327. The first part of this section addresses arguments made by the Defence concerning the correct elements of the crime of persecution, and whether they were part of international law in 1975 (legality). The second part addresses arguments about alleged factual errors.

9.5.2 Elements of Crime and Legality

328. In a number of grounds the Defence argues that the Trial Chamber erred in identifying the elements of the crime of persecution or that the crime as defined by the Trial Chamber was not in existence at the time of the alleged conduct. These legal arguments are raised in: **ground 94** (persecution of the Cham people and Buddhists),[773] **ground 95** (persecution of

[769] **E465** Trial Judgment, para. 3104.
[770] **F54** Appeal Brief, para. 882.
[771] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), pp. 85-116. Regarding the type of hearing see statements by the President at p. 83 lines 13-15 after [14.10.10] and p. 86 line 24 – p. 87 line 6 after [14.19.10].
[772] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 88 line 18 after [14.22.30], p. 89 line 12 after [14.24.56], p. 95 lines 13-25 after [14.38.05], p. 103 lines 10-17 after [15.15.26].
[773] **F54** Appeal Brief, paras 641-655.

Buddhists and Buddhist monks),[774] **ground 96** (persecution of the Cham people),[775] **ground 108** (persecution of Buddhists and Buddhist monks at Tram Kak District),[776] **ground 121** (persecution of the Cham people at the 1st January Dam Worksite),[777] **ground 122** (persecution of the Cham people at the 1st January Dam Worksite),[778] **ground 125** (persecution of real or perceived political enemies at S-21),[779] **ground 126** (persecution of the Vietnamese prisoners in S-21),[780] **ground 129** (persecution of real or perceived political enemies at Au Kanseng),[781] **ground 137** (execution of Cham people in Kang Meas District),[782] **ground 141** (persecution of the Cham people during the Movement of Population 2),[783] **ground 144** (persecution of the Cham people),[784] **ground 146** (persecution of the Cham people),[785] **ground 147** (persecution of the Cham people),[786] and **ground 158** (persecution of the Vietnamese people in Prey Veng and Svay Rieng).[787]

329. These arguments are dealt with together in this section. The Lead Co-Lawyers submit that the Trial Chamber made no legal errors concerning the crime against humanity of persecution. It correctly identified the elements of the crime as it existed in 1975.

330. "[P]ersecutions on political, racial and religious grounds" is included as a crime against humanity in article 5 of the ECCC Law.[788] This Chamber has previously examined the elements of that crime, as it existed in customary international law during the period 1975-1979. In the Case 001 Appeal Judgment this Chamber upheld the Trial Chamber's formulation of the crime's elements as:

[774] **F54** Appeal Brief, para. 656.
[775] **F54** Appeal Brief, para. 657.
[776] **F54** Appeal Brief, paras 743-745.
[777] **F54** Appeal Brief, paras 804-812.
[778] **F54** Appeal Brief, para. 813.
[779] **F54** Appeal Brief, paras 825-827.
[780] **F54** Appeal Brief, paras 828-835.
[781] **F54** Appeal Brief, paras 848-858.
[782] **F54** Appeal Brief, paras 899-910.
[783] **F54** Appeal Brief, paras 926-927.
[784] **F54** Appeal Brief, paras 933-951.
[785] **F54** Appeal Brief, paras 954-956.
[786] **F54** Appeal Brief, paras 957-959.
[787] **F54** Appeal Brief, paras 1028-1050.
[788] ECCC Law, Article 5.

> (i) 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 (*actus reus*); and
>
> (ii) deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*).[789]

331. These elements were subsequently adopted by the Trial Chamber in Case 002/01 and were uncontested on appeal.[790]

332. Consideration of relevant jurisprudence reveals that the *actus reus* involves two key discrete aspects: first, the act(s) or omission(s) in question be sufficiently grave; secondly, the act(s) or omission(s) must discriminate in fact. This section will respond in turn to Defence arguments related to each of the two elements of the *actus reus* and the element of intent.

9.5.2.1 Element 1: An act or omission of the required gravity

333. Not every discriminatory act or omission can constitute the *actus reus* of persecution. The act must either itself constitute a crime against humanity or other international crime, or otherwise must be assessed as an act or omission of sufficient gravity.[791] In the Case 001 Appeal Judgment, this Chamber laid out the "well-established"[792] test for establishing whether a particular form of conduct meets that threshold.[793] The Chamber explained that the question is "whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights such that it is *equal in gravity or severity to other underlying crimes against humanity*."[794] [*emphasis original*]

334. The Lead Co-Lawyers note that the Defence does not appear to challenge the Trial Chamber's interpretation of this requirement. Nor does there appear to be any suggestion that it did not represent customary international law in 1975. A number of arguments *are* made

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[789] **Case 001– F28** Appeal Judgment, para. 226; **Case 001 - E188** Trial Judgment paras 376, 379; reproduced at **E465** Trial Judgment, para. 713.
[790] **E313** Case 002/01 Trial Judgment, para. 427.
[791] **Case 001– F28** Appeal Judgment, para. 227; **Case 001 - E188** Trial Judgment at para. 378. See also **Case 001 – F28** Appeal Judgment paras 254, 255 (analysing the doctrine's origins in post WWII cases and at the ICTY - see in particular ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 620).
[792] **Case 001– F28** Appeal Judgment, para. 261.
[793] **Case 001– F28** Appeal Judgment, para. 257 agreeing generally with the formulation in **Case 001 - E188** Trial Judgment (**Case 001– F28** Appeal Judgment, para. 227).
[794] **Case 001– F28** Appeal Judgment, para. 257.

by the Defence concerning whether or not this element was sufficiently satisfied on the basis of the evidence before the Trial Chamber; those are dealt with below.[795]

9.5.2.2 Element 2: Discrimination in fact

335. ECCC caselaw is settled that persecution requires "discrimination in fact".[796] This requirement signifies that a discriminatory intent alone is not sufficient.[797] Thus, in Case 001, this Chamber explained that it had been "unable to identify any case before the [post World War II mechanisms] in which defendants were convicted for persecution on the basis of the existence of specific discriminatory intent alone."[798] Discrimination must not only be intended; it must actually occur.

336. However, this leaves the question of what "discrimination" encompasses; and indeed, what it encompassed in 1975. The Appeal Brief includes several arguments which appear to relate to the question of what constitutes "discrimination". They are dealt with here in turn.

9.5.2.2.1 Discernibility and immutability of the affected group

337. In order to establish discrimination in fact, the affected political, racial or religious group must be "sufficiently discernible".[799] In at least two of its grounds (**ground 125** and **ground 129**) the Defence appears to insist upon additional qualities of the group, namely that it not only be discernible, but that it also be immutable and homogeneous:[800]

    (i) Concerning the persecution of real or perceived political enemies at S-21, the Defence argues that this group could not constitute a sufficiently discernible group because it included "several categories which fluctuated over time"[801] (**ground 125**).

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[795] See Section 9.5.3 at para. 378 *et seq*. See esp. paras 465-468 (concerning the Cham people) and paras 470-477 (concerning Buddhists).
[796] **Case 001 – F28** Appeal Judgment, paras 264-271; **F36** Case 002/01 Appeal Judgment, paras 687 and 690.
[797] **Case 001 – F28** Appeal Judgment, paras 228 and 271.
[798] **Case 001 – F28** Appeal Judgment, para. 263.
[799] **Case 001– F28** Appeal Judgment, para. 274; **F36** Case 002/01 Appeal Judgment, para. 744. [*emphasis omitted*]
[800] **F54** Appeal Brief, paras 825-827 (**ground 125**) and 848-858 (**ground 129**). The Lead Co-Lawyers note that **ground 125** raises a number of discrete legal issues. This section of the Response Brief deals with the arguments concerning the content of the requirement for "discrimination". The Lead Co-Lawyers have separately addressed the procedural question of whether a single factual question can be determined differently in two separate cases (see Section 6.4 at paras 106-108). On the remainder of the issues raised in **ground 125** the Lead Co-Lawyers support the submissions of the OCP. See **F54/1** OCP Response Brief, paras 844-850.
[801] **F54** Appeal Brief, para. 825.

(ii) A similar argument is made in relation to real or perceived enemies persecuted at Au Kanseng. The Defence claims that the group "covers a whole host of sub-categories" and that the "disparity" within the group renders it incapable of meeting the requirement for sufficient discernibility[802] (**ground 129**).

338. The Lead Co-Lawyers agree with the OCP that the Trial Chamber was right to conclude that "real or perceived enemies of the CPK" constituted a sufficiently discernible group.[803] The following submissions aim to support that conclusion by responding to the Defence's specific claims that the requirement of sufficiently discernibility excludes fluctuating and diverse groups.

339. The Defence gives no authority for its apparent view that a sufficiently discernible group must be immutable and homogeneous. It is a view which is directly contradicted by the established jurisprudence of this and other courts. As noted by this Chamber, in a number of cases at the ICTY, the persecuted group was defined negatively, as "non-Serbs":[804]

> Whether these groups were defined in a negative sense, as in "non-Serbs" or "enemies and opponents of national socialism", or in cumulative fashion, such as "Serbs, Jews, Gypsies, as well as Croats who did not accept the ideology", the persecuted groups did not consist of a single homogeneous polity. The Supreme Court Chamber thus confirms the possibility that persecution as a crime against humanity might target aggregated groups without any common identity or agenda.[805]

340. Similarly, in Case 002/01, this Chamber recognised that the "New People" in fact encompassed various sub-categories, including "Khmer Republic officials, intellectuals, landowners, capitalists, feudalists, as well as petty bourgeoisie, all of whom were considered to be enemies of the socialist revolution."[806] It is thus clear that the concept of a sufficiently discernible group does not imply any requirement of homogeneity or lack of diversity within the group.

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[802] **F54** Appeal Brief, paras 849-852.
[803] **F54/1**, OCP Response Brief, para. 846 (**ground 125**) and para. 883 (**ground 129**).
[804] See **F36** Case 002/01 Appeal Judgment, para. 677; ICTY *Prosecutor v Stakić,* IT-97-24-T, Judgement, 31 July 2003, para. 826. See also ICTY *Prosecutor v Brđanin,* IT-99-36-A, Judgement, 3 April 2007, paras 318-319; ICTY *Prosecutor v Krnojelac,* IT-97-25-T, Judgment, 15 March 2002, para. 438; ICTY *Prosecutor v Tadić,* IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 714. See also **Case 001– F28** Appeal Judgment, para. 272.
[805] **F36** Case 002/01 Appeal Judgment, para. 678.
[806] **F36** Case 002/01 Appeal Judgment, para. 683.

341. Clear precedent exists for the applicability of political persecution to a scenario in which an oppressive regime targets an expanding range of perceived enemies. The Nuremberg indictment addressed persecution which was directed at "opponents and supposed or suspected opponents of the regime".[807] This included members of various groups deemed over time to constitute a potential opposition, including trade unions, priests and clergy, and pacifist groups.[808] But the persecution charge was wide enough to encompass the targeting of all persons who were suspected of opposition, namely: "all who were or who were suspected of being hostile to the Nazi Party and all who were or who were suspected of being opposed to the common plan alleged in [the first count of the indictment]."[809] The judgment detailed policies of targeting and executing a range of persons suspected to be opponents of the regime as well as their families, and a number of the accused were convicted in respect of such acts.[810]

342. The Defence's claims that "the real or perceived enemies of the CPK" is not a sufficiently discernible group must therefore fail. The political group of "real or perceived enemies of the CPK" is, by its very nature as a group targeted on political grounds prone to fluctuate and expand over time as the Trial Chamber rightly pointed out,[811] and is thus sufficiently discernible. The Defence has failed to establish a legal error that would invalidate the Trial Chamber's legal finding on persecution.

9.5.2.2.2 Equal treatment with an unequal result

343. An argument made throughout the Appeal Brief is that the Trial Chamber erred in finding that discrimination in fact had occurred, because the conduct in question merely constituted

[807] IMT *United States of America et al., v Göring et al.,* Indictment, 19 November 1945, p. 32.
[808] IMT *United States of America et al., v Göring et al.,* Indictment, 19 November 1945, p. 33.
[809] IMT *United States of America et al., v Göring et al.,* Indictment, 19 November 1945, pp. 65, 66 ("…the defendants adopted a policy of persecution, repression, and extermination of all civilians in Germany who were, or who were believed to be, or who were believed likely to become, hostile to the Nazi Government and the common plan or conspiracy…" and "These persecutions […] were also directed against persons whose political belief or spiritual aspirations were deemed to be in conflict with the aims of the Nazis.").
[810] IMT *United States of America et al., v Göring et al.,* Judgment, 1 October 1946, pp. 63-64, pp. 109-110, p. 143.
[811] **E465** Trial Judgment, para. 2600.

"equal treatment". This argument is raised in **grounds 108**,[812] **ground 121**,[813] **ground 122**,[814] **ground 144**,[815] **ground 146**,[816] and **ground 147**.[817] The Defence claims that:

(i) Preventing Buddhists from religious practices was equal treatment because all people were prohibited from religious practices (**ground 108**);

(ii) Preventing the Cham at January 1st Dam Worksite from practicing their religion was equal treatment because Khmer people were also not allowed to practice religion (**ground 122**);

(iii) Prohibiting cultural and religious practices of Cham people throughout Cambodia constituted equal treatment because all groups were expected to abandon religious practices (including places of worship, prayers, legal texts etc.), speak only Khmer, and adopt Khmer clothing and hairstyles (**ground 144** and **ground 146**, repeated in **ground 147**).

344. The Lead Co-Lawyers agree with the OCP that this argument must fail.[818] Considering the importance of this question to the Civil Parties, they add the following more detailed submissions as to why the Defence approach is misconceived.

345. The essence of this issue concerns the meaning of "discrimination in fact". Often, discrimination is explained as being concerned with the different "treatment" of various groups. But the question arises whether the concept of "treatment" refers to the *acts or omissions* which are taken in relation to the groups; or whether it can also relate to the *consequences* experienced by the different groups. The Defence proposes a restrictive interpretation: it claims that "discrimination in fact" only occurs where the different groups are exposed to different acts or omissions.[819] Where the same acts and omissions are imposed on all, but with different consequences, the Defence refers to this as "indirect discrimination", borrowing a concept from human rights law, and claims that this scenario could not amount

[812] **F54** Appeal Brief, paras 743-745.
[813] **F54** Appeal Brief, paras 804-812.
[814] **F54** Appeal Brief, para. 813.
[815] **F54** Appeal Brief, paras 939-951.
[816] **F54** Appeal Brief, paras 954-956.
[817] **F54** Appeal Brief, paras 957-959.
[818] **F54/1**, OCP Response Brief, para. 405 (**ground 108**), para. 465 (**ground 121**), para. 470 (**ground 122**), para. 479 (**ground 144**), para. 491 (**ground 146**), para. 494 (**ground 147**).
[819] **F54** Appeal Brief, paras 745, 813, 939-942.

to "discrimination in fact" according to the meaning of that element during the period in question.[820] The Defence thus repeatedly argues that the Trial Chamber erred by finding that discrimination in fact had occurred where there was "equal treatment" or "indirect discrimination".[821]

346. The Lead Co-Lawyers note that this question is not a matter which was dealt with in significant detail by the Trial Chamber. However, it was addressed more explicitly in response to similar arguments raised by the NUON Chea Defence, concerning the alleged "equal treatment" of Buddhists. The Trial Chamber criticised that approach as failing to consider:

> …the differing impact which absolute physical equality inevitably has depending on people's differing backgrounds. To force Buddhist monks to renounce their faith discriminates against Buddhist monks in fact. The result is not equal in fact because the submission ignores the overall gravity of the treatment, in particular what the monks were forced to give up.[822]

347. The Trial Chamber repeatedly referred to the requisite persecutory "consequences" which must occur for the targeted group in order to establish persecution.[823] This language, and the Trial Chamber's particular focus on *consequences*, is indicative of an endorsement of situations where indirect discrimination is the basis for discrimination in fact.

348. While the Trial Chamber could have provided more detailed reasoning on this issue, the Lead Co-Lawyers submit that it is nonetheless correct, for the reasons which follow.

9.5.2.2.2.1 The concept of 'indirect discrimination' and its relevance

349. The notion of discrimination occurring through "equal treatment" which has unequal *consequences* is well-established in human rights law, where it is referred to as "indirect discrimination".[824] For present purposes, this concept borrowed from human rights law is

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[820] **F54** Appeal Brief, paras 744, 813, 954-956.
[821] **F54** Appeal Brief, paras 745, 813.
[822] **E465** Trial Judgment, para. 1185.
[823] **E465** Trial Judgment, paras 714, 1174, 1189, 1407, 1409, 1688, 2600, 2838, 2846, 2983, 2995, 3139, 3323, 3329 and 3511.
[824] See for example UN Committee on the Elimination of Racial Discrimination, *LR et al., (represented by European Roma Rights Centre) v the Slovak Republic*, CERD/C/66/D/31/2003, Opinion, 10 March 2005, p. 12; UN Committee on the Elimination of Discrimination against Women, *General Recommendations Adopted by the Committee on the Elimination of Discrimination Against Women*, General Recommendation No 25: Article 4, paragraph 1, of the Convention (temporary special measures), thirtieth session (2004), para. 7; UN Human Rights Committee, *Derksen v*

useful for two reasons. First, the term "indirect discrimination" is a useful shorthand for the situation in which a policy, practice, act or omission of general application across various groups has a differential negative impact on a particular group (or groups). Secondly, human rights instruments are relevant for demonstrating that the term "discrimination" has long been understood as incorporating indirect as well as direct discrimination.

350. Despite the relevance of this concept to the crime of persecution, it is necessary to distinguish between, on the one hand, the ways in which indirect discrimination can create liability for a state under international human rights law, and, on the other, how it may be used in the context of a criminal charge of persecution.[825] It is correct that within human rights law, a state may be responsible in law for violating the prohibition on discrimination even where it does not intend to do so. However, this does not mean that indirect discrimination can only occur without intent. Indirect discrimination can occur either with or without intent.[826] And while it is true to say that a state can be liable under human rights law even in the absence of intent, it does not follow that any suggestion is made of individual criminal responsibility arising in the absence of intent. In international criminal law, intent is clearly required for indirect discrimination to create responsibility for persecution.

351. The Defence is therefore conflating different concepts when it claims that "[f]undamentally, the notion of indirect discrimination which does not require discriminatory intent is not compatible with the crime of persecution as defined at the time of the events."[827] "Indirect discrimination" is simply a term to refer to the specific type of discrimination which occurs through the differential *effects* of conduct. Recognition of this as a form of discrimination

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The Netherlands, CCPR/C/80/D/976/2001, Views, 15 June 2004; UN Human Rights Committee, *Althammer v Austria*, CCPR/C/78/D/998/2001, Views, 22 September 2003, para. 10.2.

[825] See ICTY *Prosecutor v Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras 470-471.

[826] See UN Human Rights Committee, *Althammer v Austria*, CCPR/C/78/D/998/2001, Views, 22 September 2003, para. 10.2; ECJ *Bilka—Kaufhaus GmbH v Karin Weber von Hartz*, Case 170/84, Judgment, 13 May 1986. See also Daniel Moeckli, "Equality and Non-Discrimination" in Daniel Moeckli, Sangeeta Shah, David Harris and Sandesh Sivakumaram (eds.), *International Human Rights Law*, (Oxford University Press 3rd ed.) 2017, p. 166, *Attachment 8*, which gives the example of literacy tests for job applicants being used as a pretext for disadvantaging particular ethnic groups. ("As is illustrated by the rulings in *Althammer* and *DH* described in Section 4.2, indirect discrimination is often equated with unintended discrimination. Conversely, it is normally assumed that where there is direct discrimination, there is a discriminatory intention. Although it is true that these concepts will often correlate, this is not always the case. There may be cases of direct discrimination – for example, the exclusion of pregnant women and mothers from certain types of work – where the intention is to protect the respective groups rather than to discriminate against them. On the other hand, a 'neutral' criterion such as a literacy test for job applicants may well be used as a pretext for excluding certain ethnic groups, amounting to intended indirect discrimination.").

[827] **F54** Appeal Brief, para. 956.

has been in existence since long before the shorthand term "indirect discrimination" was developed to refer to it.

9.5.2.2.2.2 Recognition of indirect discrimination as relevant to persecution by this Chamber

352. In Case 001, this Chamber did not need to determine whether the element of "discrimination in fact" in the crime of persecution could be established through indirect discrimination. Nonetheless, its explanations of what "discrimination" means in the context of persecution are helpful. In several parts of its Judgment the Chamber explained discrimination by reference to the *consequences* experienced by members of the group in question. Thus it referred to conduct "*resulting* in the intended discrimination",[828] to a "demonstration of actual discriminatory *consequences*"[829] and to "the requisite persecutory *consequences*".[830] [*emphasis added*]

353. These references appear to demonstrate that this Chamber considered it sufficient, for the purpose of proving "discrimination in fact" according to its meaning between 1975 and 1979, that the conduct in question had worse *consequences* for one group than for another. In other words, the crime against humanity of persecution could occur through indirect discrimination.

9.5.2.2.2.3 Indirect discrimination in customary international law in 1975-1979

354. Despite the Chamber's clarity, the Defence claims that at the time of the conduct the crime against humanity of persecution could only be committed through direct discrimination. It argues that indirect discrimination is a new concept which emerged only in the 1990s or later.[831] These arguments are demonstrably incorrect.

355. International practice in the early twentieth century shows that discrimination was understood as including indirect discrimination long before that term was coined to describe it. As far back as 1923, the Permanent Court of International Justice touched on this issue in an Advisory Opinion concerning the non-discrimination provisions contained in a Minority

[828] **Case 001– F28** Appeal Judgment, para. 263.
[829] **Case 001– F28** Appeal Judgment, para. 267.
[830] **Case 001– F28** Appeal Judgment, para. 276.
[831] **F54** Appeal Brief, para. 955.

treaty. In respect of a law which had the effect of evicting Poles of German descent (and which appears to have been intended for that purpose), the Court reasoned that:

> The facts that no racial discrimination appears in the text of the law of July 14th, 1920, and that in a few instances the law applies to non-German Polish nationals who took as purchasers from original holders of German race, make no substantial difference. Article 8 [guaranteeing "same treatment"] is designed to meet precisely such complaints as are made in the present case. There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.[832]

356. In 1929 the *Déclaration des Droits Internationaux de l'Homme* was adopted in New York by the Institute of International law. The Declaration pronounced that for equality to be effective and not merely nominal it must exclude direct and indirect discrimination.[833]

357. In two later Permanent Court of International Justice Advisory Opinions in 1932[834] and 1935[835] the Court, recalling its 1923 Opinion, re-emphasised the importance of equality both in law and in fact.

358. The UNESCO Convention against Discrimination in Education 1960 defined discrimination as:

> …any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the *purpose or effect* of nullifying or impairing equality of treatment in education…[836] [*emphasis added*]

359. The International Convention on the Elimination of All Forms of Racial Discrimination 1969 defined "racial discrimination" as:

> …any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of

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[832] Permanent Court of International Justice, *German Settlers in Poland*, Advisory Opinion, 10 September 1923, p. 24.
[833] *L'Institut De Droit International*, *Déclaration des droits internationaux de l'homme*, 12 October 1929, Article 5 ("*L'égalité prévue ne devra pas être nominale mais effective. Elle exclut toute discrimination directe ou indirecte*."). *Attachment 9*
[834] Permanent Court of International Justice, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 4 February 1932, p. 28.
[835] Permanent Court of International Justice, *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, pp. 17-21 examining a declaration granting Albanian minorities protections in law and in fact.
[836] UNESCO Convention against Discrimination in Education, 14 December 1960, Article 1.

> human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[837] [*emphasis added*]

360. In a 1974 judgment, the Court of Justice of the European Communities recognised that:

> The rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[838]

361. The International Convention on the Elimination of All forms of Discrimination Against Women, adopted in 1979 but drafted between 1976 and 1979,[839] adopted the following definition of discrimination:

> For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has *the effect or purpose* of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[840] [*emphasis added*]

362. Thus, the Defence's claim that no concept of indirect discrimination existed in international law before the decisions in cases such as *Simunek et al., v Czech Republic* in 1995,[841] and *D.H. and Others v Czech Republic* in 2007,[842] is incorrect. Although the term "indirect discrimination" was not yet in use, the notion of identifying prohibited discrimination by reference to the *effect* of policies or practices was long established. Indeed, the European Court of Human Right's decision in *D.H. and Others v Czech Republic* was in part based on the sources cited above, as well as other pre-1975 sources and caselaw.[843]

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[837] International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, Article 1(1).
[838] Court of Justice of the European Communities, *Giovanni Maria Sotgiu v Deutsche Bundespost*, Case 152-73, Judgement, 12 February 1974, summary para. 3, ground 11.
[839] Committee on the Elimination of Discrimination against Women, United Nations Fourth World Conference on Women, Progress Achieved in the Implementation of the Convention on the Elimination of all Forms of Discrimination against Women, A/CONF.177/7, 21 June 1995, para. 12.
[840] International Convention on the Elimination of All forms of Discrimination Against Women, 18 December 1979, Article 1.
[841] UN Human Rights Committee, *Simunek et al., v Czech Republic*, Communication No. 516/1992, 19 July 1995, pp. 157-162; **F54** Appeal Brief, fn. 1752.
[842] European Court of Human Rights (Grand Chamber), *D.H. and Others v The Czech Republic*, Application no. 57325/00, Judgment, 13 November 2007; **F54** Appeal Brief, para. 955.
[843] European Court of Human Rights (Grand Chamber), *D.H. and Others v The Czech Republic*, Application no. 57325/00, Judgment, 13 November 2007, paras 86, 92, 95, 101, 107.

363. The Defence's argument that indirect discrimination is a concept in human rights law and not in criminal law[844] is unpersuasive. Although international human rights law and international criminal law are distinct, they are not unrelated. It is long-established that careful reference to human rights concepts can be of use in interpreting the content of international crimes.[845] Where the crime against humanity of persecution is concerned, reference to human rights law concerning discrimination is particularly pertinent. The crime is linked to human rights standards both by reference to the tests applied for establishing gravity,[846] and the concept of discrimination. The latter concept is common to the definition of persecution and to human rights principles,[847] both having developed as a response to discriminatory atrocities committed before and during World War Two.[848]

9.5.2.2.2.4 Conclusion regarding indirect discrimination

364. For all the reasons above, equal treatment resulting in unequal consequences can amount to discrimination in fact such as to satisfy the *actus reus* requirement for persecution. The Trial Chamber therefore committed no legal error in finding that the consequences suffered by Buddhists and the Cham constituted discrimination in fact, regardless of arguments that "equal treatment" was applied to all. **Grounds 108, 121, 122, 144, 146** and **147** fail to establish a legal error in relation to the Trial Chamber's interpretation of "discrimination in fact".

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[844] **F54** Appeal Brief, para. 955.

[845] See for example in respect of the concept of torture: ICTY *Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 181; ICTY *Prosecutor v Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras 470-471.

[846] As set out in Section 9.5.2.1 above, at paras 333-334, one means of satisfying the gravity requirement for persecution is by reference to the breach of fundamental human rights.

[847] Universal Declaration of Human Rights, 10 December 1948, Articles 7 and 23; International Covenant on Civil and Political Rights, 16 December 1966, Articles 4, 20, 24 and 26; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Articles 2 and 10; International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966; International Convention on the Elimination of All forms of Discrimination Against Women, 18 December 1979.

[848] See for example Helen Brady and Ryan Liss, "The Evolution of Persecution as a Crime Against Humanity" in Morten Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping (eds), *Historical Origins of International Criminal Law: Volume 3*, (Torkel Opsahl Academic Epublisher, FICHL Publication Series No. 22), 2015, Section 12.2.4.2, pp. 497-498. ("In many ways crimes against humanity – persecution specifically – and the broader human rights movement that developed in earnest in the wake of the Second World War, have been mutually reinforcing. The crystallisation of the principle that international law's protection of the individual extends to treatment within a state – not shielded by the veil of state sovereignty – was driven in part by the post-war acceptance of the concept of crimes against humanity.") *Attachment 10*

9.5.2.2.3 Targeting of multiple groups distinguished from indiscriminate treatment

365. Discrimination in fact will not be made out where the harmful treatment is imposed *indiscriminately*.[849] Treatment is indiscriminate where people are targeted without the use of any discernible criteria.[850] Discrimination in fact will also not be made out where members of the group in question do not experience different treatment or different consequences when compared to the general population outside the group.[851]

366. At some points in the Appeal Brief (in **ground 126**,[852] **ground 137**[853] and **ground 141**[854]) the Defence appears to argue for a different requirement for the element of "discrimination in fact", namely a requirement that members of the group in question were the *only people* who suffered from harmful treatment:

    (i) Concerning Vietnamese prisoners in S-21, the Defence argues that they were not subject to discrimination in fact, in part because other foreign prisoners were also identified as "spies" and treated accordingly (**ground 126**);

    (ii) Concerning the execution of Cham people in Kang Meas district the Defence appears to argue (among other things) that this could not constitute persecution because not only Cham people, but some Khmer people also were killed[855] (**ground 137**);

    (iii) The Defence also submits that the Trial Chamber should have found that the transfer of Cham people during the Movement of Population 2 was not discriminatory since it was not limited to the Cham (**ground 141**).

367. These Defence arguments misconceive the caselaw on persecution, including this Chamber's decision in Case 002/01. Treatment does not become indiscriminate simply because multiple different groups within a population are subjected to it. The appropriate comparison to

[849] **Case 001– F28** Appeal Judgment, para. 277.
[850] **Case 001– F28** Appeal Judgment, para. 283.
[851] **F36** Case 002/01 Appeal Judgment, para. 701.
[852] **F54** Appeal Brief, paras 828-835.
[853] **F54** Appeal Brief, paras 899-910.
[854] **F54** Appeal Brief, paras 926-927.
[855] **F54** Appeal Brief, para. 908 ("Thus, SAMRETH Mony stated that he saw Cham and Khmer being taken to the pagoda from the Sambuor Meas cooperative, casting doubt on the specific nature of the alleged arrests and executions. Thus, he stated: 'from 1977 to 1979. Actually not only the Cham people were killed but also the Khmer people'.").

establish whether discrimination exists is between the alleged target group and the general population as a whole.

368. In Case 002/01 the Chamber ruled that New People had not been subjected to persecution during the Movement of Population 2 because they were not treated differently from other people. It explained its reasoning as follows:

> 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 affected exclusively or at least primarily "New People" and was therefore discriminatory, or that, in the course of the transfer, "New People" were treated differently from "Old People".[856]

369. The Lead Co-Lawyers agree with the OCP that the Defence has misconstrued this reasoning in attempting to present it as a new legal test for discrimination.[857] Rather than establishing a different test, the Chamber was merely identifying factual considerations relevant – though not necessarily determinative – in the application of the existing test.[858] In comparing the alleged target group (New People) to "Old People", the Chamber was using a shorthand for comparing New People to the general population (since all other people were considered "Old People"). Put differently, the fact that some other people are also subjected to harmful treatment does not undermine a finding of discrimination in fact. To rely again on the precedent from Nuremberg, the fact that suspected political opponents of the Nazis were targeted for detention and execution did not mean that the detention and execution of Jews was not discriminatory.[859]

370. Therefore, the Trial Chamber did not err when it determined the existence of discrimination in fact by considering whether a group was "specifically targeted".[860]

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[856] **F36** Case 002/01 Appeal Judgment, para. 701.
[857] **F54/1**, OCP Response Brief, paras 472-474; **F54** Appeal Brief, paras 926-927.
[858] See commentary to this effect in Guénaël Mettraux, *International Crimes: Law and Practice: Volume II: Crimes Against Humanity*, (Oxford University Press), 2020, Section 6.9.5.3.3, ("Mettraux, *Crimes Against Humanity"*), p. 649. *Attachment 11*
[859] *See* above Section 9.5.2.2.3 at paras 365-370.
[860] **E465** Trial Judgment, paras 3268, 3322 (referred to in **F54** Appeal Brief, para. 926 fn. 1683).

9.5.2.2.4 Targeting based on multiple factors

371. In several parts of the Appeal Brief (in **grounds 126**,[861] **137**[862] and **158**[863]), the Defence appears to argue that certain acts did not amount to "discrimination in fact" because victims were said to have been targeted for reasons other than their membership of the protected group:

(i) Regarding the detention of Vietnamese people in S-21, the Defence refers to evidence and findings of the Chamber that Vietnamese people were perceived as military and political enemies, and argues therefore that "race was not the reason for their arrest but rather their connection to an enemy country"[864] (**ground 126**).

(ii) The Defence argues that Vietnamese prisoners at S-21 could not have been persecuted on racial grounds because in Case 001 the Court held that they had been persecuted on political grounds (**ground 126**).[865]

(iii) Concerning Vietnamese people in Prey Veng and Svay Rieng the Defence argues that some of them might have been "targeted for other reasons as a result of their past activities"[866] (**ground 158**).

(iv) The Defence argues that the evidence did not support the finding that Cham people were rounded up for execution in Kang Meas district, but that in any event the evidence did not show "that people were arrested solely for the reason that they were Cham"[867] (**ground 137**).

372. These arguments are in part questions of fact, and the Lead Co-Lawyers refute several of the factual contentions and interpretations made by the Defence in these grounds. Those factual issues will be addressed below. However, even if the Defence's factual assumptions were correct, the arguments also raise a question about whether discrimination in fact occurs where a person is targeted for multiple reasons.

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[861] **F54** Appeal Brief, paras 828-831.
[862] **F54** Appeal Brief, paras 899-910.
[863] **F54** Appeal Brief, paras 1028-1050.
[864] **F54** Appeal Brief, paras 828-831.
[865] **F54** Appeal Brief, para. 833.
[866] **F54** Appeal Brief, paras 1037-1039.
[867] **F54** Appeal Brief, para. 900.

373. The Defence's position reveals a fundamental misconception regarding the nature of the element of "discrimination in fact". The Defence put forward a narrow concept of discrimination which implies that, in order to be classified as persecution, targeting must be singular, clear and cannot be in any way interlinked with any other characteristic or circumstance of the victim, nor explained by its perpetrators by reference to such factors.

374. The Lead Co-Lawyers note and agree with the point made by the OCP in relation to **ground 147**: it is entirely possible for members of a particular group to be targeted more than once, and for discrimination to occur on differing prohibited grounds each time.[868] However it is also possible that a single course of discriminatory conduct can involve victims being targeted for more than one reason. This can involve scenarios in which a combination of prohibited grounds co-exist (for example where members of a group are discriminated against on the basis of both racial and political grounds).[869] The ICC[870] and the ICTY[871] have both made findings of persecution on two or more discriminatory grounds in respect of the same conduct. It can also occur where prohibited grounds coexist with non-protected grounds of discrimination (for example a belief that the persons targeted are enemy combatants or a group that can be defined both politically and ethnically).[872]

9.5.2.3 Element 3: Intent to discriminate

375. As noted above, the intention required for persecution is the intent to discriminate on political, racial or religious grounds.[873]

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[868] See **F54/1** OCP Response Brief, para. 496.

[869] Indeed, history demonstrates that different types of persecutions tend to overlap in practice: United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, (HM Stationery Office), 1948, Chapter 9, p. 205 ("In the Far Eastern Charter there is no mention of 'persecutions on religious grounds', possibly because such violations by the Japanese Major War Criminals had not been committed. On the other hand, the relevant provision covers the same field as the Nuremberg Charter in regard to the comparatively more important 'persecutions on political or racial grounds'. In this connection it may be assumed that, in case any persecutions on religious grounds should be established and brought forward in the course of the proceedings, they could easily be included within the notion of persecution on political grounds. The example of the persecution of Jews in Nazi Germany, which motivated the express reference to persecution on religious grounds in the Nuremberg Charter, is a case in point. *Persecutions of this nature, embracing communities or groups of individuals akin on account of their religion, are always carried out in pursuance of a 'political' programme and a definite 'political' aim, so that in that general and wide sense they are invariably of a 'political' nature."*). [*emphasis added*] *Attachment 12*

[870] ICC *Prosecutor v Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 1009.

[871] ICTY *Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 438 and paras 489-90; ICTY *Prosecutor v Tadić et al.,* IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 714; ICTY *Prosecutor v Naletilić & Martinović,* IT-98-34-T, Judgement, 31 March 2003, para. 679.

[872] ICTR *Prosecutor v Nahimana et al.*, ICTR-99-52-T, Judgement and Sentence, 3 December 2003, para. 1071.

[873] See above para. 330.

9.5.2.3.1 A persecutory intent is not required

376. The Defence argues (in **ground 94**,[874] **ground 95**[875] and **ground 96**[876]) that persecution requires not only an intent to discriminate but also an intent to exclude the targeted group from society. The Lead Co-Lawyers note and agree with the OCP's submissions in response on this point which make clear that the legal position advocated by the Defence has no basis in law.[877]

377. The Lead Co-Lawyers add only that this argument was never made by the Defence during trial. Indeed, the Trial Chamber pointed out that the definition of persecution was "uncontested by the parties to this case".[878] Regarding the *mens rea* element of persecution, the Defence's Closing Brief cited the established Case 001 and 002/01 approach, and explained simply:

> 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.[879]

9.5.3 Grounds relating to specific factual conclusions

378. This section of the Brief responds to the Defence arguments concerning alleged factual errors relevant to the Trial Chamber's conclusions on the crime against humanity of persecution. It is organised by target group and type of persecution.

379. The grounds dealt with are: **ground 106** (political persecution of those associated with the former Khmer Republic in Tram Kak District),[880] **ground 107** (persecution of New People in Tram Kak District),[881] **ground 109** (persecution of Buddhists in Tram Kak District),[882] **ground 110** (persecution of the Vietnamese people in Tram Kak District),[883] **ground 114**

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[874] **F54** Appeal Brief, paras 641-655.
[875] **F54** Appeal Brief, para. 656.
[876] **F54** Appeal Brief, para. 657.
[877] **F54/1** OCP Response Brief, paras 377-382 (**ground 94**) and para. 383 (**ground 95** and **ground 96**).
[878] **E465** Trial Judgment, para. 713.
[879] **E457/6/4/1** KHIEU Samphân's Closing Brief (Case 002/02), para. 2185 citing **E313** Case 002/01 Trial Judgment, para. 427 and **Case 001– F28** Appeal Judgment, para. 226. KHIEU Samphân's Closing Brief defines "persecution" three times, never mentioning an intent to exclude targeted groups from society as part of the *mens rea*, see paras 1213, 1794 and 2185.
[880] **F54** Appeal Brief, paras 719-726.
[881] **F54** Appeal Brief, paras 727-742.
[882] **F54** Appeal Brief, paras 746-747.
[883] **F54** Appeal Brief, paras 748-755.

(persecution of real or perceived enemies in Trapeang Thma Dam),[884] **ground 118** (persecution of New People at the 1st January Dam Worksite),[885] **ground 119** (persecution of the New People at the 1st January Dam Worksite),[886] **ground 120** (persecution of those associated with the former Khmer Republic at the 1st January Dam Worksite),[887] **ground 126** (persecution of the Vietnamese prisoners in S-21),[888] **ground 130** (persecution of the Vietnamese prisoners in Au Kanseng Security Centre),[889] **ground 143** (persecution of the Cham people during the Movement of Population 2),[890] **ground 144** (persecution of the Cham people),[891] **ground 145** (persecution of the Cham people),[892] **ground 148** (persecution of the Cham people),[893] **ground 149** (persecution of the Cham people),[894] and **ground 158** (persecution of the Vietnamese people in Prey Veng and Svay Rieng).[895]

9.5.3.1 Political persecution of those associated with the former Khmer Republic

9.5.3.1.1 Overview

380. The Defence challenges the Trial Chamber's findings with respect to political persecution of those associated with the former Khmer Republic. The Lead Co-Lawyers limit their responses to issues contained in **ground 106** relating to Tram Kak and **ground 120** relating to the 1st January Dam Worksite. Aspects of these challenges are of particular interest to Civil Parties whose evidence the Defence seeks to undermine. Regarding factual errors alleged in **ground 125** in respect of political persecution of those associated with the former Khmer Republic in S-21[896] the Lead Co-Lawyers support the submissions of the OCP.[897]

381. At **ground 106**, the Defence challenges the reasonableness of the Trial Chamber's assessment of the evidence of orders to search for former Khmer Republic officials and arrest

[884] **F54** Appeal Brief, paras 763-765.
[885] **F54** Appeal Brief, paras 787-796.
[886] **F54** Appeal Brief, para. 797.
[887] **F54** Appeal Brief, paras 798-803.
[888] **F54** Appeal Brief, paras 828-835.
[889] **F54** Appeal Brief, paras 859-861.
[890] **F54** Appeal Brief, para. 932.
[891] **F54** Appeal Brief, paras 933-951.
[892] **F54** Appeal Brief, paras 952-953.
[893] **F54** Appeal Brief, paras 960-961.
[894] **F54** Appeal Brief, paras 962-963.
[895] **F54** Appeal Brief, paras 1028-1050.
[896] **F54** Appeal Brief, paras 825-827 (**ground 125**).
[897] **F54/1** OCP Response Brief, paras 844-850 (**ground 125**).

them,[898] and particularly challenges the Trial Chamber's reliance on the evidence of Civil Party SENG Soeun.[899] Similarly, the Defence challenges the underlying persecutory acts with respect to the 1st January Dam worksite at **ground 120**, including the Trial Chamber's reliance on the evidence of Civil Party HUN Sethany.[900]

9.5.3.1.2 Tram Kak

382. In **ground 106** the Defence argues that the Trial Chamber erred by finding political persecution of former Khmer Republic officials in Tram Kak District, claiming that the *actus reus* of the crime was not proved.[901]

383. At the outset, the Lead Co-Lawyers note that the Defence has not demonstrated that the issue in question affected the outcome concerning KHIEU Samphân's conviction for political persecution of those associated with the former Khmer Republic in Tram Kak District. The legal finding of political persecution in paragraph 1178 of the Trial Judgment, which the Defence challenges, relies on the factual findings reached in paragraph 1175 of the Trial Judgment, that former Khmer Republic officials were arrested and killed. However, paragraph 1175 includes findings relating to two different periods. The Trial Chamber found that former Khmer Republic officials were first persecuted in the aftermath of 17 April 1975, and that they were again persecuted in the period following May/June 1977. The Defence challenges only the finding regarding the latter period. Thus, even if the Defence had successfully demonstrated a factual error concerning the finding of persecution after May/June 1977 (which, for the reasons set out below and in the OCP Response,[902] it has not) a reversal of this factual conclusion would not impact the overall finding of political persecution concerning former Khmer Republic officials in Tram Kak District.

384. The Defence specifically disputes the Trial Chamber's findings that from approximately April/May 1977, former Khmer Republic officials were targeted for arrest and killed.[903] That finding was based on factual conclusions which the Trial Chamber had reached previously

[898] **F54** Appeal Brief, para. 720.
[899] **F54** Appeal Brief, para. 721.
[900] **F54** Appeal Brief, paras 798-803.
[901] **F54** Appeal Brief, paras 719-726.
[902] **F54/1** OCP Response Brief, paras 429-436.
[903] **F54** Appeal Brief, para. 720; **E465** Trial Judgment, para. 1175.

in the Trial Judgment. The Defence has selectively referred to five paragraphs of the Trial Chamber's factual conclusions[904] which it claims are of a low probative value.

385. The Lead Co-Lawyers agree with the submissions of the OCP on this ground,[905] but contribute the following limited submissions, particularly in relation to Civil Party evidence.

9.5.3.1.2.1 Actus reus

386. The Defence refers to paragraph 1083 of the Trial Judgment, together with four other paragraphs, as failing to sufficiently establish the crime of political persecution.[906] Paragraph 1083 concerns evidence given by Civil Parties THANN Thim and CHOU Koemlan (as well as by witnesses) about the ways in which arrests were carried out.[907] The Lead Co-Lawyers have assumed that reference to this paragraph is an error, considering that the associated footnote in the Appeal Brief instead refers to paragraph 1080,[908] and given that paragraph 1083 of the Trial Judgment was not relied on by the Trial Chamber in its findings in paragraph 1175 regarding arrests and killings from April/May 1977.[909] If the reference is not in error it should be dismissed as insufficiently substantiated and as having no bearing on the Trial Chamber's conclusions in paragraph 1175.

9.5.3.1.2.2 Intention to discriminate

387. One of the five Trial Judgment paragraphs challenged by the Defence concerns Civil Party SENG Soeun's evidence about a political session he attended at which a battalion commander named Bao announced that former Khmer Republic officials would not be spared.[910] The Defence argues that this evidence is "out-of-scope" because the session occurred outside Tram Kak District, that it has no probative value because the date of the political session is unknown and because Civil Party SENG Seoun "indicated that he did not know whether Bao was acting on his own account or if he was following orders".[911] These arguments must be rejected for the reasons which follow.

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[904] **E465** Trial Judgment, paras 1062, 1063, 1080, 1081 and 2813 as referenced in **F54** Appeal Brief, para. 720.
[905] **F54/1** OCP Response Brief, paras 429-436.
[906] **F54** Appeal Brief, para. 720.
[907] See **E465** Trial Judgment, para. 1083.
[908] **F54** Appeal Brief, fn. 1271.
[909] **E465** Trial Judgment, para. 1175.
[910] **F54** Appeal Brief, para. 721; **E465** Trial Judgment, para. 1062.
[911] **F54** Appeal Brief, para. 721.

388. First, for the reasons explained by the OCP, there is no prohibition on the use of evidence relating to events outside the Closing Order, if the evidence is relevant to crimes which are within scope.[912]

389. Moreover, the Defence has not demonstrated that Civil Party SENG Soeun's evidence was of low probative value. The Appeal Brief points to no reason personal to Civil Party SENG Soeun, nor to any inconsistencies in his evidence, to explain why his testimony should be given less weight. The only argument made is that Civil Party SENG Soeun's account lacked precision on two specific details, *i.e.* he did not recall the exact date of the political session and he did not know whether battalion commander Bao was acting on orders.[913]

390. The Lead Co-Lawyers note that Civil Party SENG Soeun's evidence was tested on this subject during questioning by the NUON Chea Defence.[914] His testimony was consistent throughout regarding the material issues: that the session happened and that he was instructed by the commander that former Khmer Republic officials would not be spared. He described his understanding from the session that officials and soldiers from the Lon Nol and Sihanouk regimes "would not be spared. They needed to be smashed and those were considered as the targets to be smashed. I received this kind of instruction during the study sessions I attended."[915] He stated that he had learned of this policy at a particular study session.[916] Despite his difficulty in recalling the date of the session, under questioning Civil Party SENG Soeun clarified that it took place after 17 April 1975,[917] the session's subject was cleansing,[918] and it was his Battalion commander Bao who had the "responsibility" to

[912] **F54/1** OCP Response Brief, para. 432.
[913] **F54** Appeal Brief, para. 721.
[914] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 36 line 9 – p. 42 line 5 between [10.45.12] and [10.59.55].
[915] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 53 line 24 – p. 54 line 5 after [13.43.41].
[916] Civil Party SENG Soeun also provided a detailed explanation of the differences between a political "session" as opposed to an education session or "school". See **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 38 lines 15-22 after [10.50.55] ("At that time, it was not a school. It was simply a session. A session would be opened for three days. At the school, the study would last for seven <to 10> days. <The session that I attended was a short political session to educate the lower-ranking leaders about the policy of the CPK. In> my unit, <there was a person who> had the responsibility to launch such a political study session to its members. <His name was Bao. He was the commander of> my battalion.").
[917] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 37 line 19 after [10.46.34].
[918] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 38 line 2 before [10.49.23].

"launch" the session[919] and who led the session's lectures.[920] When asked about a matter of which he was not aware, including the subject of Bao's instructions from higher up, Civil Party SENG Soeun answered with honesty and candour.[921]

391. The Trial Chamber was permitted to rely on Civil Party SENG Soeun's evidence that this meeting occurred, even if its precise date was not known. As it was established that the session happened after 17 April 1975,[922] the specific date of the session is not material. Given the passage of time, Civil Party SENG Soeun's inability to recall a precise date is also not a reason to doubt the credibility of his evidence.

392. Turning to whether Bao was acting on instructions, Civil Party SENG Soeun's personal lack of knowledge on this question is also immaterial. The Trial Chamber considered Civil Party SENG Soeun's evidence together with other evidence, from witnesses and documents, which demonstrated that there was a concerted effort to target those associated with the former Khmer Republic.[923]

393. The Defence has not shown that the Trial Chamber was unreasonable to rely on Civil Party SENG Soeun's evidence, or that the error alleged had a material impact on the verdict.

9.5.3.1.3 1st January Dam

394. The Trial Chamber found that there was political persecution against those associated with the former Khmer Republic at the 1st January Dam Worksite. The Defence challenges that finding (**ground 120**)[924] by arguing that the *actus reus* of the crime was not sufficiently established. The Defence appears to argue that: (1) the Trial Chamber's findings regarding the disappearance of Civil Party HUN Sethany's father were not reasonable in light of the available evidence;[925] (2) that the Trial Chamber's use of Witness UTH Sen's evidence to find that a group of former Khmer Republic officials had been disappeared was

[919] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 38 lines 19-22 after [10.50.55] and p. 41 lines 11-13 after [10.57.15].
[920] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 39 lines 3-4 after [10.50.55].
[921] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 39 lines 5-11 after [10.50.55].
[922] **E465** Trial Judgment, para. 1062. See **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party SENG Soeun), p. 37 lines 16-19 after [10.46.34] ("So my question is, did you hear that officials from – or soldiers from the former regime would not be spared before 17 April '75, or after 17 April '75? A. It was after 17 April.").
[923] **E465** Trial Judgment, paras 1061-1063. See also paras 1080-1081, 1175.
[924] **F54** Appeal Brief, paras 798-803.
[925] **F54** Appeal Brief, paras 800-801.

unreasonable;[926] and (3) that the Chamber erred overall in finding that there was a practice of identifying and arresting former Khmer Republic officials.[927] The Lead Co-Lawyers agree with the OCP submissions refuting this ground,[928] but make the following submission specifically in respect of Civil Party HUN Sethany's testimony.

395. The Trial Chamber observed that Civil Party HUN Sethany "testified that her father, who had been a teacher during the LON Nol regime, was arrested at the 1st January Dam and presumed killed at Baray Choan Pagoda".[929] She explained that one day her siblings came to tell her that her father had been taken away and that they understood that he had been killed; her father never returned.[930]

396. The Defence's challenge to this evidence is unclear. It does not specify whether it challenges the Trial Chamber's finding regarding the fate of Civil Party HUN Sethany's father; or whether it accepts that finding but questions the finding that he was targeted on political grounds. The Defence merely asserts that it was unreasonable for the Trial Chamber to rely on her account because (in the view of the Defence) (i) it was hearsay;[931] and (ii) it was uncorroborated.[932]

397. The claim that Civil Party HUN Sethany's evidence should be discounted because it is hearsay should be rejected. First, the most important aspects of Civil Party HUN Sethany's evidence are not hearsay. She gave direct evidence, based on her own observation, that her father disappeared and never returned.[933] She also spoke from her own knowledge that her father had been associated with the former regime as he was a teacher during the former Khmer Republic[934] and that he was opposed to the Khmer Rouge.[935] She gave evidence that

[926] **F54** Appeal Brief, para. 802.
[927] **F54** Appeal Brief, paras 801, 803.
[928] **F54/1** OCP Response Brief, paras 437-443.
[929] **E465** Trial Judgment, para. 1662; **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 17 line 11 – p. 18 line 23 after [09.50.06], p. 36 line 12 – p. 38 line 15 after [11.06.10]. See also **E465** Trial Judgment, para. 1690 (the Trial Chamber's legal findings referring to that evidence).
[930] See especially **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 17 line 3 – p. 19 line 9 after [09.48.10], p. 31 line 16 – p. 34 line 21 before [11.01.32], p. 44 lines 20-22 before [11.31.30].
[931] **F54** Appeal Brief, para. 800.
[932] **F54** Appeal Brief, para. 801.
[933] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany) p. 17 line 20 – p. 18 line 14 after [09.50.06], p. 32 lines 2-4 after [10.53.02] and p. 33 lines 11-13 after [10.55.55].
[934] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 33 line 1-23 before [10.59.14]
[935] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 33 line 25 – p. 34 line 5 after [10.59.14].

her father was terrified of what they would do to him and his family.[936] Although Civil Party HUN Sethany explained that she knew this because she overheard a conversation between her parents, this does not mean that the evidence is "hearsay".[937] It is direct evidence from Civil Party HUN Sethany regarding her own observations of her father's state of mind. She also explained in court how her father had been targeted from the beginning of the regime.[938]

398. Moreover, although other parts of HUN Sethany's account are hearsay, the Trial Chamber was entitled to assess her evidence on a case-by-case basis.[939] In this instance, Civil Party HUN Sethany recounted multiple consistent original sources of the information. She clearly stated that she heard about the arrest from her younger siblings who witnessed it.[940] Villagers also told her that her father had been killed.[941] Her father was believed to have been killed at Baray Choan Dek Pagoda and other people informed Civil Party HUN Sethany that this was a known site for executions.[942] The Defence put no questions to Civil Party HUN Sethany regarding her father.

399. The overwhelming inference that Civil Party HUN Sethany's father was executed because of his link to the former regime is further reinforced by the disappearance and presumed execution of her mother and five of her siblings only three months later.[943] Civil Party HUN Sethany gave direct evidence that her mother and siblings disappeared on 7 July 1977 and that five days later she saw her siblings' clothes being dried by someone else.[944] She had assisted her mother to pack for a move to a new piece of land and told her mother to write

[936] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 34 lines 5-20 before [11.01.32].
[937] See Section 8.3.1 above at paras 216-228 esp. at paras 221-223.
[938] **E1/305.1** [Corrected 1] T., 26 May 2015 (Civil Party HUN Sethany), p. 94 lines 8-16 before [15.44.13].
[939] See Section 8.3.1 above at paras 216-228.
[940] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 17 line 24 – p. 18 line 12 after [09.50.06], p. 31 line 16 – p. 32 line 9 before [10.55.55].
[941] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 18 lines 21-23 after [09.52.41] ("Villagers who would come and go to my place told me that -- told him that my father was taken away and killed.").
[942] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 17 lines 3-13 after [09.48.10].
[943] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 36 line 12 – p. 38 line 15 after [11.06.10]. Although the Civil Party subsequently referred two siblings who went with her mother (p. 38 line 24 after [11.13.04]), the Lead Co-Lawyers understand her to have been indicating that the two siblings in the photograph she was being shown were among the five siblings who were killed with her mother, and whom she lists and names in **E3/4790** Supplementary Information of Civil Party Applicant (Civil Party HUN Sethany), 8 November 2009, ERN (En) 00940139-00940140.
[944] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 37 lines 18-19 after [11.09.37] ("I recall clearly that the day that my mother and younger siblings went away, it was on 7th of <July> of '77."), p. 38 lines 10-15 after [11.10.54].

when she arrived so that Civil Party HUN Sethany could visit.[945] She personally observed her mother and siblings leave with other villagers in an ox cart, the driver of which was behaving strangely.[946] After being told by a friend that her mother and siblings had been killed, she observed their clothing in the possession of others.[947] The driver of the ox cart confirmed to her that her family had been killed.[948]

400. When Civil Party HUN Sethany's evidence is considered holistically, it is clear that although parts of it were hearsay, this is not sufficient to demonstrate that it was unreasonable for the Trial Chamber to rely on it.

401. Secondly, the Defence's claim that Civil Party HUN Sethany's evidence should be dismissed for lack of corroboration is a mere assertion and clearly wrong. The Trial Chamber's reasons make clear that its findings of a practice of targeting former Khmer Republic officials at the 1st January Worksite were not based on Civil Party HUN Sethany's evidence alone.[949] Her evidence was supported by evidence from Witnesses OR Ho, YOU Vann, PRAK Yut and UTH Seng.[950] The suggestion that the Trial Chamber found a "pseudo 'policy'" based solely on the testimony of a single Civil Party,[951] ignores the wider context and the Trial Chamber's findings that "a policy targeting *all* Khmer Republic officials and their family members for discriminatory treatment existed throughout the DK period".[952] [*emphasis original*]

9.5.3.2 Political persecution of New People

9.5.3.2.1 Overview

402. In **ground 107** (Tram Kak),[953] **ground 114** (Trapeang Thma Dam),[954] and **ground 118** (1st January Dam),[955] the Defence argues that the Trial Chamber erred in fact when it found that the *actus reus* of persecution was satisfied regarding the political persecution of New People.

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[945] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 36 line 19 – p. 37 line 1 before [11.09.37].
[946] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 37 lines 14-25 after [11.09.37].
[947] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 38 lines 2-15 after [11.10.54].
[948] **E1/306.1** [Corrected 1] T., 27 May 2015 (Civil Party HUN Sethany), p. 38 line 24 – p. 39 line 7 after [11.13.04].
[949] **E465** Trial Judgment, paras 1660-1663 and 1690.
[950] **E465** Trial Judgment, paras 1660-1663 (factual findings), paras 1685-1691 (legal findings).
[951] **F54** Appeal Brief, para. 801.
[952] **E465** Trial Judgment, para. 4059.
[953] **F54** Appeal Brief, paras 727-742.
[954] **F54** Appeal Brief, paras 763-765.
[955] **F54** Appeal Brief, paras 737-796.

403. At the outset the Lead Co-Lawyers respond to a common argument raised throughout the Appeal Brief in relation to the Trial Chamber's assessment of evidence regarding these crimes, namely that more weight was given to the evidence of New People than that of Base People, leading the Trial Chamber into error.[956] The Trial Chamber explicitly acknowledged and evaluated the accounts of Base People, but having weighed all the evidence nonetheless accepted the evidence of witnesses and Civil Parties who had been New People.[957] The Trial Chamber is the body charged with hearing the evidence and is best placed to consider any divergences in testimony and assign weight appropriately.[958] The Defence has shown no error in the Trial Chamber's assessments regarding these witnesses.

9.5.3.2.2 Tram Kak

404. The Trial Chamber found that political persecution as against New People took place in the Tram Kak District.[959] In **ground 107**, the Defence argues that there was no "discrimination in fact against NP in TK absent any evidence".[960]

405. The OCP Response to this ground highlights the available evidence and concludes that the Trial Chamber made a reasonable finding of discrimination in fact.[961] The Lead Co-Lawyers agree in broad terms with the OCP and limit their Response to Defence arguments which concern specific Civil Parties.

406. The Trial Chamber's conclusions regarding discrimination in fact against New People in Tram Kak are summarised in paragraph 1177 of the Trial Judgment. The Trial Chamber relied on its factual findings that: (i) New People received less food than Base People; (ii) Base People generally enjoyed better working conditions than New People; (iii) New People were subject to "miserable treatment"; and (iv) New People were targeted for arrest for innocuous thoughts, speech or conduct considered to be contrary to the revolution.[962]

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[956] See for example **F54** Appeal Brief, paras 728, 730, 791.
[957] **E465** Trial Judgment, para. 1444 and para. 925.
[958] See **Case 001– F28** Appeal Judgment, para. 17; **F36** Case 002/01 Appeal Judgment, para. 89 fn. 193.
[959] **E465** Trial Judgment, paras 1168-1179.
[960] **F54** Appeal Brief, paras 727-742.
[961] **F54/1** OCP Response Brief, paras 787-799.
[962] **E465** Trial Judgment, para. 1177.

407. The Defence challenges these four findings, including by challenging the Trial Chamber's assessment of Civil Party evidence in relation to each.[963] The Lead Co-Lawyers address these challenges in turn below.

408. The Lead Co-Lawyers also note the arguments raised by the Defence in relation to mobile youth units[964] but consider these of minimal relevance. Findings on mobile units were not directly relied on by the Trial Chamber in reaching its conclusions that New People experienced discrimination in fact in Tram Kak.[965] Instead the question of mobile units was only one of the aspects considered by the Trial Chamber in reaching its broader findings about working conditions,[966] addressed below. An attack on the Trial Chamber's specific finding regarding mobile units can have no impact on the conclusion regarding discrimination in fact.

9.5.3.2.2.1 Access to food

409. The Trial Chamber concluded that in Tram Kak District New People received less food than Base people.[967] The Defence argues that this finding constituted an error of fact[968] and focuses its challenges on the evidence of Civil Party TAK Sann and Witnesses PECH Chim and RIEL Son. These submissions respond to the Defence arguments concerning Civil Party TAK Sann. The Lead Co-Lawyers submit that the Defence has selectively referred to evidence without looking at the totality of the evidence, and has not demonstrated that no reasonable trier of fact could decide otherwise.

410. The Defence claims that Civil Party TAK Sann "was confused" and therefore lacks credibility, and that "she did not explain how she arrived at the conclusion that NP received a little less food than BP."[969] No explanation or transcript reference is provided by the Defence in support of the assertion that Civil Party TAK Sann was "confused" in her evidence. This argument must be deemed to be unsubstantiated.

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[963] **F54** Appeal Brief, paras 728-733 and 735-742.
[964] **F54** Appeal Brief, para. 734; **E465** Trial Judgment, para. 1020.
[965] Indeed, paragraph 1176 of the Trial Judgment explicitly notes that the evidence did not address the basis on which persons were assigned to mobile units. See **E465** Trial Judgment, para. 1176.
[966] **E465** Trial Judgment, paras 1017-1020 (referred to in support of general conclusions on working conditions in para. 1177).
[967] **E465** Trial Judgment, para. 1177 (relying on its findings in paras 1009 and 1016).
[968] **F54** Appeal Brief, paras 728-731.
[969] **F54** Appeal Brief, para. 729.

411. In fact, Civil Party TAK Sann's testimony concerning differentiated rations was clear. Under questioning from Defence Counsel for NUON Chea, she responded that New People received less food than Base People; and she knew this because she witnessed it herself.[970] "The food ration was not equal. For Base People, they had more food. And as for us, we were New People, our food was less."[971] Contrary to the Defence's assertion that she did not explain how she knew this, she explicitly clarified that she knew it because she witnessed it with her own eyes during communal meals.[972]

412. The Lead Co-Lawyers therefore submit that the Defence submissions misrepresent Civil Party TAK Sann's evidence, and provide no tenable reason why the Trial Chamber should not have relied on it.

413. Finally, the Lead Co-Lawyers note that the Defence submissions misrepresent the overall evidentiary picture on differentiated access to food. As the OCP points out, the Defence attacks only two sources of inculpatory evidence.[973] The Lead Co-Lawyers emphasise that other Civil Parties also gave evidence that New People received less food in Tram Kak District, including Civil Parties CHOU Koemlan,[974] OEM Saroeurn,[975] and IM Vannak.[976]

414. The Defence has not shown, or indeed even argued, why the Trial Chamber was unreasonable to reach the findings that it did.

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[970] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 43 line 24 – p. 46 line 22 after [14.06.34].
[971] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 45 lines 21-22 after [14.11.51].
[972] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 45 line 23 – p. 46 line 5 after [14.11.51] ("Q. And how were you able to determine this? How were you able to see with your own eyes that that was the situation? A. I had foods and I had meals, so I could witness it. Q. How were you able to witness that you had less food than other people? A. I had meal with other people in the dining hall. We were sitting at the table and we were sitting close to each other. So <> I could see that <>.").
[973] **F54/1**, OCP Response Brief, para. 790.
[974] **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party CHOU Koemlan), p. 47 lines 18-21 after [11.15.46], p. 48 lines 7-8 after [11.18.25], p. 60 lines 3-11 after [11.50.25], p. 61 lines 10-16 and lines 19-21 after [11.53.11], p. 78 lines 8-10 after [14.08.37], p. 81 lines 20–25 after [14.17.48] (" I already told the Chamber that New and Base People had to go to work at their worksites. However, their food rations were different, because the Base People had their reserve meal or food <at their homes>. As for New People we could only have meal as we were provided and we had the same work. We went to work at the worksites. Sometimes we faced hunger."); **E1/253.1** [Corrected 1] T., 27 January 2015 (Civil Party CHOU Koemlan), p. 10 line 22 – p. 11 line 1 before [09.31.28].
[975] **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 12 line 25 – p. 13 line 1 after [09.34.24] ("Base People, they could have enough <rice>. As for 17 April People, they had only gruel."), p. 46 line 17 – p. 50 line 18 after [11.11.37].
[976] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 91 lines 13-16 after [15.27.37] ("Q. So, were there children's units for Base People children, and then children's units for New People children? A. Yes, there were different units. And the work was not the same in each unit neither was the food ration.").

9.5.3.2.2.2 Working conditions

415. The Trial Chamber concluded that "working conditions varied depending on a person's categorisation, with Full-Rights Persons generally enjoying better conditions".[977] In challenging this conclusion, the Defence argues that harsh working conditions were not specific to New People. It criticises the Trial Chamber's reliance on the evidence of Civil Parties BUN Saroeun, TAK Sann and EAM Yen, claiming that even if their evidence established harsh working conditions, it did not establish differentiated treatment.[978]

416. Civil Parties EAM Yen and BUN Saroeun testified about their extremely difficult working conditions.[979] Civil Party EAM Yen was separated from her parents and forced to work hard long hours without enough food.[980] She was underfed, "overworked"[981] and made to work "at day time and night time."[982] Civil Party BUN Saroeun described struggling to flatten termite mounds with his bare hands.[983] In his children's unit he was also forced to work long hours with insufficient food.[984] Although neither Civil Party directly addressed the question of how their work compared to that of Base People (neither was asked),[985] the fact that they did not provide evidence on the subject does not undermine the Trial Chamber's conclusion. The Trial Chamber was entitled to rely on their evidence concerning the severity of their working conditions to corroborate other evidence, including evidence which made a direct comparison between the working conditions of New People and Base People.

417. Civil Party TAK Sann was a person who gave such specific evidence comparing working conditions. Contrary to the Defence's submissions, she explicitly addressed the difference between New People's working conditions and those of Base People: "…for us [New People]

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[977] **E465** Trial Judgment, para. 1177 (referring to paras 1017-1020).
[978] **F54** Appeal Brief, para. 733.
[979] **E465** Trial Judgment, para. 1018.
[980] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party EAM Yen), p. 57 lines 15 – 18 before [15.05.41].
[981] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party EAM Yen), p. 60 lines 18-19 before [15.13.23].
[982] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party EAM Yen), p. 61 lines 9-10 before [15.15.15].
[983] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 34 lines 10-13 after [10.45.17] ("<Because we were working under the sun, there> were blisters on our hands and even tractors have a hard time flattening termite mounds, so we did not have the choice, we had to do our job otherwise we would not be fed.").
[984] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 35 lines 1-6 after [10.46.39] ("We had to work very hard, we had to get up early in the morning <at around 6 a.m.> and we had to work <until 11 a.m., and we resumed> at around 1 o'clock and then we would finish at 5 o'clock in the afternoon, so all this in exchange for one bowl of rice porridge. No, that was not enough <compared to the workload we were required to do>.").
[985] See **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party EAM Yen), pp. 55-67 after [15.00.14] and **E1/287.1** [Corrected 1] T., 2 April 2015 (Civil party EAM Yen), pp. 3-24 before [10.12.57]; and **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), pp. 22-51 after [10.18.30].

we had to work harder than them because they did not work as hard as we did because they were the Base People."[986]

418. This testimony was also corroborated by other evidence, relied on by the Trial Chamber elsewhere in the Trial Judgment, that Base People held all leadership positions in Tram Kak District.[987] This included supervisory roles in work units, meaning that Base People oversaw the work being done by New People, creating a clear differential in the nature of the work done. Civil Party RY Pov testified that "[d]uring the Khmer Rouge regime no one was allowed to be free and not working, and all the 17 April People and the people from Vietnam worked very hard. And only the Base People, that is our unit chief or group chief, did not work because they only monitored our work. Whether they were older people or whether they were young children, they did not work and they only monitored how hard we worked."[988] Evidence to the same effect was given by Civil Parties BENG Boeun[989] and TAK Sann.[990]

419. The Lead Co-Lawyers agree with the OCP that the specific evidence above was also corroborated by other evidence regarding the broader context.[991] The Defence has failed to show that the Trial Chamber's conclusion was not open to a reasonable trier of fact.

9.5.3.2.2.3 "Miserable" treatment

420. The Trial Chamber accepted "that New People were exposed to miserable treatment and treated as 'worthless slaves'", explaining that this included being hit and cursed by Base People.[992] The Trial Chamber's conclusion refers to findings it based on the evidence of a number of Civil Parties.[993] The Defence challenges this finding as unjustified, claiming that the Trial Chamber should not have relied on evidence given by Civil Party RY Pov.[994]

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[986] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 39 line 25 – p. 40 line 6 after [13.57.01].
[987] **E465** Trial Judgment, para. 1002.
[988] **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 65 lines 4-10 after [13.59.11]. See also p. 16 lines 10-16 before [09.47.00].
[989] **E1/287.1** [Corrected 1] T., 2 April 2015 (Civil party BENG Boeun), p. 72 lines 3-4 after [14.40.35].
[990] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 39 line 25 – p. 40 line 3 after [13.57.01].
[991] **F54/1**, OCP Response Brief, paras 793-794.
[992] **E465** Trial Judgment, para. 1177 referring to findings in para. 1023; **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 15 lines 5-15 after [09.43.04].
[993] **E465** Trial Judgment, para. 1023.
[994] **F54** Appeal Brief, paras 735-738.

421. The Defence criticises the Trial Chamber for failing to assess Civil Party RY Pov's credibility in its reasons, but gives no reason why it should have done so.[995] This argument must fail, for reasons which the Lead Co-Lawyers address later in this Brief.[996] In any event, Civil Party RY Pov's testimony was corroborated by other evidence before the Trial Chamber, including the evidence of Civil Party IM Vannak. She testified about New People children being beaten by Base People children,[997] a practice which she said happened "quite often",[998] and explained that "we were New People and they hated us. They were always looking for the small fault in order to beat us."[999] Civil Party IM Vannak's evidence was considered reliable by the Trial Chamber and does not appear to have been called into question by the Defence.

422. The Trial Chamber reasonably relied on the evidence of Civil Parties RY Pov and IM Vannak to make this finding and committed no error of fact in doing so.

9.5.3.2.2.4 Arrest for innocuous thoughts, speech or conduct

423. The Trial Chamber concluded that New People "were targeted for arrest for innocuous thoughts, speech or conduct considered to be contrary to the revolution."[1000] It relied on documentary evidence and testimony, including from Civil Parties THANN Thim and BUN Saroeun.[1001]

424. The Defence alleges that the Trial Chamber was unreasonable to make findings that the New People were more likely than Base People to be subject to arrests.[1002] The Defence argues that the evidence of Civil Parties THANN Thim and BUN Saroeun was insufficient as a basis for the Trial Chamber's findings because it was too personalised to them and could not be generalised.[1003] This is not the case.

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[995] **F54** Appeal Brief, para. 736.
[996] See Section 10.3 at paras 748-751.
[997] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 70 line 7 – p. 71 line 5 after [14.17.58] and relied on by the Trial Chamber at **E465** Trial Judgment, para. 1023.
[998] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 70 line 19 before [14.20.20].
[999] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 72 lines 15 – 17 before [14.25.10].
[1000] **E465** Trial Judgment, para. 1177 referring to findings in paras 1055 and 1080.
[1001] **E465** Trial Judgment, paras 1055 and 1080.
[1002] **F54** Appeal Brief, para. 739-742.
[1003] **F54** Appeal Brief, para. 740.

425. As highlighted by the OCP,[1004] Civil Party THANN Thim did testify about general practices. He made clear that New People were distrusted and surveilled in general:

> [The militiamen] did not trust New People. They did not trust New People at all. We were watched and we were under surveillance so we were not trusted. <They kept making inquiries about us as they called it 'making a cold-water soup'. They constantly kept their eye on us and never trusted us.>[1005]

426. Civil Party BUN Saroeun testified that he was "being watched on a permanent basis".[1006] He also explained that surveillance occurred through the work unit leadership: "[t]here were leaders who would lead us to work, who would watch over us, but we had to work…".[1007] Read together with the evidence that only Base People held these supervisory roles,[1008] this testimony does support a finding regarding a generalised practice.

427. The evidence of Civil Parties THANN Thim and BUN Saroeun did not stand alone. The Trial Chamber relied on it together with documentary evidence as well as the accounts of witnesses including VONG Sarun, CHANG Srey Mom and EK Hoeun.[1009] Other consistent and reliable evidence was also available to support these findings, such as the evidence of Civil Party CHOU Koemlan. Her evidence corroborated Civil Party BUN Saroeun's regarding the use of work supervision as a means of monitoring and controlling New People.[1010] She testified that New People were under surveillance and if they committed any infractions they would be killed or disappeared:

> [W]henever our infractions were found, we were taken to a study session. New People would be taken away and killed, as for Base People, I never saw Base People disappear. I was there <three years> eight months and <three days,> I did not see Base People disappear.[1011]

[1004] **F54/1**, OCP Response Brief, para. 799.
[1005] **E1/289.1** [Corrected 1] T., 21 April 2015 (Civil Party THANN Thim), p. 27 lines 6-10 after [10.35.16].
[1006] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 37 lines 4-13 after [10.53.18].
[1007] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 35 lines 10-14 after [10.48.05].
[1008] See para. 418 above.
[1009] **E465** Trial Judgment, para. 1055.
[1010] **E1/253.1** [Corrected 2] T., 27 January 2015 (Civil Party CHOU Koemlan), p. 19 lines 2–7 before [09.54.27] ("Actually, we worked together, and for Base People, <the 18 April People,> would keep an eye on New People. They would observe whether New People are complaining <against their line, such as> food, <and> work. And if New People mistakenly said something, we would be taken to a study session, or to be refashioned. So, Base People, they were in charge of New People.").
[1011] **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party CHOU Koemlan), p. 80 line 15 – p. 81 line 1 before and after [14.15.48] (The evidence continued, "Q. Did I understand you correctly when you said that New People were

428. Civil Party CHOU Koemlan further explained that New People were accused of being lazy and this was a reason for being killed; they therefore lived in fear and did whatever they could to follow orders in order to survive.[1012] This evidence is consistent with the testimony of Civil Party OEM Saroeurn that her brother was criticised as a New Person and had asked for additional food, with the consequence that he was sent for re-education and disappeared.[1013]

9.5.3.2.2.5 Other evidence and the need for a cumulative assessment

429. For the reasons set out above, as well as those identified by the OCP,[1014] the Defence has not demonstrated an error in any of the Trial Chamber's four factual findings relevant to discrimination in fact against New People in Tram Kak District (concerning access to food, working conditions, miserable treatment and arrests for thoughts, speech or conduct). However, the Defence is also wrong to artificially separate these four findings from each other. They cannot correctly be considered in isolation.

430. The interplay between the different forms of discrimination is exemplified by the evidence of Civil Party TAK Sann. Her suffering from having minimal food was compounded by her heightened fear of punishment: she dared not mention the lack of food, believing that it would result in her death.[1015] Her fear was not without reason: Civil Party CHOU Koemlan confirmed that "some people complained that they did not have enough food and as a result, they would be taken away to be killed."[1016] Civil Party TAK Sann also testified about how the threat of further food reductions was used by work supervisors to exacerbate the

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under surveillance? This means that New People had to behave well, otherwise they would disappear, is that correct? A. That is true, if we committed any mistakes or if we were not active, if we were not energetic enough, we would disappear.").

[1012] **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party CHOU Koemlan), p. 59 lines 13-20 after [11.48.48] ("[w]e were accused that we were 17 April People. We were accused that we were lazy, we did nothing. That is why -- so they would need to smash all of us. And those who had relation or were linked to civil servants in the < >former regime, <Lon Nol regime,> we would be killed since we were 17 April People. We were afraid of being killed. That is why <whatever> we were <told> to do our work, we would try to perform them. <That's how I've survived till today.>").

[1013] **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 25 lines 3-7 before [10.06.27].

[1014] **F54/1** OCP Response Brief, paras 787-799.

[1015] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 31 lines 23-24 before [13.35.20] ("I was afraid that I would be taken away and killed so we did not dare to complain even if the food was not enough.").

[1016] **E1/252.1** [Corrected 1] T., 22 January 2015 (Civil Party CHOU Koemlan), p. 61 lines 10-16 after [11.53.11].

inhumane working conditions.[1017] During her work she was also demeaned in a way that could be described as "miserable treatment", including being forced to taste excrement.[1018] This evidence demonstrates that the different types of conduct considered by the Trial Chamber as constituting discrimination in fact were closely interlinked.

431. Still other aspects of life in Tram Kak District also involved discrimination against New People. Civil Party CHOU Koemlan gave evidence about differentiated housing: "Actually we were New People. I lived under the yard. I lived in the yard with just roof. <The Base People had longer houses.> And as for our places for living, it was very small. It was a small hut so we slept close to each other."[1019] Civil Party OEM Saroeurn testified about segregation not only for accommodation but also at meal times.[1020] New People were subject to scrutiny not only through monitoring but also through the requirement to provide "biographies".[1021] They were made to feel constantly under scrutiny and unable to speak openly, as Civil Party OUM Suphany testified: "[t]hey mobilized us in such a way so that it was easy for them to work and to control us. If we lived with the New People, we could secretly talk about, or recall the old memories when we lived in Phnom Penh. Unfortunately, since we lived with the Base People, we had to keep silent like mutes, like the deaf. We only used our eyes to watch the road ahead, the work site, and our mouth to eat and speak about important things."[1022]

[1017] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 40 lines 7-13 before [13.58.48] ("Q. You also stated on the information - on the victim's information sheet that if you did not complete your work on the rice fields, <that of transplanting> rice shoots, you wouldn't receive any food. Did it happen that you were not fed when you did not complete your work or <> was <that> only a threat? A. It was a threat, although we were still given the food ration. But I must say the food ration was not enough.").

[1018] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 40 lines 15-25 after [13.58.48] ("Q. You also stated that you <had to test> the fertiliser you made using excrement, <by tasting it> to make sure it wasn't too salty <as> to destroy the rice shoot. Why did you <take the precaution> to taste this fertiliser made with excrement? A. I was ordered to taste it, so I had to force myself to do that as I was scared. Q. And if the rice shoot died, what would have happened to you according to the orders that were given to you by the Khmer Rouge? A. <If> the rice seedlings <died>, then we would be <punished. It was too salty>.").

[1019] **E1/253.1** [Corrected 1] T., 27 January 2015 (Civil Party CHOU Koemlan), p. 10 lines 22-25 before [09.31.28].

[1020] **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 25 line 22 – p. 26 line 2 and lines 10-11 after [10.07.26], p. 47 lines 9-15 after [11.14.06], p. 47 line 25 – p. 48 line 3 after [11.15.33], p. 48 lines 15-19 before [11.18.41], p. 49 lines 1-4 after [11.18.41].

[1021] **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party CHOU Koemlan), p. 79 lines 13-21 after [14.11.57], p. 80 lines 1-4 and lines 8-11 after [14.13.42].

[1022] **E1/251.1** [Corrected 1] T., 23 January 2015 (Civil Party OUM Suphany), p. 69 line 25 – p. 70 line 7 before [14.04.10].

432. Taken together the evidence demonstrates that differences were drawn between New People and Base People in significant aspects of their daily lives. Differential treatment on particular issues such as housing, food and working conditions were also a reminder to New People of their differential status, reinforcing the ever-present threat of re-education, violence and death. Considering the situation holistically, it is clear that the New People experienced discrimination in fact. The Trial Chamber's conclusions have not been shown to be unreasonable and must stand.

9.5.3.2.3 Trapeang Thma Dam

433. The Trial Chamber found that political persecution had been established at Trapeang Thma Dam against "real or perceived enemies of the CPK", including New People.[1023] In **ground 114** the Defence challenges that conclusion.[1024] First, the Defence claims that the Trial Chamber's legal conclusions on persecution of New People were based on a single factual finding only, namely that "New People were excluded from having any leadership positions which were instead attributed to Old People with the task of monitoring the New People in their units."[1025] Secondly, the Defence claims that this factual finding was based solely on the evidence of Civil Party SAM Sak and argues that the Trial Chamber distorted his evidence and placed inappropriate reliance on it.[1026] Thirdly, and proceeding on the basis of its two previous arguments, the Defence claims that the conduct described by Civil Party SAM Sak does not meet the gravity requirement for the crime against humanity of persecution.[1027]

434. The Lead Co-Lawyers support the arguments of the OCP on this ground,[1028] but add the following submissions regarding the evidence of Civil Party SAM Sak. The Defence's arguments contain three layers of misrepresentation, addressed in turn.

435. First, it is not the Trial Chamber which has distorted Civil Party SAM Sak's evidence. Contrary to the Defence claim,[1029] Civil Party SAM Sak's testimony did not suggest that Base People and New People had similar feelings at the worksite. Rather, Civil Party SAM

[1023] **E465** Trial Judgment, paras 1407-1413.
[1024] **F54** Appeal Brief, paras 763-767.
[1025] **E465** Trial Judgment para. 1409; **F54** Appeal Brief, paras 763-764.
[1026] **F54** Appeal Brief, paras 764-765.
[1027] **F54** Appeal Brief, para. 766.
[1028] **F54/1** OCP Response Brief, paras 834-835.
[1029] **F54** Appeal Brief, paras 765.

Sak's quote highlighted by the Defence is about the pain and fear experienced by New People in his unit:

> Q.[…] <Did all members in your unit feel the same way as you> at the time<? Could> you describe to the Court how painful such a feeling was? <Did you live in fear from day to day?>
>
> A. I believed my feeling at the time was similar to all of those workers in the mobile unit, since mostly they were 17 April People <who was evacuated from the city>. And yes, there were a handful of Base People in the mobile unit, but they were the one playing a different role. They would monitor our activities or the works that we spoke.[1030]

436. Other portions of Civil Party SAM Sak's testimony also emphasise that his mistreatment was due to his status as a New Person: "It was so painful for me. I was seriously mistreated since I was considered a 17 April person. They hated <> the 17 April People so much because 17 April People were said to be capitalists and feudalists."[1031]

437. Secondly, no principle exists which would preclude the Trial Chamber from making a finding based on the evidence of a single Civil Party.[1032] However, it is not the case that the Trial Chamber did so in this instance. The Trial Chamber corroborated Civil Party SAM Sak's evidence with evidence from witnesses and from Civil Party SEN Sophon as well as from documentary sources.[1033]

438. Thirdly, the Defence also misrepresents the Trial Chamber's legal conclusions and reasoning when it claims that the finding on the different roles within the worksite was the only finding supporting conclusion of discrimination against New People. The Trial Chamber also found that New People were singled out to be arrested and killed, they were "searched for and

[1030] **E1/340.1** [Corrected 2] T., 2 September 2015 (Civil Party SAM Sak), p. 21 lines 2-11 after [10.07.05].
[1031] **E1/340.1** [Corrected 2] T., 2 September 2015 (Civil Party SAM Sak), p. 12 lines 22-25 before [09.41.27].
[1032] **F36** Case 002/01 Appeal Judgment, para. 424.
[1033] **E465** Trial Judgment, para. 1345. That paragraph refers to the evidence of four witnesses, as well as to Civil Parties SAM Sak and SEN Sophon. The surrounding paragraphs provide additional corroboration from documentary evidence (see for example the sources cited in **E465** Trial Judgment, paras 1340 and 1342). In paragraph 1345 the Trial Chamber also cross-references to its findings concerning working structures in paragraph 1289, thus incorporating the additional witness and Civil Party evidence contained there.

found".[1034] The Trial Chamber had concluded that New People were specifically targeted for arrests and executions and that this was a form of discriminatory treatment.[1035]

439. The Defence's arguments demonstrate no error by the Trial Chamber in its findings of discrimination in fact against New People at Trapeang Thma Dam.

440. It also follows from the above that the Defence's arguments concerning gravity[1036] must fail. An assessment which properly takes into account all of the Trial Chamber's findings regarding the treatment of New People (including being targeted for arrests and executions) is clearly capable of meeting the gravity threshold.

9.5.3.2.4 1st January Dam

441. The Trial Chamber concluded that political persecution had been committed at the 1st January Dam Worksite against New People.[1037] The Defence challenges this finding by arguing in **ground 118** that the Trial Chamber erred in using out of scope evidence, and that some of its findings of unequal treatment amounting to discrimination in fact were unreasonable.[1038] In **ground 119** the Defence argues that the treatment of New People at the 1st January Dam Worksite did not affect a fundamental right and therefore was not sufficiently grave to constitute persecution.[1039]

442. The Lead Co-Lawyers largely agree with the detailed submissions made by the OCP in response to these two grounds,[1040] and limit their response to issues linked to the Civil Parties who testified on these matters.[1041] However, they also note that part of the Defence's arguments in **ground 118** are incomprehensible. In one section,[1042] the Defence appears to draw a distinction between two categories of alleged discrimination; however, the distinction

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[1034] **E465** Trial Judgment, paras 1348 and 1410.
[1035] **E465** Trial Judgment, para. 1348. Although the Trial Chamber does not explicitly refer back to paragraph 1348 when reaching its legal conclusions in paragraph 1410, the two paragraphs are clearly linked, with the conclusions in paragraph 1410 quoting directly from the material cited in paragraph 1348 about New People being "searched for and found".
[1036] **F54** Appeal Brief, para. 766.
[1037] **E465** Trial Judgment, paras 1687-1689.
[1038] **F54** Appeal Brief, paras 787-796.
[1039] **F54** Appeal Brief, para. 797.
[1040] **F54/1**, OCP Response Brief, paras 812-825.
[1041] Three Civil Parties testified in this segment of the trial: Civil Parties HUN Sethany, UN Rann, SEANG Sovida. Two Civil Parties testified during the hearings on harm related to this segment: Civil Parties UY Samna *alias* NUON Narom and CHAO Lang.
[1042] **F54** Appeal Brief, paras 793-796.

is unclear, and has been rendered less clear in the corrected version of the Appeal Brief.[1043] Indeed, the Defence refers to a number of findings of discrimination by the Trial Chamber which it does not appear to challenge.[1044] It is unclear how this is to be reconciled with the claim that the Trial Chamber's findings of discrimination in fact should be rejected.

443. The Lead Co-Lawyers limit their submissions below to the comprehensible portion of the Defence's arguments concerning discrimination in fact, namely, that the Trial Chamber erred in: (i) relying on the evidence of Witness OR Ho that New People suffered more serious punishments than Base People; and (ii) relying on "subjective" assessments of different treatment, including those given by Civil Parties HUN Sethany and UN Rann.

444. First, the Defence argues that Witness OR Ho's evidence was hearsay and of low probative value.[1045] However, the Lead Co-Lawyers note that Witness OR Ho's evidence on the issue of reprimands and punishments was "confirmed" by the evidence of Civil Party HUN Sethany,[1046] which the Defence appears to accept in its Appeal Brief.[1047] Indeed, Civil Party HUN Sethany's evidence made clear that New People lived in constant terror of the consequences of any minor infraction, and were treated differently in this regard to Base People.[1048] The Lead Co-Lawyers note that other Civil Parties also corroborated this evidence in their testimony.[1049]

[1043] In the corrected version of **F54** Appeal Brief, "objective" has become "objectives" in the first sentence of paragraph 793. The Lead Co-Lawyers have been unable to understand how the matters which follow that sentence relate to "objectives".
[1044] **F54** Appeal Brief, para. 793.
[1045] **F54** Appeal Brief, paras 794-795.
[1046] **E465** Trial Judgment, para. 1652.
[1047] **F54** Appeal Brief, para. 793.
[1048] **E1/306.1** [Corrected 2] T., 27 May 2015 (Civil Party HUN Sethany), p. 10 line 21 – p. 11 line 2 after [09.28.17] ("As for the New People, no, they didn't violate any instruction; they were so afraid. However, some Old People did cross the line but the new ones, no, they were so afraid of the Khmer Rouge. <We were extremely frightened.> Old People had a bit more right; they could go, for example, 10 or 20 metres far from the lines that they were standing guard but the New People didn't dare do so."), see also at p. 11 lines 9-15 before [09.31.05] ("If the Old People made a minor mistake, the Old People could provide justification to the Khmer Rouge but this did not apply to the New People. The New People were under tremendous pressure and if a new person was accused of a wrongdoing and although he or she didn't commit it, the person would remain quiet, <shut up his or her mouth and> did not dare to protest or to provide any justification in order to survive.").
[1049] See for example **E1/307.1** [Corrected 1] T., 28 May 2015 (Civil Party UN Rann), p. 18 line 19 – p. 19 line 4 before [09.48.32] (UN Rann testified that as a New Person she "did not dare to question anything"); **E1/339.1** [Corrected 1] T., 1 September 2015 (Civil Party CHAO Lang), p. 63 line 15 – p. 64 line 2 after [14.13.54], p. 81 lines 11-19 before [15.30.32]; **E1/339.1** [Corrected 1] T., 1 September 2015 (Civil Party NUON Narom), p. 38 lines 13-18 after [11.09.50]; **E1/308.1** [Corrected 1] T., 2 June 2015 (Civil Party SEANG Sovida), p. 7 line 25 – p. 8 line 2 before [09.22.06], p. 43 lines 4-20 before [11.02.20].

445. The Defence's second argument is that the Trial Chamber erred by unreasonably relying on evidence of different treatment that was "subjective" and therefore of "very low probative value".[1050] The Defence fails to demonstrate any error with respect to paragraph 1652 of the Judgment. The Trial Chamber relied on the testimony of a number of witnesses and Civil Parties,[1051] including the perceptions of unequal treatment by people whose evidence was based on their personal experience. Its generalised complaint that the Trial Chamber did "not cite specific instances of their allegations of unequal treatment"[1052] with respect to the evidence of Witness UTH Sen, Civil Party UN Rann and Civil Party HUN Sethany,[1053] is therefore misleading. The Trial Chamber relied on a range of relevant evidence, including the evidence of Civil Party SEANG Sovida which corroborated the evidence of Civil Parties HUN Sethany and UN Rann.[1054] The Trial Chamber also included evidence regarding the inability of New People to hold senior positions, to request to work in a specific place, or to obtain clothes or sandals.[1055] The Defence has likewise not challenged the Trial Chamber's findings that New People lived in constant fear because of militiamen spying on them and because of the disappearance of other New People.[1056]

446. In light of the weight of other evidence which has not been challenged, it is particularly clear that the Defence has failed to demonstrate that the error it alleges would have affected the Trial Chamber's conclusions regarding discrimination in fact. But in any event neither has the Defence demonstrated any error in the Trial Chamber's findings.

447. Concerning **ground 119** the Lead Co-Lawyers agree with the OCP[1057] that the Defence has misconstrued the Trial Chamber's findings and ignored its explicit findings concerning gravity based on the violation of multiple fundamental rights.[1058]

[1050] **F54** Appeal Brief, para. 796.
[1051] **E465** Trial Judgment, para. 1652.
[1052] **F54** Appeal Brief, para. 796.
[1053] The Lead Co-Lawyers note that when Counsel for NUON Chea asked Civil Party HUN Sethany for a specific example of such discrimination she readily provided it. See **E1/306.1** [Corrected 2] T., 27 May 2015 (Civil Party HUN Sethany), p. 66 lines 11-21 after [14.27.25].
[1054] **E465** Trial Judgment, para. 1652.
[1055] **E465** Trial Judgment, para. 1652.
[1056] **E465** Trial Judgment, para. 1653 and factual findings regarding the disappearance of New People in paras 1562 and 1564.
[1057] **F54/1** OCP Response Brief, paras 819-825.
[1058] **E465** Trial Judgment, para. 1691.

448. There can be no doubt that the conduct reached the required threshold to constitute persecution. Even aside from the considerable evidence of suffering from Civil Parties,[1059] enforced disappearances (the Trial Chamber's findings on which have not been challenged by the Defence) are well established in international caselaw as conduct sufficiently grave to constitute persecution.[1060]

9.5.3.3 Persecution of the Cham people during MOP2 on political grounds

449. In three grounds the Defences argues that the Trial Chamber erred in finding that the movement of Cham people constituted discrimination in fact (**ground 141**),[1061] in finding discriminatory intent (**ground 142**),[1062] and in finding that the underlying acts were of the required degree of severity (**ground 143**).[1063] On these questions the Lead Co-Lawyers agree with the submissions already made by the OCP and do not add anything further.[1064]

9.5.3.4 Persecution of the Cham people on religious grounds

9.5.3.4.1 Overview

450. The Trial Chamber held that the crime against humanity of persecution on religious grounds against Cham people was proven beyond reasonable doubt. The finding incorporates conduct nationwide throughout the DK period. It was based on a range of underlying conduct, some of which (including arrests, torture and killings, forced relocations) was charged separately

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[1059] See **E465** Trial Judgment, para. 4444 which details the harm suffered by Civil Parties at January 1st Dam describing the immediate physical and long-term emotional suffering because of the mistreatment and loss of loved ones. The Trial Chamber cited Civil Party CHAO Lang's suffering as a result of her relatives being killed and tortured culminating in her loss of "hopes and expectations". See **E1/339.1** [Corrected 1] T., 1 September 2015 (Civil Party CHAO Lang), p. 63 lines 7-20 before [14.17.07]. Civil Party NUON Narom stated that she had "no goal in […] life after the regime" after losing all her relatives. See **E1/339.1** [Corrected 1] T., 1 September 2015 (Civil Party NUON Narom), p. 21 lines 21-23 after [09.57.17]. Civil Party HUN Sethany testified about her PTSD, trauma and loneliness resulting from losing all of her family. See **E1/306.1** [Corrected 2] T., 27 May 2015 (Civil Party HUN Sethany), p. 81 line 25 – p. 82 line 16 after [15.24.14]. Civil Party UN Rann testified about the physical suffering she endured including the painful and tiring work and falling sick at the 1st January Dam worksite. See **E1/307.1** [Corrected 1] T., 28 May 2015 (Civil Party UN Rann), p. 23 lines 6-9 after [10.00.13], p. 65 lines 4-12 after [14.24.45], p. 66 lines 1-15 after [14.26.52]. Civil Party SEANG Sovida testified about the long-term harm she suffered and the impact this suffering has on her present day and family life, explaining how she was "mentally, morally tortured". See **E1/308.1** [Corrected 1] T., 2 June 2015 (Civil Party SEANG Sovida), p. 94 line 17 – p. 95 line 6 before [14.48.23].

[1060] See for example ICTY *Prosecutor v Gotovina et al.*, IT-06-90-T, Judgement Volume II of II, 15 April 2011, paras 1831-1839 esp. para. 1838; The Court of Bosnia and Herzegovina, Section I for War Crimes, *Prosecutor's Office of Bosnia and Herzegovina v Jukić,* S1 1 K 008728 12 Kri, Verdict, 15 January 2014, paras 141-146, 309. *Attachment 13*

[1061] **F54** Appeal Brief, paras 926-927.

[1062] **F54** Appeal Brief, paras 928-931.

[1063] **F54** Appeal Brief, para. 932.

[1064] **F54/1** OCP Response Brief, paras 471-474, 524-528, 529-531.

as other crimes, as well as additional specific restrictions on Cham religious and cultural practices.[1065]

451. The Defence brings challenges attacking these findings in relation to all elements of persecution: discrimination in fact (**ground 144**[1066] and **ground 146**[1067]), intent to discriminate (**ground 147**),[1068] and gravity (**ground 145,**[1069] **ground 148**[1070] and **ground 149**[1071]). The Lead Co-Lawyers broadly agree with the arguments made by the OCP on these grounds, but add the following submissions regarding the evidence of Civil Parties.

9.5.3.4.2 Discrimination in fact

452. The Trial Chamber found that the CPK had implemented a policy of specifically targeting Cham people as an ethnic and religious group.[1072] In addition to the Chamber's findings that Cham people were subjected to arrests, detentions, torture and killings,[1073] the Trial Chamber also identified six discriminatory restrictions on Cham religious and cultural practices, and additionally found that those who resisted the imposition of these restrictions were arrested and/or killed.[1074] In **ground 144** the Defence argues that the Trial Chamber erred in finding a policy to target Cham people;[1075] and that the Trial Chamber's findings regarding restrictions were unreasonable because: (i) four of the restrictions were merely part of the general prohibition of religion that was applied to the whole population;[1076] and (ii) the evidence did not support the remaining two findings (that Cham were forced to eat pork and that Korans were burned).[1077] The Lead Co-Lawyers agree with the OCP's response[1078] regarding the existence of a policy but make the following submissions regarding the restrictions identified by the Trial Chamber.

[1065] **E465** Trial Judgment, paras 3327-3332.
[1066] **F54** Appeal Brief, paras 933-951.
[1067] **F54** Appeal Brief, paras 954-956.
[1068] **F54** Appeal Brief, paras 957-959.
[1069] **F54** Appeal Brief, paras 952-953.
[1070] **F54** Appeal Brief, paras 960-961.
[1071] **F54** Appeal Brief, paras 962-963.
[1072] **E465** Trial Judgment, para. 3328.
[1073] **E465** Trial Judgment, paras 3281, 3304.
[1074] **E465** Trial Judgment, para. 3328. Underlying factual findings about restrictions on religious and cultural practice are found in paras 3229-3250.
[1075] **F54** Appeal Brief, paras 936-938.
[1076] **F54** Appeal Brief, paras 940-942.
[1077] **F54** Appeal Brief, paras 943-951.
[1078] **F54/1** OCP Response Brief, paras 475-483.

453. The Defence arguments are premised on a misunderstanding of the law and specifically the definition of "discrimination in fact". As elaborated above, it is the unequal *consequences* for the victims which matter when finding discrimination, even if they result from apparently equal conduct.[1079] The Trial Chamber correctly applied this approach and made no error in concluding that Cham people suffered consequences which Khmer people did not.

454. Regarding the Trial Chamber's findings on the forced consumption of pork and the burning of Korans, the Defence appears to accept that these acts could amount to discrimination, but claims that the evidence does not support the Trial Chamber's findings.[1080] The Defence has failed to demonstrate that the Trial Chamber erred in reaching its findings on these facts. In any event, the Lead Co-Lawyers note that the Trial Chamber had also identified a number of other acts constituting discrimination in fact.

9.5.3.4.2.1 The forced consumption of pork

455. The Defence accepts that Cham people were provided with rations containing pork.[1081] However it argues that the evidence does not support a conclusion that Cham people were monitored or actively punished to ensure that they ate the pork they were given. The Defence goes on to argue that in the absence of such monitoring or active punishment, it cannot be said that Cham people were forced to eat pork.

456. In fact, the Trial Chamber did hear evidence in addition to that of Civil Party LOEP Neang[1082] that Cham people were actively compelled to eat the pork they were provided, under threat of punishment. Civil Party SOS Min explicitly spoke of the consequences if Cham people did not eat the pork they were provided, and that many ate it out of fear.[1083] Likewise Civil

[1079] See Section 9.5.2.2.2 at paras 343-364.
[1080] **F54** Appeal Brief, para. 942.
[1081] **F54** Appeal Brief, paras 944, 945, 946.
[1082] The Defence states that she "allegedly" was given pork to eat while a person with a gun stood behind her waiting for her to eat it, but does not identify any reason why her evidence should not be believed. See **F54** Appeal Brief, para. 946; **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party LOEP Neang), p. 98 lines 2-14 after [15.46.46].
[1083] **E1/343.1** [Corrected 1] T., 8 September 2015 (Civil Party SOS Min), p. 72 lines 8 – 12 after [14.19.39] ("We were forced to eat the food that we could not eat. And if we did not eat, we would be accused of not giving up to our religious practice. And that would be subject to be monitored. If we opposed any of the principles they imposed, then we would be accused of being an enemy of Angkar"), p. 73 lines 4-7 after [14.22.30] ("…if anyone violated <any of the principles>, the person would be accused of being enemy. For that reason, people were tied up and arrested almost every night.").

Party HIM Man testified to explicit threats of being shot if Cham people did not consume the pork,[1084] and also testified that Cham people were scared of being reported.[1085]

457. In any event, even without the threat of imminent violence, the very real prospect of starvation was a more than adequate means of compelling Cham people to eat pork when it was the only food they were provided. Civil Party MAN Sles[1086] testified that some Cham people would eat the pork which had been added to their food out of a desperation to survive.[1087] The Defence seems to accept that Civil Party MEU Peou's father died from starvation because he refused to eat pork.[1088] The Defence's attempt to differentiate the threat of starvation from other threats of death, and to suggest that it was not a form of coercion, is unconvincing.[1089] Indeed, Civil Party MEU Peou's evidence made clear that starvation was explicitly and intentionally used as a means of coercion: "Angkar gave him a last warning that he had to eat pork. And if he could not eat pork, then there would be nothing for him to eat."[1090] "<They used his case as an example to scare other Cham people.>"[1091]

[1084] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 41 lines 1-6 after [11.09.06]; **E465** Trial Judgment, paras 3239 fn. 10935.
[1085] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 40 lines 12-22 after [11.07.35]. ("…the person who was sitting next to us would report to Angkar in order to gain favour from Angkar and for that reason when we were having meal, no Khmer Rouge came to see whether we were having pork or not. We were afraid that we were being watched and if we were reported by <> other <> people then we would be in danger.").
[1086] The Lead Co-Lawyers note that in this section of the Appeal Brief the Defence refers to Civil Party MAN Sles's evidence, but provides a footnote reference which relates to the evidence of Civil Party MEU Peou. See **F54** Appeal Brief, para. 944 fn. 1725.
[1087] **E1/393.1** [Corrected 1] T., 29 February 2016 (Civil Party MAN Sles), p. 65 lines 20-25 before [14.15.13] ("We, the Cham people, were prohibited from eating pork but when they cooked food or they cooked gruel they actually put pork with oil in the gruel. And when we were given pork with gruel we actually tried to get rid of the soup and ate only the rice. Some people could not bear <the smell of the pork> while others tried to eat in order to survive. <I drank only the soup for survival.>").
[1088] **F54** Appeal Brief, para. 946.
[1089] International courts have long recognised that coercion can occur other than at gunpoint or through an immediate threat of violence. For example the ICTY Appeals Chamber has affirmed that the creation of "severe living conditions" which made it impossible for Muslims and Croats to remain in their municipalities amounted to "forced" displacement. See ICTY *Prosecutor v Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para. 319.
[1090] **E1/393.1** [Corrected 1] T., 29 February 2016 (Civil Party MEU Peou), p. 11 lines 14-17 after [09.29.41].
[1091] **E1/393.1** [Corrected 1] T., 29 February 2016 (Civil Party MEU Peou), p. 11 lines 22-23 before [09.31.13]. Civil Party MEU Peou went on to say of his father that it "was terrible for him, living in such a situation. I would think that it would be better <> if they were to kill him and not to allow him to suffer such a terrible circumstance."

9.5.3.4.2.2 The burning of Korans

458. The Defence's arguments regarding Korans[1092] must also fail. The Trial Chamber found that Korans were confiscated and burned or destroyed.[1093] The Defence claims that the Trial Chamber had insufficient evidence to reasonably draw conclusions regarding the fate of the confiscated Korans and refers particularly to the evidence of two Civil Parties.[1094] Civil Party NO Sates believed that Korans were "collected and destroyed", although she recognised that she did not know "where Korans were sent to and put".[1095] However, her evidence was clear that the Cham people "were not allowed to practice, to use <Korans>."[1096] Civil Party SOS Min was likewise clear in stating that Korans were removed from Cham people, saying that they were placed in the village chief's house.[1097]

459. Ultimately these Civil Parties and other sources were entirely consistent that Cham people were prohibited from using Korans, and that their Korans were taken from them. The eventual fate of those Korans is irrelevant to the question of whether this constituted discrimination in fact. The removal of the Korans was in itself discriminatory.

460. The Defence has demonstrated no error in the Trial Chamber's findings regarding religious discrimination in fact against Cham people.

[1092] **F54** Appeal Brief, paras 948-951.
[1093] **E465** Trial Judgment, para. 3238 (Kroch Chhmar district), para. 3245 (Central (old North) Zone) and para. 3250 (various locations).
[1094] **F54** Appeal Brief, paras 948-951. The Defence also refers to a third Civil Party, HIM Man, however the quote attributed to him is from Civil Party NO Sates's testimony. See **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 80 lines 4-7 before [15.35.47]. The transcript reference provided at **F54** Appeal Brief, fn. 1744 is incorrect. The reference to Civil Party HIM Man therefore appears to be an error. However Civil Party HIM Man's testimony did corroborate that of Civil Parties NO Sates and SOS Min that the practice of religion was prohibited ("we were explicitly prohibited from praying, from practicing holy Koran"). See **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 73 lines 22-23 after [14.29.11].
[1095] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 79 line 14 – p. 80 line 7 after [15.33.24], referred to by the Defence at **F54** Appeal Brief, para. 948.
[1096] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 81 line 10 before [15.38.56]. See also p. 79 line 23 – p. 80 line 7 after [15.33.24] ("Korans were collected and burnt <down>, we were not allowed to have the possessions of Korans. <But, I don't know where they took the Koran texts to> and Korans were <not allowed to be kept in> houses. Q. Do you remember in what year were the Korans collected from houses and burned? A. In 1975, when we were evacuated, Korans were also collected and <they swept and cleaned the village.> <We were not allowed to possess Korans.> I did not <know> where Korans were sent to and put.").
[1097] **F54** Appeal Brief, para. 948.

9.5.3.4.2.3 Other conduct constituting discrimination in fact

461. The Lead Co-Lawyers note that the Trial Chamber made findings regarding other conduct which also constitutes discrimination in fact against Cham people on religious grounds. In particular the Chamber assessed arrests, detention, and killings at Trea Village and Wat Au Trakuon and found that these acts were targeted specifically at Cham people, as set out below. Even if the Defence had demonstrated flaws in the Trial Chamber's findings regarding the six restrictions on religious practice (which they have not), discrimination in fact would still have been established through the arrest, detention, torture and killing of Cham people.

462. Civil Party HIM Man's experience at Wat Au Trakuon exemplifies the discriminatory nature of these arrests and killings: the Trial Chamber found that the militia known as the Long Sword Group were often instructed to arrest "all Cham people" at a particular location and to bring them to Wat Au Trakuon.[1098] Civil Party HIM Man and his wife were rounded up together with all of the other Cham people from their village of Sach Sou, and walked in the direction of Wat Au Trakuon.[1099] Civil Party HIM Man and his wife survived only because they managed to escape and hide.[1100] While in hiding they heard the sounds of Cham people being killed and smelled dead bodies.[1101] Civil Party HIM Man later saw grave pits near Wat Au Trakuon with many bones in them.[1102] Civil Party HIM Man lost many relatives, and he and his wife were the only Cham people from their village to survive the DK period.[1103] Although the Defence has sought to argue otherwise, Civil Party HIM Man's evidence clearly supported a finding by the Trial Chamber that the executions at Wat Au Trakuon were

[1098] **E465** Trial Judgment, para. 3291.
[1099] **E465** Trial Judgment, para. 3293. See also **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 45 lines 2-8 before [11.22.37].
[1100] **E465** Trial Judgment, para. 3293. See also **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 47 line 12 – p. 48 line 13 after [11.28.14].
[1101] **E465** Trial Judgment, para. 3293. See also **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 51 line 16 – p. 52 line 3 before [13.40.34], p. 60 line 17 – p. 61 line 6 after [13.57.29], p. 78 lines 15-20 before [14.43.43], p. 82 lines 1-11 after [14.51.44].
[1102] **E465** Trial Judgment, para. 3295. See also **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 69 line 17– p. 70 line 13 after [14.19.21]; **E3/5203** Written Record of Interview (Civil Party HIM Man), 11 August 2008, ERN (En) 00242091.
[1103] **E465** Trial Judgment, para. 3295; **E3/8750** Written Record of Interview (Witness CHEA Maly), 14 July 2011, p. 4, ERN (En) 00722232 ("Kang Meas district. In the commune where we are now, only one [Cham] family survived for it ran away to live in the lake."). See also **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 62 lines 12-13 before [14.04.36].

specifically targeted against Cham people.[1104] The discriminatory nature of the arrests and killings was corroborated by a range of evidence.[1105] The Trial Chamber relied in particular on witness evidence of specific orders to identify, arrest and purge all Cham people in the sector.[1106]

463. Regarding the executions at Trea Village, Civil Party NO Sates's experience similarly demonstrates the way in which Cham people were specifically targeted in a clearly discriminatory manner.[1107] In her village, all the Cham men were first collected and sent away; next the women were brought together and told they would be relocated to other places.[1108] Civil Party NO Sates was among a group of women taken to Trea Village and detained there, after which they were questioned about whether they were Khmer or Cham.[1109] Those who said they were Cham were taken away and have since "disappeared".[1110] Civil Party NO Sates and some other women said they were Khmer: they were told they were lucky and were not taken away.[1111] They were given pork to eat, which Civil Party NO Sates testified she had to eat to make her captors believe she was not Cham.[1112] Civil Party NO Sates testified that some Khmer people were moved from her village at the same time as the Cham people, but were sent to a different location and were not executed.[1113] The discriminatory nature of the executions at Trea Village was also

[1104] A more detailed analysis of Civil Party HIM Man's evidence regarding these events and the Defence challenges to them are found below in Section 10.2 at paras 739-747.
[1105] **E465** Trial Judgment, paras 3285-3290 and 3291, 3296-3300 and findings in para. 3328.
[1106] **E465** Trial Judgment, paras 3285-3290.
[1107] A more detailed analysis of Civil Party NO Sates's evidence regarding these events and the Defence challenges to them is found below at Section 10.5 at paras 759-767.
[1108] **E465** Trial Judgment, para. 3277. See also **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 88 lines 10-24 after [15.56.59].
[1109] **E465** Trial Judgment, para. 3278. See also **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 56 line 20 – p. 57 line 1 before [14.10.30], p. 58 lines 1-8 before [14.14.56], p. 58 line 20 – p. 59 line 14 after [14.14.56].
[1110] **E465** Trial Judgment, para. 3278. See also **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 71 lines 18-25 after [15.11.12].
[1111] **E465** Trial Judgment, para. 3278. See also **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 59 lines 5-14 after [14.16.35].
[1112] **E465** Trial Judgment, para. 3278. See also **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 75 line 20 – p. 76 line 11 after [15.21.54].
[1113] **E465** Trial Judgment, para. 3277. See also **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 90 lines 4-7 before [16.03.09].

corroborated by other sources, including two other survivors who testified as witnesses,[1114] and evidence regarding orders to purge Cham people in the East Zone.[1115]

464. The Trial Chamber clearly found these acts to have been targeted specifically at Cham people. The Lead Co-Lawyers therefore submit that even without the six forms of restrictions on religious practice discussed above and attacked by the Defence in **ground 144**, the Trial Chamber's finding of discrimination in fact must stand.

9.5.3.4.3 Gravity

465. The Appeal Brief includes three arguments (**ground 145**,[1116] **ground 148**,[1117] and **ground 149**[1118]) which are related to the gravity of the discriminatory acts against Cham people.

466. First, in **ground 148** and **ground 149**, the Defence argues that the conduct does not reach the level of gravity required for the crime of persecution.[1119] The Lead Co-Lawyers agree with the OCP that the Defence has only reached this position by adopting an erroneous interpretation of the Trial Chamber's findings on religious persecution, emphasising the six restrictions on religious practice, while at times appearing to ignore the Trial Chamber's findings regarding arrest, torture and killings.[1120] The Lead Co-Lawyers also agree with the OCP that, contrary to the Defence assertion, the underlying conduct *was* found by the Trial Chamber to constitute international crimes.[1121] Nevertheless, this is not necessary for the crime against humanity of persecution: "persecution as a crime against humanity does not require that the underlying acts are crimes under international law", and therefore can be established without a demonstration that the conduct in question separately fulfils the elements of other international crimes.[1122] There is no doubt that conduct met the alternative test of violating fundamental rights:

[1114] **E465** Trial Judgment, paras 3276 and 3279-3281.
[1115] **E465** Trial Judgment, paras 3273-3275.
[1116] **F54** Appeal Brief, paras 952-953.
[1117] **F54** Appeal Brief, paras 960-961.
[1118] **F54** Appeal Brief, paras 962-963.
[1119] **F54** Appeal Brief, paras 962-963.
[1120] **F54/1** OCP Response Brief, paras 536-540.
[1121] **F54/1** OCP Response Brief, para. 539.
[1122] See ICTY *Prosecutor v Popović et al.*,IT-05-88-A, Judgement, 30 January 2015, para. 738; Mettraux, *Crimes Against Humanity*, Section 6.9.5.1.1, pp. 608-610. *Attachment 14;* see also Section 9.5.2.1 above at paras 333-334.

467. In **ground 145**, the Defence argues that the Trial Chamber erred by concluding that the six restrictions on religious practice were not permissible.[1123] The Lead Co-Lawyers agree with the OCP that this conclusion was reasonable and sufficiently reasoned by virtue of its reference to the Trial Chamber's earlier reference to the restrictions permissible on religious freedom.[1124] Although the Trial Chamber regrettably did not explicitly refer to the freedom of religion when listing the fundamental rights and freedoms violated,[1125] it is sufficiently clear that this was intended when the reasons are read as a whole (not least from the fact that the Trial Chamber had addressed the question of which restrictions on that right were permissible). The Defence is therefore wrong to say (in **ground 148**) that the Trial Chamber did not consider that the restrictions imposed breached freedom of religion.[1126]

468. In any event, the Lead Co-Lawyers submit that this argument can have no bearing on the finding of religious persecution against the Cham people. The question of whether rights to religious freedom were violated in this regard is relevant only to the gravity element, in determining whether the conduct "result[ed] in a gross or blatant breach of fundamental rights such that it is equal in gravity or severity to other underlying crimes against humanity."[1127] As indicated above, the restrictions on religious practice were only one of several acts which cumulatively constituted religious persecution against the Cham people. Other relevant conduct included the arrests, detention, torture, extra-judicial killings which the Trial Chamber clearly had in mind when listing the fundamental rights which had been violated.[1128] The Defence has not shown that the Trial Chamber was unreasonable to conclude that such acts carried out against the Cham people met the gravity threshold.

9.5.3.5 Persecution of Buddhists on religious grounds in Tram Kak

9.5.3.5.1 Overview

469. The Trial Chamber found that the crime against humanity of religious persecution was established regarding Buddhists in Tram Kak District.[1129] The Defence argues that the Trial

[1123] **F54** Appeal Brief, para. 952; **E465** Trial Judgment, para. 3328.
[1124] **F54/1** OCP Response Brief, paras 486-487.
[1125] **E465** Trial Judgment, para. 3330.
[1126] **F54** Appeal Brief, para. 961.
[1127] **Case 001– F28** Appeal Judgment, para. 257 [*emphasis omitted*]; see Section 9.5.2.1 at paras 333-334.
[1128] **E465** Trial Judgment, para. 3330.
[1129] **E465** Trial Judgment, para. 1187.

Chamber erred in fact in finding that the underlying conduct satisfied the gravity requirement (**ground 109**)[1130] and in finding discriminatory intent (**ground 95**).[1131]

9.5.3.5.2 Gravity

470. The Trial Chamber's findings of religious persecution against Buddhists related to the forced defrocking of monks, destruction of Buddhist symbols, repurposing of pagodas, and the banning of any outward expression of Buddhist practice or belief.[1132] In **ground 109** the Defence argues that the Trial Chamber erred in finding that this conduct was sufficiently grave to constitute the crime against humanity of persecution.[1133] The OCP is correct that no factual error by the Trial Chamber has been shown.[1134] The Lead Co-Lawyers make the following submissions which relate to Civil Party evidence on this issue.

471. The Defence claims that the Trial Chamber's finding of gravity placed too much reliance on the "subjective and personal evidence of Civil Party BUN Saroeun".[1135] While it is entirely permissible for the Trial Chamber to make findings based on the in-court testimony of one Civil Party or witness,[1136] this is not what occurred in this instance. As identified by the OCP,[1137] the Trial Chamber relied on evidence from various sources to justify its conclusions.

472. The Defence also mischaracterises Civil Party BUN Saroeun's evidence as being simplistically concerned with the "absence of pagodas". It is true that the immediate question had related to "the pagodas being destroyed and… the <Buddhist> statues that were shattered",[1138] but his answer addressed the absence of monks, ceremonies, and religious practices generally.[1139] It must also be seen in the context of the explanation he had just given about broader events targeting Buddhists, including the disappearance of his own family members:

[1130] **F54** Appeal Brief, paras 746-747.
[1131] **F54** Appeal Brief, para. 656.
[1132] **E465** Trial Judgment, paras 1183-1186.
[1133] **F54** Appeal Brief, paras 746-747.
[1134] **F54/1** OCP Response Brief, para. 407-413.
[1135] **F54** Appeal Brief, para. 746.
[1136] See **F36** Case 002/01 Appeal Judgment, para. 424.
[1137] **F54/1** OCP Response Brief, paras 411-413.
[1138] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 31 lines 19-20 after [10.38.36].
[1139] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 31 line 21 – p. 32 line 3 after [10.38.36] ("I was absolutely torn because this was a sacred place and there were no longer any monks there and in the past there used to be celebrations, ceremonies but there were no longer any religious practice so I felt that I was completely deprived of any psychological base.").

> I was hoping to see my older brother but he disappeared. All I could see was his robe, his monk's robe and I was asked to pick up the robe and to retrieve the pieces of the objects he had with him <put them in a box>. I saw the militia chief and I was absolutely flabbergasted when I saw a sacred place become a desert and on top of that when I knew that my father had disappeared and when I knew also that my uncle was a monk in this pagoda, so this really broke my heart and I only saw loss and damage all the way <from 1975 up> until 1979.[1140]

473. This portion of Civil Party BUN Saroeun's evidence demonstrates that the various persecutory acts cannot be separated from each other in assessing impact. This is also reflected in the gravity test itself, which requires the severity of various persecutory acts to be assessed cumulatively and in the light of their context.[1141]

474. The Defence seeks to diminish Civil Party BUN Saroeun's evidence as "subjective and personal",[1142] implying that he was unusual or oversensitive in the level of suffering he experienced. The evidence demonstrates that this was not the case: two people, including Civil Party MIECH Ponn, gave evidence to OCIJ investigators that Buddhist monks committed suicide because of the measures imposed during the DK.[1143] It was therefore entirely appropriate for the Trial Chamber to adopt Civil Party BUN Saroeun's language (concerning the deprivation of Buddhists' "psychological base")[1144] to describe the impact of the acts targeted at Buddhists.

475. However, and in any event, gravity is readily established in respect of the acts which the Trial Chamber found to have been carried out against Buddhists. The ICTY Appeals Chamber has ruled that:

> [T]he destruction of religious property meets the equal gravity requirement as it amounts to "an attack on the very religious identity of a people" and as such manifests "a nearly pure expression" of the notion of crimes against humanity, as also found by several trial chambers. Proof that a building is dedicated to religion satisfies the equal gravity requirement without requiring an assessment of the value of the specific religious property to a particular community.[1145]

[1140] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 31 lines 6-15 after [10.35.41].
[1141] **Case 001– F28** Appeal Judgment, para. 257.
[1142] **F54** Appeal Brief, para. 746.
[1143] **E3/5523** Written Record of Interview (Civil Party MIECH Ponn), 9 December 2009, A.5 at ERN (En) 00434652; **E3/7983** Written Record of Interview (Witness TEP Dom), 13 November 2007, ERN (En) 00165219.
[1144] **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party BUN Saroeun), p. 31 line 25 after [10.38.36]; **E465** Trial Judgment, paras 1107 and 1186.
[1145] ICTY *Prosecutor v Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014, para. 567.

476. The Appeals Chamber referenced post-World War II judgments as having established the basis for this finding,[1146] making clear that such acts constituted persecution since that time.

477. Civil Party BUN Saroeun's evidence adduced at trial was a powerful statement on the mental effects of religious persecution. The Defence arguments concerning the gravity of suffering experienced by Buddhists fail to establish any legal error by the Trial Chamber and should be dismissed.

9.5.3.6 Persecution of Vietnamese on racial grounds

9.5.3.6.1 Overview

478. The Trial Chamber held that the crime against humanity of racial persecution was established beyond reasonable doubt concerning the Vietnamese in Prey Veng and Svay Rieng;[1147] in the Tram Kak Cooperatives;[1148] and in the S-21[1149] and Au Kanseng security centres.[1150] Different underlying acts were found by the Trial Chamber to have been made out regarding each of those crime sites.

479. The Defence first challenges whether a sufficiently discernible group has been identified. The Defence then challenges the findings that discrimination was established at each of the three crime sites, arguing either: that the underlying acts were not made out; that the conduct did not amount to discrimination in fact; or that discriminatory intent had not been demonstrated. These arguments are responded to separately by crime site.

9.5.3.6.2 Sufficiently discernible group

480. The Defence argues that the Trial Chamber erred in finding a sufficiently discernible group for the purposes of racial persecution.[1151] The Lead Co-Lawyers submit that the Trial Chamber's substantive findings on this question are compelling and reveal no error. They

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[1146] ICTY *Prosecutor v Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014, para. 567 fn. 1872; IMT *The United States of America et al., v Göring et al.*, Trial of Major War Criminals Before the International Military Tribunal Under Control Council Law No. 10, Vol. 1 (1947), Judgment, 1 October 1946, p. 248; District Court of Jerusalem, *Israel v Adolph Eichmann*, Judgment, 11 December 1961, para. 57.
[1147] **E465** Trial Judgment, paras 3508-3513.
[1148] **E465** Trial Judgment, paras 1168-1179.
[1149] **E465** Trial Judgment, paras 2605-2610.
[1150] **E465** Trial Judgment, paras 2994-2999.
[1151] **F54** Appeal Brief, paras 1029-1032.

respond to two issues raised by the Defence submissions in **ground 158**[1152] and **ground 126**.[1153]

481. First, in **ground 158** concerning Prey Veng and Svay Rieng, the Defence has seized on the fact that the Trial Chamber's finding on the sufficiency of the discernible group relies on a cross-reference to Section 16.3.2.1.3.5 of the Trial Judgment. That cross-reference appears to be in error: the section in question clearly relates to an entirely different topic,[1154] whereas another section of the Trial Judgment considers in detail precisely the question of the CPK's approach towards Vietnamese people (Section 13.3.5.2)[1155] and the Vietnamese as an identified racial group (Section 13.3.6).[1156] The latter two sections comprehensively set out reasoning in support of the Trial Chamber's conclusions regarding the targeted group and no challenge has been made against them. The presence of an apparent clerical error in the Trial Judgment is not a basis for overturning the Trial Chamber's substantive conclusions.[1157]

482. Secondly, in **ground 126**[1158] and **ground 158**[1159] the Defence appears to argue that persons accused of being members of the Vietnamese military could not form part of the targeted group as identified by the Trial Chamber. The Lead Co-Lawyers note the Trial Chamber's language in defining the Vietnamese group may have contributed a certain degree of confusion. In some parts of the Trial Judgment the Trial Chamber referred to "Vietnamese living in Cambodia" as being a sufficiently discernible racial group.[1160] The language may have been adapted from the deportation context, which is the only place in which the Closing Order referred to "Vietnamese living in Cambodia";[1161] concerning persecution the Closing Order refers to "Vietnamese" as the protected group.[1162] Likewise at trial the Parties defined

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[1152] **F54** Appeal Brief, paras 1029-1050.
[1153] **F54** Appeal Brief, paras 828-835.
[1154] **E465** Trial Judgment, paras 3851-3855. This section of the judgment relates to the common purpose and the concept of political enemies within it, describing how the terms "CIA", "KGB" and "*Yuon*" were used to label perceived enemies. These terms did not refer to racial groups. Indeed, the Defence itself submitted at trial, and the Trial Chamber agreed, that the terms were not literal and "were used for foreigners as well as anyone who opposed the CPK's regime". See **E465** Trial Judgment, paras 3854-3855.
[1155] **E465** Trial Judgment, paras 3382-3417.
[1156] **E465** Trial Judgment, paras 3418-3428.
[1157] **Case 001– F28** Appeal Judgment, para. 629.
[1158] **F54** Appeal Brief, paras 828-835.
[1159] **F54** Appeal Brief, paras 1028-1050.
[1160] **E465** Trial Judgment, paras 1189 and 3511.
[1161] **D427** Closing Order, para. 1398.
[1162] **D427** Closing Order, para. 1422 (based on biological and particularly matrilineal descent).

the persecuted racial group as "Vietnamese".[1163] Indeed, the Trial Chamber's reference to "Vietnamese living in Cambodia" cites paragraphs of the Closing Order where the group is defined as "Vietnamese".[1164]

483. The Lead Co-Lawyers submit that, as at trial, the group should be defined as Vietnamese people. The Defence has made no arguments which show that it was unreasonable for the Trial Chamber to find that the Vietnamese people were a sufficiently discernible racial group. Indeed, the Defence did not challenge the Vietnamese as a discernible racial group in its final trial submissions.[1165] Moreover, in parts of the Trial Judgment the Trial Chamber also speaks of "targeted group of Vietnamese",[1166] or refers simply to "Vietnamese" or "Vietnamese people" when speaking of the relevant group.[1167]

484. The Defence now appears to argue: (i) that the Trial Chamber erred by not distinguishing Vietnamese civilians from Vietnamese military personnel or Vietnamese people affiliated with the enemy (**ground 158**);[1168] and (ii) that Vietnamese victims were not members of the identified racial group because (according to the Defence) they did not live in Cambodia (**ground 126**).[1169] The Lead Co-Lawyers submit that the Defence has confused the issue. The group subject to racial persecution must be a racial group. It can include members of the military as well as civilians. Here, the group is Vietnamese people.[1170] Whether or not some members of the group were affiliated or perceived to be affiliated with an enemy military or political power is irrelevant to their identity as members of a racial group.[1171] Where detentions relate to persons who are genuinely members of an enemy military force, a separate question can of course arise as to whether the detention targets them because of their race or, rather, for their enemy status. The Lead Co-Lawyers respond to this issue below.

[1163] See **E457/6/4/1** Defence Closing Brief, paras 1889-1893, 2186-2198; **E457/6/3/1** NUON Chea's Amended Closing Brief in Case 002/02, 28 September 2017, para. 696; **E457/6/1/1** Co-Prosecutors' Amended Closing Brief in Case 002/02, paras 894-895 fn. 3634.
[1164] **E465** Trial Judgment, para. 3418 fn. 11520 (referring to paragraphs 791 and 1343 of the Closing Order, where it describes the group as the "Vietnamese").
[1165] **E457/6/4/1** Defence Closing Brief, paras 1889-1893, 2184-2198. The Lead Co-Lawyers note that the Defence used "Vietnamese", "Vietnamese people", or "ethnic Vietnamese" throughout their submissions in describing the targeted group.
[1166] **E465** Trial Judgment, para. 2609.
[1167] **E465** Trial Judgment, paras 2605-2609, paras 2995-2996.
[1168] **F54** Appeal Brief, paras 1029-1032.
[1169] **F54** Appeal Brief, paras 828-835.
[1170] See paras 482-483 above.
[1171] See *Prosecutor v Kupreškić,* IT-95-16-T, Judgement, 14 January 2000, para. 568.

485. Regarding the question of the appropriate and sufficiently identified racial group, the Lead Co-Lawyers submit that the relevant *racial* group must be Vietnamese people. Just as this was not doubted by any party to trial, it should not now be questioned as a reasonable finding by the Trial Chamber.[1172]

9.5.3.6.3 Persecution in Prey Veng and Svay Rieng

486. In **ground 158**,[1173] in addition to challenging the discernibility of the group (responded to above), the Defence asserts that the Trial Chamber erred in finding: (i) that the persecutory acts charged were either not established beyond reasonable doubt or were not within the scope of the trial; (ii) that the challenged acts were not discriminatory in fact; and (iii) that the Vietnamese were not intentionally targeted in Prey Veng and Svay Rieng.

9.5.3.6.3.1 Underlying acts – killings, arrests, deportations

487. The Defence argues that the underlying acts have not been proven beyond reasonable doubt.[1174] Those acts as identified by the Trial Chamber in relation to Prey Veng and Svay Rieng were: (i) deportations from Prey Veng to Vietnam that took place in 1975 and 1976; (ii) arrests that took place in Prey Veng and Svay Rieng between 1977 and 1979; and (iii) killings of Vietnamese civilians that took place in Svay Rieng in 1978.[1175]

488. The Lead Co-Lawyers respond elsewhere in this Brief to claims that deportations from Prey Veng were not proved beyond reasonable doubt.[1176]

489. With regard to the arrests in Prey Veng, the Defence does not appear to allege any error in the Trial Chamber's factual findings on arrests, but merely challenges whether the acts fall within the temporal scope of the charge. Specifically, the Defence claims that the Trial Chamber was not permitted to rely on arrests which may have occurred between late 1975

[1172] In any event, as argued elsewhere in this Brief, the Trial Chamber made findings concerning arrests and disappearances of Vietnamese people whom it had identified as living in Cambodia: see below at para. 719. The Defence has not demonstrated any error in those findings.
[1173] **F54** Appeal Brief, paras 1028-1050.
[1174] **F54** Appeal Brief, paras 1033-1036.
[1175] **E465** Trial Judgment, para. 3512.
[1176] See paras 308-313.

and early 1977.[1177] The Defence appears to believe that the temporal scope only includes conduct after April 1977.[1178] This is incorrect.

490. The Trial Chamber was seized:

> On the basis of the Closing Order and the Severance Decision, the acts charged with regard to the treatment of the Vietnamese are limited to expulsions from Cambodian territory to Vietnam, arrest, detention and killings of Vietnamese and, from April 1977, mass gathering and killings in Prey Veng and Svay Rieng.[1179]

491. The only charges which did not include events before April 1977 are those concerning "mass gatherings and killings". That temporal limitation in the charges does not apply to other forms of underlying conduct or to the crime of racial persecution in general. The Lead Co-Lawyers note that the Defence itself understood that the charge of racial persecution overall, as it relates to the Vietnamese, should "be considered for the entire duration of the ECCC's temporal jurisdiction, i.e., 17 April 1975 to 6 January 1979."[1180] There is no error in the Trial Chamber's reliance on arrests which might have occurred between late 1975 and early 1977.[1181]

492. Regarding arrests in Svay Rieng, the Defence claims that the Trial Chamber failed to provide reasons enabling "the identification of the specific arrests that are characterised as persecution."[1182] However, the Trial Chamber did make findings regarding the arrest of Vietnamese people in Svay Rieng.[1183] The Defence contests the Trial Chamber's findings[1184] regarding the disappearance of four families from the area of Svay Yea village.[1185] However, the Trial Chamber also had before it the evidence of Civil Party SIENG Chanthy, that the two other Vietnamese families in her village were arrested and killed or disappeared.[1186] The

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[1177] **F54** Appeal Brief, para. 1034; **E465** Trial Judgment, para. 3450.
[1178] **F54** Appeal Brief, para. 1034.
[1179] **E465** Trial Judgment, para. 3508.
[1180] **E457/6/4/1** Defence Closing Brief, para. 1892.
[1181] This applies to arrests in Pou Chentam Village described by Civil Parties LACH Kry and DOUNG Oeurn and Witness THANG Pal. See **E465** Trial Judgment, paras 3450-3451.
[1182] **F54** Appeal Brief, para. 1035.
[1183] **E465** Trial Judgment, paras 3452-3455.
[1184] **E465** Trial Judgment, para. 3453.
[1185] **F54** Appeal Brief, para. 1035, referring to paras 987-992.
[1186] **E1/393.1** [Corrected 1] T., 29 February 2016 (Civil Party SIENG Chanthy), p. 93 lines 14-15 after [15.43.15]; **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 15 lines 7-22 after [09.34.42], p. 20 line 6 – p. 22 line 13 before [09.53.00], p. 33 line 21 – p. 35 line 13 after [10.35.02], discussed by the Trial Chamber at **E465** Trial Judgment, para. 3452.

Trial Chamber clearly accepted that evidence when it found that the fear caused by these disappearances led Civil Party SIENG Chanthy's father to commit suicide.[1187]

9.5.3.6.3.2 Discrimination in fact

493. In the third argument within **ground 158**, the Defence argues that the Trial Chamber erred in finding that the above acts were discriminatory in fact. It does so not by questioning whether the killings or disappearances occurred, but challenging whether the victims were targeted for their Vietnamese race or for another reason. In doing so it misrepresents the evidence of Civil Parties SIENG Chanthy and DOUNG Oeurn.[1188]

494. Civil Party SIENG Chanthy's father was Vietnamese. However the Defence implies that the harms suffered by her family were because her brothers were associated with the former regime.[1189] The Trial Chamber considered the evidence and concluded that Civil Party SIENG Chanthy's father had committed suicide because he feared the harm that would come to him and his family because he was Vietnamese. There was significant evidence before the Trial Chamber to support the finding that the threat of harm resulted from targeting of Vietnamese people: Civil Party SIENG Chanthy testified that the cooperative chiefs accused her father of being a Vietnamese puppet;[1190] the two other Vietnamese families in the village were taken away and disappeared, with people understanding that they had been killed;[1191] other people would not dare speak to Civil Party SIENG Chanthy because of fear of being associated with a half-Vietnamese person.[1192] To Civil Party SIENG Chanthy, the basis of the persecution was so clear that at the end of her testimony her question to the Accused was why the regime had killed members of minority ethnic groups.[1193]

[1187] **E465** Trial Judgment, para. 3455.
[1188] **F54** Appeal Brief, paras 1037-1039.
[1189] **F54** Appeal Brief, para. 1038.
[1190] **E1/393.1** [Corrected 1] T., 29 February 2016 (Civil Party SIENG Chanthy), p. 94 lines 8-13 after [15.45.29]; **E465** Trial Judgment, para. 3452.
[1191] **E1/393.1** [Corrected 1] T., 29 February 2016 (Civil Party SIENG Chanthy), p. 93 lines 14-16 after [15.43.15]; **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 19 line 19 – p. 20 line 12 after [09.46.34], p. 21 line 13 – p. 22 line 5 after [09.50.08], p. 33 line 21 – p. 36 line 2 before [10.42.54]. See also **E465** Trial Judgment, para. 3452.
[1192] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 6 lines 18-20, before [09.17.12].
[1193] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 41 lines 13-16, before [10.56.02] ("Why did Democratic Kampuchea regime kill people and why they discriminated against other ethnicities, including the Cham, the Vietnamese and the Chinese who lived through the regime? <Why did they kill those people?>").

495. Civil Party DOUNG Oeurn's[1194] husband was Vietnamese. He was taken away and disappeared soon after the similar arrest and disappearance of the other Vietnamese people in the village. The Defence does not appear to contest that Civil Party DOUNG Oeurn's husband was arrested and disappeared. Instead, it claims that, according to DOUNG Oeurn's evidence, he was a smuggler and a former Vietnamese soldier, and therefore might have been arrested for those reasons.[1195] Curiously, the Defence draws that assertion from statements recorded by DC-Cam,[1196] an organisation whose working methods it has expressly impugned in its Appeal Brief.[1197] In fact, Civil Party DOUNG Oeurn repeatedly refuted the Defence's allegation that her husband was a drug smuggler,[1198] and said she knew little about what military or Viet Cong background he might have had in the past.[1199] Civil Party LACH Kry corroborated her account.[1200] Civil Party DOUNG Oeurn's evidence was clear as to the reason why her husband and the others were targeted: "The Vietnamese would be taken away, all of them <would not be spared in that regime>. <>Since my child belonged to a Cambodian mother, <only the husband was taken away>."[1201]

496. The Lead Co-Lawyers note that in each of these villages, every Vietnamese family was targeted for arrest and disappearance. The Defence has made no attempt to explain why the other families were targeted if not because they were Vietnamese.

497. The Trial Chamber's findings that people were arrested and killed because they were Vietnamese was entirely reasonable in light of the evidence. The Defence has demonstrated no error in the Trial Chamber's findings. In any event, the Lead Co-Lawyers note that the Defence's arguments with respect to Civil Parties DOUNG Oeurn and SIENG Chanthy

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[1194] Further submissions are made regarding Civil Party DOUNG Oeurn at paras 308-312.
[1195] **F54** Appeal Brief, para. 1038.
[1196] **F54** Appeal Brief, fn. 1920.
[1197] **F54** Appeal Brief, paras 326-328.
[1198] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 16 lines 12-13 after [09.45.35], p. 46 lines 18-23 after [11.24.34], p. 51 lines 2-8 and lines 12-15 before [13.36.18]. The allegation concerning opium trading appears to have come from written statements taken by DC-Cam. See **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 51 line 17 – p. 53 line 10 after [13.36.18]. The reasons for discounting such statements are addressed elsewhere in this brief: see Section 8.2.4 at paras 204-212, esp. at 207-211.
[1199] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 18 lines 15-19 before [09.52.50], p. 53 line 11 – p. 54 line 19 before [13.47.00].
[1200] **E1/380.1** [Corrected 3] T., 21 January 2016 (Civil Party LACH Kry), p. 79 lines 5-6 before [15.02.03], p. 80 lines 8-9 after [15.05.03], p. 91 lines 9-12 after [15.35.06]. In **F54** Appeal Brief, fn. 1920 the Defence erroneously attributes a statement to Civil Party LACH Kry which he did not make and which is contradicted by his testimony. See **E3/7559** DC-Cam Interview (CHHUON Ri), 10 March 2000.
[1201] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 31 lines 23-25 after [10.48.20].

would not alter the Trial Chamber's ultimate conclusions, given the range of other persecutory acts which the Trial Chamber relied on in its findings.

9.5.3.6.3.3 Intention to discriminate

498. The Defence continues in **ground 158**[1202] with submissions arguing that the Trial Chamber erred in concluding that discriminatory intent had been established. The Defence particularly focuses on disputing the notions that Vietnamese victims were identified through the creation of lists, and that they were targeted on the basis of a theory of matrilineal descent.[1203]

499. The Lead Co-Lawyers note that a finding relating to the creation of lists of Vietnamese in Prey Veng and Svay Rieng Provinces is unnecessary for a finding of an intention to discriminate. The Lead Co-Lawyers recall that crime-base evidence in Prey Veng and Svay Rieng demonstrated that lists were unnecessary in those communities: people already knew who the Vietnamese people were. The Trial Chamber recalled Civil Party SIENG Chanthy's evidence that the cooperative chief "<[…] knew clearly who was who in the village. As for> my family, the chief of the cooperative knew <it> very well that my grandparents were ethnically Vietnamese."[1204] The Civil Party testified that there were three mixed families in her village, including her own.[1205] Likewise, in Civil Party DOUNG Oeurn's village of Pou Chentam, in Prey Veng Province, there were a total of three mixed Vietnamese families.[1206] The Vietnamese family members were all taken away and never seen again.[1207]

[1202] **F54** Appeal Brief, paras 1029-1050.
[1203] **F54** Appeal Brief, paras 1040-1048.
[1204] **E465** Trial Judgment, para. 3452; **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 22 lines 8-13 before [09.53.00]. See also **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 15 lines 4-6 after [09.34.42] ("Everyone knew because my father had a fair complexion, and he looked really like Vietnamese, so villagers were aware that my father was Vietnamese") and p. 15 lines 17-18 after [09.36.28] ("They did not do anything to search for Vietnamese since Khmer Rouge had known in advance that which family was half-blooded").
[1205] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 15 lines 7-12 before [09.36.28]; **E465** Trial Judgment, para. 3452.
[1206] **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 39 line 21 – p. 40 line 3 after [11.06.59].
[1207] **E465** Trial Judgment, paras 3445-3451; **E1/381.1** [Corrected 2] T., 25 January 2016 (Civil Party DOUNG Oeurn), p. 11 line 16 – p. 16 line 3 before [09.45.35], p. 28 line 6 – p. 30 line 5 before [10.43.58], p. 38 line 6 – p. 39 line 18 after [11.00.49], p. 59 line 4 – p. 61 line 7 after [13.58.59]; **E1/379.1** [Corrected 2] T., 20 January 2016 (Civil Party LACH Kry), p. 64 line 10 – p. 66 line 15 before [14.04.04], p. 69 lines 1-19 before [14.14.16], p. 73 line 11 – p. 74 line 7 after [14.23.18], p. 89 lines 6-15 after [15.20.41], p. 100 lines 8-14 after [15.49.25]; **E1/371.1** [Corrected 3] T., 6 January 2016 (Witness THANG Phal), p. 41 line 2 – p. 45 line 9 after [10.52.46], p. 56 lines 4-15 after [11.29.43], p. 62 lines 3-16 before [13.42.12], p. 80 lines 5-10 after [14.32.19], p. 89 lines 1-19 before [15.17.37].

500. Similarly, the question of matrilineal policy is not determinative. It is relevant because it explains why in some instances the children of Vietnamese men were not killed, and why this does not negate a finding of intent. In respect of the Chamber's findings regarding persecution the Defence has not explained how the alleged error would alter the Trial Chamber's conclusions.

9.5.3.6.4 Persecution in Tram Kak

501. With respect to Tram Kak District, the Trial Chamber found that racial persecution had been established in relation to the deportation of Vietnamese people from Tram Kak to Vietnam from 1975 to mid-1976.[1208] The Defence's appeal in respect of this crime (**ground 110**) argues that (i) no evidence exists to support the Trial Chamber's finding regarding the underlying acts and (ii) intent was not correctly established by the Trial Chamber.[1209] Regarding intent, the Lead Co-Lawyers agree with the submissions of the OCP.[1210]

502. Concerning the underlying acts, the Lead Co-Lawyers submit that the Defence submissions fail to demonstrate any reason for disturbing the Trial Chamber's findings. The Trial Chamber found persecution of Vietnamese people in Tram Kak based on the acts set out in its factual analysis,[1211] describing the conduct as "deportation".[1212] In disputing the finding of persecution, the Defence merely relies on its previous arguments which challenged the Trial Chamber's finding of deportation.[1213] However, as set out above,[1214] the Defence's arguments in relation to deportation from Tram Kak are restricted to arguing that Vietnamese people did not cross an international border.[1215]

503. The Lead Co-Lawyers are therefore perplexed as to how these same arguments could be used to challenge the Trial Chamber's finding of persecution. The finding of persecution does not require that the victims crossed an international border. Neither does it depend on the specific legal characterisation of the underlying acts.[1216] It requires only that members of the protected

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[1208] **E465** Trial Judgment, paras 1188-1192.
[1209] **F54** Appeal Brief, paras 748-755.
[1210] **F54/1** OCP Response Brief, para. 638.
[1211] **E465** Trial Judgment, paras 1110-1125.
[1212] **E465** Trial Judgment, para. 1189.
[1213] **F54** Appeal Brief, para. 750 (referring to paras 686-718).
[1214] See above at 9.2.2 at paras 314 *et seq.*
[1215] **F54** Appeal Brief, paras 686-718.
[1216] So long as they are serious enough to constitute the violation of fundamental rights – see Section 9.5.2.1 at paras 333-334.

group were subjected to treatment which denied or infringed upon their fundamental rights (and which was discriminatory in fact).

504. The Trial Chamber found that in Tram Kak District large numbers of Vietnamese people were "gathered up".[1217] Specific findings in support of this include: that "a 'huge number' of Vietnamese were indeed transported from several communes to the vicinity of the District Office in Angk Roka";[1218] that "instructions were issued from at least the district level to round up Vietnamese from various communes, and those instructions were implemented";[1219] that Vietnamese people "vanished without people knowing their fate";[1220] and that Vietnamese people were exchanged for Khmer Krom.[1221] Regarding the fate of these people, the Trial Chamber concluded that: from late 1975 until early 1976 they were expelled or disappeared; from April 1977 onwards they were increasingly under suspicion and many were arrested; and instructions to kill Vietnamese were issued at various times.[1222] The Trial Chamber made clear that in this treatment, "persons identified as Vietnamese were being targeted on the basis that they were Vietnamese".[1223]

505. In light of the these findings, it is difficult to comprehend the relevance of the Defence's argument that Vietnamese people did not cross an international border. The Trial Chamber clearly found that Vietnamese people were arrested, moved, and in many cases killed or disappeared. The treatment targeted them as Vietnamese people and clearly infringed their fundamental rights, as found by the Trial Chamber.[1224] The Defence has demonstrated no error in the Trial Chamber's conclusion regarding racial persecution in Tram Kak.

9.5.3.6.5 Persecution in S-21 and Au Kanseng

506. The Trial Chamber found racial persecution at S-21 based on the discriminatory arrest, detention, interrogation and execution of Vietnamese people.[1225] In respect of Au Kanseng,

[1217] **E465** Trial Judgment, para. 1125.
[1218] **E465** Trial Judgment, para. 1114.
[1219] **E465** Trial Judgment, para. 1115.
[1220] **E465** Trial Judgment, para. 1117.
[1221] **E465** Trial Judgment, para. 1125.
[1222] **E465** Trial Judgment, para. 1125.
[1223] **E465** Trial Judgment, para. 1125.
[1224] **E465** Trial Judgment, para. 1190
[1225] **E465** Trial Judgment, para. 2609.

the Trial Chamber found racial persecution relating to the treatment of a specific group of six Vietnamese people who were arrested and executed.[1226]

507. The Defence raises a number of somewhat confusing arguments about these findings in **ground 126**[1227] and **ground 130**.[1228] To the extent that these appear to question the sufficient discernibility of the targeted group, the Lead Co-Lawyers have responded above.[1229] The arguments seem otherwise concerned with disputing whether Vietnamese prisoners were targeted on the basis of their race, and therefore whether discrimination in fact is established.

508. The Lead Co-Lawyers agree with the points made by the OCP in response to these arguments.[1230] The Lead Co-Lawyers principally address the Defence's argument that the treatment meted out to Vietnamese people was permissible because it was not due to their race but to the fact that "Vietnam was perceived as a military and political enemy",[1231] or due to the fact that Vietnamese people were "seen as political enemies".[1232]

509. These Defence arguments involve several levels of conflation. First, the Lead Co-Lawyers note that in the context of the crime of persecution, there is a material difference between treating persons differently because they are "seen as political enemies" and treating them differently because they are known to be members of an opposing military force in the context of an armed conflict.

510. But more fundamentally, the Defence has not justified treating *all people of Vietnamese race* either as political enemies or as spies or members of an enemy military force. To make such a categorisation (with its attendant consequences for treatment) purely on the basis of race is the very definition of discrimination in fact. The fact that this categorisation was made purely on the basis of race is clear from the evidence and was recognised by the Trial Chamber. The Trial Chamber found that Vietnamese persons brought to S-21 included persons known to be civilians.[1233] The group of six Vietnamese people executed at Au Kanseng were likewise

[1226] **E465** Trial Judgment, paras 2994-2999.
[1227] **F54** Appeal Brief, paras 828-835.
[1228] **F54** Appeal Brief, paras 859-861.
[1229] See Section 9.5.3.6.2 at paras 480 *et seq.*
[1230] **F54/1** OCP Response Brief, paras 639-645, 646-649.
[1231] **F54** Appeal Brief, para. 829.
[1232] **F54** Appeal Brief, para. 831.
[1233] **E465** Trial Judgment, paras 2460, 2461, 2464, 2465.

known to be civilians.[1234] Those detained at S-21 included not only the spouses of Vietnamese soldiers,[1235] but also more than 30 children,[1236] some younger than 10 years of age,[1237] with one Vietnamese child killed in S-21 described as about one year old.[1238] Labelling these people (including young children)[1239] as enemy spies[1240] does not avoid racial discrimination when the basis on which they have been so labelled is their race.

511. The Defence repeatedly refers to the existence of an armed conflict with Vietnam.[1241] However, international law does not authorise parties to an armed conflict to undertake internment (much less execution) based on race.[1242] The Trial Chamber clearly took into account the context of armed conflict,[1243] but found that the reason for the detention, mistreatment and execution of Vietnamese people was their race.[1244] These findings were justified by the evidence and the Defence has not demonstrated that they were unreasonable.

512. Lastly, the Lead Co-Lawyers agree with the OCP that the Defence has misrepresented this Chamber's ruling in Case 001.[1245] In any event, for reasons which have been explained above,[1246] the Trial Chamber was not bound by factual findings from Case 001. The Trial Chamber's only obligation in this regard was to properly consider the evidence which was before it in the present case – including material from Case 001 which was admitted in Case 002/02.[1247] The Defence arguments do not demonstrate that it failed to do so.

[1234] **E465** Trial Judgment, para. 2926.
[1235] **E465** Trial Judgment, paras 2460, 2477 and fn. 8356.
[1236] **E465** Trial Judgment, para. 2478. Regarding the presence of Vietnamese children in S-21, see also paras 2460, 2477 and fns 8356, 8405.
[1237] **E465** Trial Judgment, fns 8409 and 8412.
[1238] **E465** Trial Judgment, fn. 8416.
[1239] See for example **E465** Trial Judgment, fn. 8412 (where the Trial Chamber refers to records of children as young as eight being recorded as spies).
[1240] **E465** Trial Judgment, para. 2465.
[1241] **F54** Appeal Brief, paras 829, 831, 860-861.
[1242] See ICTY *Prosecutor v Kordić and Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001, para. 291; See also ICTY *Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 438 (where such internment was held to constitute the crime against humanity of persecution).
[1243] See for example **E465** Trial Judgment, paras 2483, 2996.
[1244] **E465** Trial Judgment, paras 2609, 2996.
[1245] **F54/1** OCP Response Brief, para. 645; **F54** Appeal Brief, paras 833-834; **Case 001– F28** Appeal Judgment, paras 281-284.
[1246] Section 6.4 above at paras 106-108.
[1247] On the distinction between referring to the Case 001 judgment and considering the underlying evidence admitted in both cases, see **E314/12/1** Reasons for Decision on Applications for Disqualification, 30 January 2015, para. 84.

9.6 Crime Against Humanity of Other Inhumane Acts

513. The Trial Chamber held that the crime of other inhumane acts was established in respect of the DK's regulation of marriage, enforced disappearances, forced movement, and attacks against human dignity.

514. In this section, the Lead Co-Lawyers address the Defence's arguments about the elements of the crime and legality (primarily set out in **ground 97**[1248] and **ground 98**,[1249] but also linked to arguments about the regulation of marriage in **ground 160** and **grounds 171-172**[1250]). The Lead Co-Lawyers then consider arguments made by the Defence concerning the Trial Chamber's factual findings and whether the crime was correctly established in respect of each type of conduct. Those sections are divided by reference to the type of conduct involved: (i) disappearances; (ii) forced movement of populations; and (iii) forced marriage and forced sexual intercourse. However, each type of conduct relates to legal characterisation as the same crime: other inhumane acts.

9.6.1 Elements of the Crime and Legality

515. The Defence makes a broad attack on the Trial Chamber's finding that the principle of legality was not violated by the charges of crimes against humanity of other inhumane acts. The challenge is focused particularly on the Trial Chamber's application of the crime of other inhumane acts to conduct characterised as forced marriage, and through conduct characterised as rape in the context of forced marriage.[1251]

516. The crime of other inhumane acts captures crimes against humanity that are not specifically enumerated in the statutes of international tribunals because they take "forms which are ever-changing and carried out with particular ingenuity."[1252] It was initially conceived as a "catch-all", to ensure that "any crime of sufficient gravity and fulfilling the other conditions of a

[1248] **F54** Appeal Brief, paras 659-665.
[1249] **F54** Appeal Brief, paras 666-671.
[1250] **F54** Appeal Brief, paras 1098-1116 and 1281-1300 .
[1251] **F54** Appeal Brief, paras 659-671, 1098-1116, 1281-1287. The Trial Chamber's decisions regarding the legality of these forms of other inhumane acts are found at **E465** Trial Judgment, paras 728-732, 740-749. Its findings on the legal characterisation of the conduct as crimes are found at **E465** Trial Judgment, paras 3686-3701.
[1252] ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 623.

crime against humanity would not go unpunished for mere lack of imagination of the drafters."[1253]

517. Other inhumane acts clauses are well-established in international law. They have been included in the statutes of all international tribunals since Nuremberg, and routinely prosecuted in cases before the ICTY,[1254] SCSL,[1255] ICTR,[1256] and the ICC.[1257] Although challenges on the basis of legality have been brought repeatedly before each of those tribunals, the Defence has been unable to direct the Chamber to any that has succeeded. As this Chamber has observed, there is "no doubt that under customary international law as it stood in 1975, 'other inhumane acts' was accepted as a residual category of crimes against humanity."[1258]

518. Ordinarily, this conclusion would be sufficient for establishing legality – the principle requires only that a charged offence existed as a matter of international (or domestic) law at the time of the charged acts.[1259] However, the crime of other inhumane acts attracts an additional degree of scrutiny due to the potentially broad range of conduct that could fall within its ambit. In the words of this Chamber, a residual clause will always be in "natural tension with the requirement of *lex certa*".[1260]

[1253] Terhi Jyrkkiö, "'Other Inhumane Acts' as Crimes Against Humanity", *Helsinki Law Review*, 2011, p. 184. *Attachment 15*

[1254] ICTY *Prosecutor v Tadić et al.*, IT-94-1-T, Opinion and Judgment, 7 May 1997; ICTY *Prosecutor v Stakić*, IT-97-24-T, Judgement, 31 July 2003; ICTY *Prosecutor v Stakić*, IT-97-24-A, Judgement, 22 March 2006; ICTY *Prosecutor v Kvočka et al.*, IT-98-30/1-T, Judgement, 2 November 2001; ICTY *Prosecutor v Kupreškić et al*., IT-95-16-T, Judgement, 14 January 2000.

[1255] SCSL *Prosecutor v Brima et al*., SCSL-04-16-T, Judgement, 20 June 2007; SCSL *Prosecutor v Gbao et al*., SCSL-04-15-T, Judgement, 2 March 2009; SCSL *The Prosecutor v Brima et al*., SCSL-2004-16-A, Judgment, 22 February 2008.

[1256] ICTR *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998; ICTR *Prosecutor v Kayishema et al*., ICTR-95-1-A, Judgment (Reasons), 1 June 2001.

[1257] ICC *Prosecutor v Ongwen*, Decision on Confirmation of Charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, 23 March 2016; ICC *Prosecutor v Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008; ICC *Prosecutor v Al-Hassan, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18- 461-Corr-Red, 13 November 2019.

[1258] **F36** Case 002/01 Appeal Judgment, para. 576.

[1259] **Case 001 – F28** Case 001 Appeal Judgment, paras 89, 95; see also International Covenant on Civil and Political Rights, 16 December 1966, Articles 15(1), 15(2).

[1260] **F36** Case 002/01 Appeal Judgment, para. 578.

519. Accordingly, in Case 002/01, the Chamber carefully defined other inhumane acts in a way that ensured compliance with the maxim *nullum crimen sine lege*, while simultaneously preserving the crime's inclusive nature.[1261]

9.6.1.1 The Approach to Assessing Legality Set Out in Case 002/01

520. The Trial Chamber recognised the approach to legality established by this Chamber in Case 002/01.[1262] There, the Chamber adopted a restrictive definition of the crime of other inhumane acts, following careful review of the approaches taken by other international tribunals.[1263] The elements of the crime articulated by this Chamber are:

(i) there was an act or omission of similar seriousness to the other acts that, at the time, were 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.[1264]

521. The Court also took note of the approach developed by the ICTY in *Kupreškić*.[1265] In that case, the ICTY Trial Chamber held that parameters for interpreting other inhumane acts could be better identified with reference to international human rights standards, such as those described in the Universal Declaration of Human Rights and the two United Nations Covenants on Human Rights.[1266] In Case 002/01, this Chamber found the *Kupreškić* approach to be tenable, and adopted it as an additional requirement that would further assure the foreseeability of the crime of other inhumane acts.[1267]

522. The test for determining whether conduct constitutes an other inhumane act articulated by this Chamber in Case 002/01 is consistent with customary international law,[1268] and, in the Chamber's view, has been shown to have practically protected the principle of legality over

[1261] **F36** Case 002/01 Appeal Judgment, para. 578.
[1262] **E465** Trial Judgment, para. 726.
[1263] **F36** Case 002/01 Appeal Judgment, para. 578.
[1264] **F36** Case 002/01 Appeal Judgment, para. 580.
[1265] **F36** Case 002/01 Appeal Judgment, paras 582, 583; ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000.
[1266] ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 566.
[1267] **F36** Case 002/01 Appeal Judgment, para. 584.
[1268] Mettraux, *Crimes Against Humanity*, Section 6.10.1.3.1, pp. 680-681. *Attachment 16*

time.[1269] Provided that an act meets the requirements, evaluated holistically and in context, no challenge on the grounds of a violation of *nullum crimen sine lege* will stand.

9.6.1.2 The Sufficiency of the Standard set out in Case 002/01

523. The Defence argues not only that the Trial Chamber misapplied the elements of the crime set out by this Chamber in Case 002/01, but also suggests that application of those elements does not secure legality.[1270] The Lead Co-Lawyers submit that the test set out in Case 002/01 is correct and sufficiently protects the principle of legality.

524. First, as this Chamber has recognised, the *ejusdem generis* standard contained in the first element itself provides an "essential safeguard" of legality.[1271] By requiring that acts brought within the clause are comparable in nature (as well as gravity) to listed crimes against humanity,[1272] only conduct that is characteristically similar to that underlying enumerated acts will be captured. The gravity component of this element further bolsters the definiteness of the crime by ensuring that obscure or minor offences cannot be brought within its ambit.

525. Secondly, the ICTY Trial Chamber's approach to identifying other inhumane acts in *Kupreškić* offers additional protection of accessibility and foreseeability.[1273] At any given time, potential perpetrators are on notice of the set of basic human rights that, if violated in the context of a widespread or systematic attack on a civilian population, could result in commission of an other inhumane act. The standards set out in international human rights instruments are clearly articulated and widely understood.

526. Finally, with regard to the standard of clarity and specificity required for a crime to be accessible, the elements of other inhumane acts are not necessarily more broadly formulated than those of the enumerated crimes against humanity. Provided that the provision is strictly construed,[1274] and an analysis is conducted of the nature and gravity of human rights violated, (rather than a superficial comparison with other crimes against humanity) the principle of *nullum crimen sine lege* will be protected.

[1269] **F36** Case 002/01 Appeal Judgment, para. 581.
[1270] **F54** Appeal Brief, paras 1099-1107, 1118, 1281-1287.
[1271] **F36** Case 002/01 Appeal Judgment, para. 578.
[1272] **F36** Case 002/01 Appeal Judgment, para. 656
[1273] ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, paras 565, 566.
[1274] **F36** Case 002/01 Appeal Judgment, para. 578.

527. These considerations demonstrate that a court can be satisfied that the requirement of legality has not been violated where acts are found to meet the elements set out in Case 002/01. In the words of this Chamber: "the guiding issue – and indeed the only one of relevance – was whether the conduct in question, in light of all the specific circumstances of the case at hand, actually fulfilled the definition of other inhumane acts."[1275] The Trial Chamber did not fall into error by applying this approach.

9.6.1.3 The Defence's General Challenges Based on the Principle of Legality

528. The Defence mounts two general challenges to the Trial Chamber's analysis of legality in relation to the crime of other inhumane acts (**ground 97** and **ground 98**).[1276]

529. First, the Defence argues that the Trial Chamber erred by focusing its analysis of legality on the crime itself – other inhumane acts.[1277] Instead, the Defence submits that the Court's focus should be on the specific *acts* alleged to have constituted the crime (for example, forced marriage or disappearances), an approach that this Chamber has explicitly dismissed.[1278]

530. Secondly, the Defence argues that the Trial Chamber misapplied the test set out by the ICTY in *Kupreškić*.[1279] In particular, it submits that an accurate reading of *Kupreškić* requires identification of specific prohibitions in international human rights instruments that align with charged conduct, not just positive human rights protections. The Defence submissions on this point are framed around the Trial Chamber's failure to analyse a condition of "formal unlawfulness" – a phrase used sparingly by this Chamber in Case 002/01,[1280] that the Defence has co-opted and misused throughout its brief.

531. Each of these challenges advances a misunderstanding of the crime of other inhumane acts and its application, as elaborated below.

[1275] **F36** Case 002/01 Appeal Judgment, para. 589.
[1276] **F54** Appeal Brief, paras 659-671; but see also paras 1099-1107 and 1131-1132.
[1277] **F54** Appeal Brief, paras 663-665; **E465** Trial Judgment, para. 741.
[1278] **F54** Appeal Brief, para. 665; **F36** Case 002/01 Appeal Judgment, para. 589
[1279] **F54** Appeal Brief, paras 666-671.
[1280] This Chamber used the phrase "formal unlawfulness" and "formal international unlawfulness" at two places in the 002/01 Appeal Judgment: **F36** Case 002/01 Appeal Judgment, paras 584 and 585. The Chamber used the phrase to refer to the requirement that other inhumane acts are tied to conduct infringing basic human rights, and made clear that "formal unlawfulness" is not a requirement that must be fulfilled.

9.6.1.3.1 Whether specific acts charged were criminal offences

532. The Defence's insistence on analysing the legality of specific acts charged as other inhumane acts subverts the notion of a residual clause. The crime is intended to capture acts that have *not* been imagined and specifically criminalised by drafters, but that nevertheless "deeply shock the conscience of humanity".[1281]

533. The Defence's misplaced focus leads it to make three erroneous submissions, mostly in relation to the DK's regulation of marriage: first, that the particular acts charged as other inhumane acts were not criminalised under Cambodian domestic law at the time;[1282] secondly, that the acts charged were not criminalised under the laws of various domestic jurisdictions around the world;[1283] and thirdly, that the acts charged were not prohibited by international conventions.[1284] The Defence argues that the charges were therefore not foreseeable to the accused.

534. This Chamber should reject the Defence's argument concerning domestic law.[1285] It is uncontroversial that crimes against humanity, from their inception in the Charter of the IMT, have been recognised as criminal internationally "whether or not in violation of the domestic law of the country where perpetrated."[1286] A court *may* consider whether an offence had been criminalised under domestic law (as this Chamber did in Case 001), but domestic criminalisation is not *required* for a finding of compliance with the principle of legality.[1287] Moreover, this Chamber's conclusion in Case 001 that domestic criminalisation was relevant to legality concerned the offences charged, not the specific acts.[1288]

535. The Defence's argument concerning international law is also obviously flawed. The Defence suggests that, in order to protect the principles of accessibility and foreseeability, conduct

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[1281] Rome Statute of the International Criminal Court, 17 July 1998, preamble.
[1282] **F54** Appeal Brief, paras 1119-1130, 1294-1297.
[1283] **F54** Appeal Brief, paras 1137-1139, 1147, 1298-1300.
[1284] **F54** Appeal Brief, paras 664-665, 1111, 1131-1132, 1284-1285.
[1285] **F54** Appeal Brief, paras 1284-1323.
[1286] Charter of the International Military Tribunal, 8 August 1945, Article 6(c); ICTY *Prosecutor v Šainović et al*., IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 21 May 2003, paras 40-43.
[1287] **Case 001 – F28** Case 001 Appeal Judgment, para. 96, citing ICTY *Prosecutor v Šainović et al*., IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 21 May 2003, para. 40.
[1288] **Case 001 – F28** Case 001 Appeal Judgment, para. 96.

charged as other inhumane acts needs to have been specifically criminalised in the laws of war or international conventions.[1289]

536. Again, this Court should not attempt to locate crimes under international law that match the description of acts charged as other inhumane acts, or to identify their legal elements and definition. To do so would be "anachronistic and legally incorrect".[1290] Thus, although "forced marriage" may be a convenient shorthand for one aspect of the DK regulation of marriage, there is no need for the charged acts to correlate with the elements of any standalone conception of "forced marriage" as a crime under international law. As the Trial Chamber held,[1291] it is by determining whether the DK's marriage system satisfies the elements of the crime of other inhumane acts[1292] that the Chamber can be satisfied that the charges do not violate the principle of legality. Because no separate "crime" of forced marriage is under consideration, it is also not necessary for the Chamber to consider the legality of such a crime. The same is true for other conduct charged as other inhumane acts, including enforced disappearances and forced movement of populations.

537. The correctness of this approach is reflected in this Chamber's concern that a "holistic analysis" must be conducted,[1293] and in its emphasis on the need for case-specific analysis of legality.[1294] In Case 002/01, it specifically found that the Trial Chamber had erred in attempting to set out the legal definition and elements of crimes charged as other inhumane acts, "as though they constituted separate categories of crimes against humanity".[1295] It would be equally misguided for the Trial Chamber in this case to have attempted to identify discrete offences such as forced marriage or conjugal rape and to evaluate the conduct charged against the "elements" of those offences.

538. To put the matter beyond doubt, the Lead Co-Lawyers refer to the caselaw of other tribunals. Despite the Defence's attempt to argue that a system of forced marriages could not constitute other inhumane acts because it has not yet been recognised as a specifically enumerated crime

[1289] **F54** Appeal Brief, paras 1111, 1131.
[1290] **F36** Case 002/01 Appeal Judgment, para. 589.
[1291] **E465** Trial Judgment, para. 746.
[1292] **F36** Case 002/01 Appeal Judgment, para. 589.
[1293] **F36** Case 002/01 Appeal Judgment, para. 590.
[1294] **F36** Case 002/01 Appeal Judgment, paras 590, 654.
[1295] **F36** Case 002/01 Appeal Judgment, para. 589.

against humanity,[1296] international tribunals have consistently held that other inhumane acts can be established in such circumstances. Examples of conduct which have been found to amount to the crime against humanity of other inhumane acts despite not being reflected in a specifically enumerated type of crime against humanity include: forcing people to watch their family members being murdered;[1297] perpetrating sexual and physical violence on dead human bodies;[1298] using detainees as human shields,[1299] forcing women to undress and march in public;[1300] and enforced disappearances, humiliation, harassment, and confinement in inhumane conditions.[1301] The Lead Co-Lawyers reiterate that it is the very objective of a residual clause to catch these types of conduct which fall outside the enumerated crimes against humanity.

9.6.1.3.2 Whether there was a need to identify prohibitions, as well as rights, in international human rights instruments

539. The Defence argues that the Trial Chamber's findings about legality are also invalidated by its failure to properly analyse the "formal unlawfulness" of the charges, a requirement it says was articulated by the ICTY Trial Chamber in *Kupreškić*.[1302] In its view, a Court must be satisfied that conduct constituting other inhumane acts is tied not only to the rights contained in international human rights instruments, but also to specific prohibitions.[1303] The Defence submits that because the Trial Chamber only considered the positive human rights protected by international instruments, it could not have been satisfied that the crimes were accessible and foreseeable to the accused.

540. This argument suffers from numerous deficiencies: it reveals confusion about basic legal concepts; has no foundation in any of the authorities relied on by the Defence; and misstates the relevance of *Kupreškić* to analysing legality.

541. First, the Defence's distinction between the rights and prohibitions contained in international human rights instruments has no basis in law. As will be clear to this Chamber, any right

[1296] **F54** Appeal Brief, para. 1106.
[1297] ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 819.
[1298] ICTR *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, para. 936.
[1299] ICTY *Prosecutor v Blaškić*, IT-95-14-T, Judgement, 3 March 2000, para. 716.
[1300] ICTR *Prosecutor v Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 697.
[1301] ICTY *Prosecutor v Kvočka et al.*, IT-98-30/1-T, Judgement, 2 November 2001, paras 206-209.
[1302] **F54** Appeal Brief, paras 666-671, 1098.
[1303] **F54** Appeal Brief, paras 671, 1107.

protected in international human rights instruments carries with it a corresponding duty on a State, which amounts to a prohibition against violating that right. Moreover, it is uncontroversial that international human rights standards, even when they are framed as "prohibitions", cannot themselves render conduct criminal. The Defence is wrong to suggest that the Trial Chamber treated the existence of human rights as though this was sufficient for establishing that conduct was criminalised at a given point in time.[1304] The Trial Chamber merely treated them as relevant to the analysis, not as sufficient or determinative.

542. Secondly, the Defence's appeal to ICTY jurisprudence in support of its reading misconstrues the caselaw of that tribunal. No distinction between "rights" and "prohibitions" was drawn by the *Kupreškić* Trial Chamber in articulating the approach:

> Less broad parameters for the interpretation of 'other inhumane acts' can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.[1305]

Nor was such a distinction between "rights" and "prohibitions" reflected in the *Blagojević* trial judgment (another case cited by the Defence).[1306] On this point, the Defence is also unassisted by its reliance on the *Stakić* trial judgment.[1307] The *Stakić* trial judgment rejected the approach developed in *Kupreškić*,[1308] but was overturned on this issue.[1309] In any event, contrary to the Defence's submissions,[1310] the *Stakić* trial judgment did not embrace a focus on "prohibitions" in its discussion of legality.[1311] The Defence is also wrong to suggest that this Chamber in Case 002/01 adopted a "compromise" of the *Kupreškić* approach and the

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[1304] See **F54** Appeal Brief, para. 669.
[1305] ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 566.
[1306] **F54** Appeal Brief, para. 668 referring to ICTY *Prosecutor v Blagojević & Jokić*, IT-02-60-T, Judgement, 17 January 2005.
[1307] **F54** Appeal Brief, para. 668 referring to ICTY *Prosecutor v Stakić*, IT-97-24-T, Judgement, 31 July 2003, para. 721.
[1308] ICTY *Prosecutor v Stakić*, IT-97-24-T, Judgement, 31 July 2003, para. 721.
[1309] A matter apparently overlooked by the Defence: ICTY *Prosecutor v Stakić*, IT-97-24-A, Judgement, 22 March 2006, paras 313-318.
[1310] **F54** Appeal Brief, para. 668.
[1311] The *Stakić* trial judgment rejected the approach adopted in the *Kupreškić* trial judgment, on the basis that human rights instruments could not automatically be used as the basis of norms of criminal law. It nowhere suggested that prohibitions contained in those same instruments might be sufficient. See ICTY *Prosecutor v Stakić*, IT-97-24-T, Judgement, 31 July 2003, para. 721.

Stakić trial judgment.[1312] The distinction drawn by the Defence is entirely artificial; it has no foundation in ICTY jurisprudence.

9.6.1.4 The legality of charges concerning conduct characterised as forced marriage

543. Building on its submissions about legality, the Defence argues that the Trial Chamber could not have been satisfied of the foreseeability and accessibility of charges concerning the DK's regulation of marriage (**ground 160**). In particular, it submits that:

(i) Forced marriage was permitted under Cambodian law before 1975;[1313]

(ii) Forced marriage could not have been a crime given the prevalence of arranged marriages under the DK;[1314] and

(iii) The law of armed conflict made no reference to forced marriage at the time.[1315]

544. As noted above, the Trial Chamber was not required to consider the legality of the specific conduct charged as other inhumane acts. Once satisfied that other inhumane acts was established as a crime at the time of the charged acts, the Chamber must ensure that the conduct alleged to constitute the crime satisfies the elements set out in Case 002/01[1316] – no separate or additional analysis of the legality of the underlying conduct is required. The Lead Co-Lawyers agree with the OCP's submissions regarding the application of these principles to the concept of forced marriage.[1317]

545. However, even if this Chamber were to adopt the Defence's approach and consider the legality of the specific acts charged under domestic or international law, the Lead Co-Lawyers observe that each of the Defence's arguments fail on their own merits. In the following sections, the Lead Co-Lawyers address each of the three Defence arguments identified above. They submit that even by the Defence's own erroneous approach to evaluating legality, its arguments fail. Under either domestic or international law, the Accused would have been on notice that the conduct charged was unlawful.

[1312] **F54** Appeal Brief, para. 669.
[1313] **F54** Appeal Brief, paras 1113-1114, 1123.
[1314] See **F54** Appeal Brief, paras 1133-1136, 1150-1154, 1161.
[1315] **F54** Appeal Brief, para. 1131.
[1316] At one stage, the Defence appears to agree with this conclusion: **F54** Appeal Brief, para. 660; **F36** Case 002/01 Appeal Judgment, para. 586.
[1317] **F54/1** OCP Response Brief, paras 666-673.

9.6.1.4.1 The content of Cambodian law applicable prior to 1975

546. On several occasions, the Defence makes the demonstrably false assertion that Cambodian law in 1975 did not require the members of a couple to consent to their own marriage, and that it was clear that only their parents needed to provide consent for a marriage to take place.[1318] In the Defence's formulation, the "institutionalisation of the absence" of prospective spouses' consent confirms "the absence of domestic unlawfulness" as it stood in 1975.[1319] The Defence submits that it was not until a series of reforms were passed in 1989 and 1993 that prospective spouses were required to consent to a marriage.[1320]

547. The Defence focuses particularly on the 1920 Civil Code. The Lead Co-Lawyers note the OCP's submission that the 1920 Civil Code was replaced in 1953.[1321] In the section which follows, the Lead Co-Lawyers engage with the substance of the Defence submissions regarding the 1920 Civil Code and observe that it is in any event incapable of supporting the Defence's claims.

548. While it is true that the 1920 Civil Code required the consent of parents of prospective spouses to marry, this consent was neither indispensable nor exclusive of the consent of the couple. Rather, a correct reading of the 1920 Civil Code shows that parental consent was subordinate to that of prospective spouses.

549. First, the 1920 Civil Code provided that either member of a couple could break off an engagement at any time.[1322] If parents held the sole legal rights over marriage, this would not make sense.

550. Second, if consent to marriage was refused by a couple's parents, either member of the couple could ask the local *mekhum* to conduct a process of conciliation.[1323] If a couple's parents continued to refuse, the couple could marry without parental consent after a period of three

[1318] **F54** Appeal Brief, paras 1114, 1121, 1141, 1147.
[1319] **F54** Appeal Brief, para. 1114.
[1320] **F54** Appeal Brief, para. 1136.
[1321] **F54/1** OCP Response Brief, para. 683.
[1322] Cambodian Civil Code of 1920, Article 109 ("La promesse de mariage résultant des fiançailles peut toujours être rompue par l'un des fiançés"). *Attachment 17, p. 34*
[1323] Cambodian Civil Code of 1920, Article 134. *Attachment 17, p. 37*

months from the date of the attempt at conciliation.[1324] This, too, would not make sense if only the consent of the parents had legal consequences.[1325]

551. Thirdly, the 1920 Civil Code provided that, in addition to religious ceremonies, the celebration of marriage consisted of a public declaration by each of the intending spouses that they wished to marry.[1326]

552. Fourth, the 1920 Civil Code provided that a marriage may be nullified when the consent of one of the spouses was vitiated by error or coercion.[1327] This provision made clear that the consent of the spouses was an essential condition for the validity of a marriage under the Civil Code of 1920.

553. This position is confirmed by scholars writing before 1975 and today.[1328] For example, Jacques Migozzi wrote in 1973:

> *Le mariage de leurs enfants étant l'événement désiré par les familles, il est possible que ce mariage soit décidé par les parents avant le consentement des futurs époux. Cependant il est assez rare, semble-t-il que des jeunes gens soient mariés absolument contre leur goût et, en tout cas, leur consentement est formellement requis par le nouveau Code Civil de 1920.*[1329]

554. Similarly, Bridgette Toy-Cronin writes that:

[1324] Cambodian Civil Code of 1920, Article 135. *Attachment 17, p. 37*

[1325] See also Kuong Teilee, "Development of Legal Norms on Marriage and Divorce in Cambodia – The Civil Code Between Foreign Inputs and Local Growth (I)" in *Nagoya University Asian Law Bulletin,* Vol. 1, June 2016, p. 74 ("Although the old Civil Code stated that 'marriage is a solemn contract between a man and a woman…which they cannot arbitrarily dissolve', consents by the parents of the man and the woman were required. At the objections of the parents, the man and the woman had to ask for the intervention of the head of the local commune to mediate for a compromise. If the parents retained their objections three months after the intervention by the head of the local commune, the marriage could proceed even without the consent of the parents."). *Attachment 18*

[1326] Cambodian Civil Code of 1920, Article 138. *Attachment 17, p. 38*

[1327] Cambodian Civil Code of 1920, Article 163. *Attachment 17, p. 41*

[1328] See LIM Suy Hong, *L'égalité dans les relations du travail au Cambodge* (Thèse de doctorat en droit - Université Lumière Lyon 2, 2007), p. 18, who wrote: "*Lorsqu'on lit le Code civil cambodgien de 1920, on constate, contrairement aux « Codes Cambodgiens » anciens, que la puissance paternelle et maritale a été limitée. Concernant le mariage, le consentement entre fille et garçon est indispensable.*" Translation provided to the Lead Co-Lawyers by the ECCC Interpretation and Translation Unit: "Upon reading the Cambodian Civil Code of 1920 we see that, contrary to the old "Cambodian Codes" paternal and marital power has been limited. With respect to marriage, it is essential to have the consent of both the boy and the girl." *Attachment 19*

[1329] Jacques Migozzi, *Cambodge, faits et problèmes de population* (C.N.R.S.), 1973, p. 54-55. *Attachment 20* Translation provided to the Lead Co-Lawyers by the ECCC Interpretation and Translation Unit: "Since the marriage of their children was a much-desired event for the families, it is possible that the parents agreed to this marriage before the future spouses gave their consent. Nevertheless, it is rather rare that young people are married completely against their own will and, in any case, their consent is formally required by the new Civil Code of 1920."

> Parental involvement in marriages was included in the Civil Code that operated prior to 1975. The Code required both minor and adult children to seek the permission of their parents for the match, though it allowed adult children to marry without parental consent. May Ebihara, in her study of a 1960s Cambodian village, observed that it is the parents who decide on the marriage and "the child acquiesces because of a sense of obedience or because she/he has no strong feelings about marrying a particular person." The system of arranged marriage is, of course, open to abuse, and doubtless some of these marriages were without one or both of the spouses' freely given consent. For example, a rape victim could be forced to marry her rapist, as she could no longer marry another man because she had lost her virginity. The Civil Code did contain provisions that allowed either the man or woman to break off an engagement and allowed either spouse, once married, to annul the marriage if their consent was vitiated by mistake or coercion. The basic institution therefore envisioned consensual arranged marriage. Marriage ceremonies were elaborate, with rituals involving the bride and groom and their families.[1330]

555. The provisions of the 1920 Civil Code do not assist the Defence in its argument that spousal consent had never been a part of Cambodian law, and therefore that punishment for forced marriage was impossible to foresee. To the contrary, they defeat the argument in its entirety.

9.6.1.4.2 Forced marriage vs. arranged marriage

556. Closely related to the Defence argument about the domestic legality of forced marriage is its submission that the cultural prevalence of arranged marriages in Cambodia meant that potential perpetrators were not on notice that the DK's regulation of marriage was unlawful.[1331] The Lead Co-Lawyers submit that the Defence's conflation of the DK's forced marriages and traditional arranged marriages is flawed. The Trial Chamber correctly held that "arranged marriage in Cambodian culture is very different from forced marriage in the DK regime".[1332]

557. First, as the Trial Chamber explained at length, arranged marriage can be distinguished from forced marriage by the role of consent (or at least, by consent through delegation of a decision to family members).[1333] The Defence submits that such reasoning is impermissible, and describes the Trial Chamber's analysis as a "Manichean presentation" of the distinction

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[1330] Bridgette A. Toy-Cronin, "What Is Forced Marriage – Towards a Definition of Forced Marriage as a Crime against Humanity", *Columbia Journal of Gender and Law*, Vol. 19, no. 2, 1 June 2010, p. 547. *Attachment 21*
[1331] **F54** Appeal Brief, paras 1140-1145.
[1332] **E465** Trial Judgment, para. 3688.
[1333] **E465** Trial Judgment, paras 3688-3689.

between arranged and forced marriages.[1334] It argues that through its regulation of marriage, the DK simply substituted itself for a couple's parents, or even improved upon existing traditions for the arrangement of marriages.[1335]

558. The Defence explains this manoeuvre with reference to theoretical notions of "constraint" in French jurisprudence,[1336] suggesting that because the State has authority to constrain individuals' behaviour, it could legitimately regulate people's decision to marry. As this Chamber will readily appreciate, it by no means follows that such constraints would be lawful: It is a fundamental premise of international criminal law that state officials are not unhindered in the constraints they impose on a populous.[1337]

559. A second error in the Defence's analysis lies in its failure to acknowledge the contextual elements of the crimes charged – namely, that the regulation of marriage was implemented as part of a systematic and widespread attack on a civilian population.[1338]

560. Thirdly, the actual conduct charged in this case could not be characterised as an uncomplicated example of "arranged marriage", or even of "forced marriage". As the Defence itself submits, the acts alleged must be viewed in context, and cannot be considered in part.[1339] "Forced marriage" is nothing more than a convenient shorthand for certain practices under the DK's regulation of marriage. Considering the full extent and context of the charged acts, the brutality of the regime takes it well beyond any practices that potential perpetrators might have believed were lawful. The threats of physical punishment and death for those who resisted marriage,[1340] the exclusion of couples' families from marriage

[1334] **F54** Appeal Brief, paras 1136, 1147, 1150, 1159, esp. para. 1147.
[1335] **F54** Appeal Brief, paras 1151, 1154, 1159, 1161, 1162.
[1336] **F54** Appeal Brief, paras 1122-1123, 1151, 1159.
[1337] See for example Charter of the International Military Tribunal, 8 August 1945, Article 6(c), making clear that conformity with domestic law is irrelevant to international criminal liability.
[1338] **E465** Trial Judgment, paras 317-323 (legal findings), 301-316 (discussion of requirements).
[1339] **F54** Appeal Brief, paras 1282-1283.
[1340] **E465** Trial Judgment, paras 3619-3622. See also **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 17 line 25 – p. 18 line 8 after [09.44.45]; **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 101 lines 18-22 before [15.51.07]; **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 96 lines 21-25 after [15.47.01].

ceremonies,[1341] the absence of customs and rituals from those ceremonies,[1342] and the forced consummation of marriages provided ample notice of the criminal character of the DK's regulation of marriage.[1343] Even the strongest belief that arranged marriage or "forced marriage" was lawful in Cambodia could not have stretched to apply to the DK's regulation of marriage.

561. Even if the Court was required to consider the domestic criminalisation of "forced marriage" as a crime, the Defence's submissions about legality and context fail on their own merits.

9.6.1.4.3 The content of the law of armed conflict

562. Similarly, if this Chamber were to revisit its approach to assessing legality and consider the status of forced marriage as a crime under international law, it would nevertheless find the Defence submissions lacking. The Defence's argument that forced marriage was not prohibited under international humanitarian law at the time, or under any other international instruments, fails by its own (erroneous) standard.[1344]

563. The obligation to respect family rights was recognised in the late nineteenth century, beginning with the Lieber Code.[1345] Subsequently, the Brussels Declaration of 1874, the Oxford Manual of 1880, and The Hague Regulations of 1907 contained clauses to the following effect:

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.[1346]

[1341] **E465** Trial Judgment, paras 3639-3640. See also **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 97 line 21 – p. 98 line 2 after [15.50.40].; **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 84 lines 2-9 after [15.17.35]; **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 25 lines 11-13 after [10.06.45].

[1342] **E465** Trial Judgment, paras 3636-3638. See also **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 97 line 25 – p. 98 line 10 after [15.50.40]; **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 50 line 24 – p. 51 line 4 after [11.24.42]; **E1/459.1** T., 17 August 2016 (Civil Party MEY Savoeun), p. 62 lines 7-13 after [14.08.07].

[1343] **E465** Trial Judgment, paras 3641-3661. See for example **E1/487.1** [Corrected 2] T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 94 line 13 – p. 95 line 7 after [15.08.15]; **E1/488.1** T., 24 October 2016 (Civil Party NGET Chat), p. 125 lines 15-18 after [16.03.42]; **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 38 line 23 – p. 39 line 2 after [10.44.30]; **E1/412.1** T., 31 March 2016 (Civil Party SUN Vuth), p. 10 lines 4-8 after [09.28.10].

[1344] **F54** Appeal Brief, paras 1111, 1116, 1131.

[1345] Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 24.

[1346] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Article 46; Project of an International Declaration concerning the Laws and Customs of War, 27 August 1874, Article 38; The Laws of War on Land, 9 September 1880, Article 49.

564. The Fourth Geneva Convention extended the obligation to all protected civilians, providing:

> [p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.[1347]

565. The obligation to respect family life was also reflected in customary international law.[1348] The DK regulation of marriage deprived individuals of the ability to decide whether, when and with whom to have a family.

9.6.1.5 The legality of charges concerning forced sexual intercourse within marriage

566. The Defence submits that the Trial Chamber could not have been satisfied of the legality of charges concerning forced sexual intercourse within a marital relationship **(ground 171** and **ground 172)**, arguing that:

(i) Rape between spouses, or "conjugal rape", was not part of the Cambodian Penal Code at the time of the charged conduct;[1349]

(ii) Rape between spouses had not been prohibited in the domestic laws of other jurisdictions;[1350] and

(iii) No provision prohibiting rape between spouses could be found in international treaties regulating armed conflict.[1351]

567. In contrast to its approach to the regulation of marriage,[1352] the Defence appears to recognise that forcing submission to sexual intercourse contravened fundamental human rights standards protected by international instruments at the time.[1353] It argues, however, that the fact that couples were married before being forced to have sexual intercourse created an

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[1347] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 27.
[1348] ICRC, Customary International Humanitarian Law, Vol. 1: Rules (Cambridge University Press), 2005, Rule 105. *Attachment 22*
[1349] **F54** Appeal Brief, para. 1294-1297.
[1350] **F54** Appeal Brief, paras 1298-1299.
[1351] **F54** Appeal Brief, para. 1284.
[1352] See Section 9.6.1.4 at paras 543 *et seq*.
[1353] **F54** Appeal Brief, para. 1284. See for example United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 25 July 1951.

exemption from criminal liability, and meant that the Trial Chamber could not have been satisfied of the legality of the crimes.[1354]

568. Again, this Chamber need not consider the legality of the specific acts alleged to constitute other inhumane acts.[1355] The Lead Co-Lawyers agree with the OCP that the Trial Chamber did not violate the principle of legality in finding that conduct characterised as rape within forced marriages amounted to other inhumane acts.[1356] The Lead Co-Lawyers add only that, as with the Defence's submissions concerning the legality of the DK's regulation of marriage, the Defence arguments fail by their own standards.

9.6.1.5.1 The existence of an exemption from prosecution for the crime of conjugal rape in Cambodian domestic law prior to 1975

569. The Defence correctly observes that Article 443 of the Cambodian Penal Code of 1956 treated rape as a crime.[1357] That Article provided:

> Whosoever by force or by using threats introduces or attempts to introduce his sexual organ into the sexual organ of a person who refuses, is committing rape.[1358]

570. The fact that Article 443 contained no carve-out or caveat for married couples suggests that the Code *did* apply to perpetrators of rape within a marriage. Indeed, by the Defence's own submission,[1359] the only implication of an exemption from prosecution for rape between spouses in the text of the Code lay in Article 452, which criminalised the abandonment of a marital home.[1360] Needless to say, that provision is unrelated to the question of whether such an exemption actually existed.

571. Despite the unequivocal terms of the Code, the Defence relies on an "inviolable presumption" that modified Article 443 to create an exemption for men accused of raping their wives.[1361] This argument might have its source in the practice of other civil law jurisdictions, in which courts sometimes read an exemption for conjugal rape into law even where penal codes were

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[1354] **F54** Appeal Brief, paras 1282, 1284, 1288.
[1355] See generally Section 9.6.1 above at para. 515 *et seq.*; **F54** Appeal Brief, paras 1281-1287.
[1356] **F54/1** OCP Response Brief, paras 674-683.
[1357] **F54** Appeal Brief, para. 1294 referring to Cambodian Penal Code of 1956, Article 443 (available on the Case File, **D288/6.91/6/1.1** at p. 357 of Tome/Vol. II in French).
[1358] **D288/6.91/6/1.1** Cambodian Penal Code of 1956, Article 443, p. 357; **F54** Appeal Brief, para. 1294.
[1359] **F54** Appeal Brief, para. 1295.
[1360] **D288/6.91/6/1.1** Cambodian Penal Code of 1956, Article 452, p. 359.
[1361] **F54** Appeal Brief, paras 1295-1296.

silent on the matter.[1362] However, the Defence has not provided any authority for the assertion that this applied in Cambodia.

572. The Defence argues that it is the *lack* of cases brought before Cambodia's courts that proves the existence of an exemption for conjugal rape.[1363] An equally compelling reason for the absence of criminal cases could lie in the cultural pressures that discouraged women from instituting proceedings against their husbands.[1364] In any case, without providing evidence in support of its arguments, the Defence cannot argue that a *legal* exemption existed in Cambodian law. At best, it could have submitted that a cultural or political understanding existed to protect men from prosecution for raping their wives.

9.6.1.5.2 The applicability of a conjugal rape exemption to the acts charged

573. Further, the Defence's attempts to flatten the systematised regime of forced sexual intercourse between couples who were forcibly married into the general notion of conjugal rape should be dismissed. Even if an exemption for "conjugal rape" had existed in Cambodian law before 1975, the concept would not apply to the regime of forced sexual intercourse charged in this case. The Lead Co-Lawyers point to three aspects of the charged conduct that demonstrate that it falls outside any exemption for "conjugal rape" as it had been recognised in other jurisdictions.

574. First, the rapes were perpetrated by the DK leaders and cadre, not by the men within each marriage, meaning that any exemption that might have existed would not apply in any event. The Defence repeatedly seeks to distract from this fact by referring to husbands as the "perpetrators" of the crimes.[1365] However, as the Trial Chamber recognised, *both* members of the couple were forced to have sexual intercourse by the authorities.[1366] The evidence demonstrated that, in most cases, husbands were mere tools in rapes perpetrated by DK cadre.

[1362] Vasanthi Venkatesh and Melanie Randall, "Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and Historical Perspective" in *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*, (Hart Publishing), 2017, pp. 41–88 at 68. *Attachment 23*

[1363] **F54** Appeal Brief, para. 1297.

[1364] Cathy Zimmerman, "Plates in a Basket will Rattle: Domestic Violence in Cambodia (A Summary)", distributed at the Fourth World Conference on Women in Beijing, 1995, p. 12, *Attachment 24*; Rebecca Surtees, "Rape and sexual transgression in Cambodian society" in Linda Rae Bennett and Lenore Manderson (eds), *Violence Against Women in Asian Societies: Gender Inequality and Technologies of Violence* (Routledge), 2003, p. 97. *Attachment 25*

[1365] See for example **F54** Appeal Brief, para. 1304.

[1366] **E465** Trial Judgment, para. 3701.

Even if a husband would have had protection from prosecution for a particular act, it does not follow that third persons can enjoy that same protection by using the husband as an instrument in the commission of the same conduct. Far from being perpetrators, men forced by cadres to have sexual intercourse with their wives were instruments of the DK.

575. Secondly, marriages under the DK were not consensual. This means that the most common historical explanation for conjugal exemptions – that a woman impliedly consented to sexual intercourse with her husband by entering into a marriage contract – has no application. By severely restricting the ability of both women and men to choose whether to enter into a contractual relationship with their spouses, the DK ensured that they could not be held to the terms of any contract (if indeed such a contract could be evaluated today). Nor do the alternative historical explanations for spousal exemptions – that upon marriage women became men's property,[1367] or that the doctrine of coverture obliterated women's independent legal existence[1368] – apply. Because both members of a couple were required by the DK to consummate their marriages, men could not be said to have been exercising a property right over their wives by forcibly having sexual intercourse with them. Even by the arcane standards of marital duty and legal personhood that the Defence implies should have regulated the DK's conduct, the system implemented for the regulation of marriage was clearly unlawful.

9.6.1.5.3 Unsubstantiated arguments about comparative law concerning conjugal rape

576. The Lead Co-Lawyers observe that the Defence's comparative analysis of domestic laws concerning rape in the context of marriage is unhelpful. The Appeal Brief refers to a total of seven countries (France, Germany, Switzerland, Spain, UK, Barbados and Belize),[1369] but cites legal authority supporting the existence of a conjugal rape exception only from France.[1370]

[1367] Vasanthi Venkatesh and Melanie Randall, "Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and Historical Perspective" in *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi,* (Hart Publishing), 2017, pp. 41–88 at 47-48. *Attachment 23*

[1368] *Ibid.*, pp. 48-49.

[1369] **F54** Appeal Brief, para. 1299. The Lead Co-Lawyers note that in respect of the United Kingdom it is unclear which of its three separate criminal jurisdictions (England and Wales; Scotland or Northern Ireland) are referred to.

[1370] **F54** Appeal Brief, para. 1299.

9.6.1.5.4 The content of the law of armed conflict

577. The Defence also fails to make out its argument that the charged conduct was not prohibited at the time in "instruments relative to the rights of war".[1371] As above, even if this Chamber were to dismiss its earlier jurisprudence and adopt the Defence's approach to assessing legality, this argument fails.

578. The Defence gives no authority for the proposition that prohibitions of rape in the laws of war do not apply to where a married couple is involved. Instead, the Defence simply claims that the Trial Chamber did not properly consider the "context" of the crimes charged, apparently arguing that the key context is that couples were married before being forced into sexual intercourse.

579. The Lead Co-Lawyers submit that international instruments clearly prohibit rape during armed conflict, and the Defence has shown no basis for its claim that that prohibition does not apply where couples are first compelled to marry. The Lead Co-Lawyers note that it would be wrong to assume that these principles are not intended to apply to married couples because they are concerned with combatants: the conduct in question here is not conjugal rape in the sense usually conceived of – it is the use by the DK of husbands to carry out rapes of wives.

580. Once the Defence's artificial construction of the conduct is abandoned, it is clear that the acts in question were prohibited by treaties regulating armed conflict. As this Chamber concluded in Case 001, rape had been well-established as a war crime by 1975.[1372] Rape was expressly prohibited in the Lieber Code of 1863, Article 44 of which provided:

> All wanton violence committed against persons in the invaded country… all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.[1373]

581. The other early treaties regulating armed conflict included similar protections. The Hague Regulations of 1899 and 1907 protect the "family honour and rights" of the population of an

[1371] **F54** Appeal Brief, para. 1284.
[1372] **Case 001 – F28** Case 001 Appeal Judgment, para. 176.
[1373] Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 44.

occupied territory.[1374] The 1929 Geneva Convention on prisoners of war provides that prisoners of war are entitled to respect for "their persons and honour", and that "[w]omen [prisoners of war] shall be treated with all consideration due to their sex."[1375] Those protections were carried into the Third Geneva Convention of 1949.[1376]

582. The Fourth Geneva Convention is more explicit, and provides that civilian "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[1377] Additional Protocol I provides that "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault", are "prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents".[1378] An additional protection specifically protects women "against rape, forced prostitution and any other form of indecent assault."[1379] Rape is also prohibited under customary international law.[1380]

583. The Defence's assertion that the instruments cited don't concern the charged conduct is baseless. Its repeated suggestions that forcing strangers to marry one another somehow legalised or legitimised subsequent rape is illogical, and stems from a highly selective understanding of the conduct charged.[1381] In any event, the question is ultimately moot. As argued above,[1382] application of the correct test for assessing the legality of other inhumane acts leads to the clear conclusion that the conduct was unlawful at the time of its commission.

9.6.2 Factual Conclusions concerning Disappearances

584. The Defence contests findings by the Trial Chamber that the practice of disappearing people in Tram Kak and at the Kraing Ta Chan and Phnom Kraol Security Centres constituted the

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[1374] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 Article 46; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Article 46.
[1375] Convention relative to the Treatment of Prisoners of War, 27 July 1929, Article 3.
[1376] Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, Article 14.
[1377] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 27.
[1378] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Article 75(2)(b).
[1379] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, 8 June 1977, Article 76(1).
[1380] ICRC, Customary International Humanitarian Law, Vol. 1: Rules, (Cambridge University Press), 2005, Rule 93. *Attachment 26*
[1381] **F54** Appeal Brief, para. 1284.
[1382] See Section 9.6.1 above at para. 515 *et seq.*

crime against humanity of other inhumane acts.[1383] The Lead Co-Lawyers note that the Defence's arguments on this issue are marked by an apparent misunderstanding of the charges. Although the conduct in question is described as enforced disappearances, the legal characterisation in question is the crime against humanity of other inhumane acts. As this Chamber explained in Case 002/01, the question is not whether the elements of the crime against humanity of enforced disappearances was proved (it was not yet a separate crime in international law at the time of the acts), but whether the conduct in question constituted the crime against humanity of other inhumane acts.[1384]

9.6.2.1 Tram Kak

585. The Lead Co-Lawyers respond to two grounds concerning disappearances in Tram Kak District: **ground 111** (regarding Vietnamese victims) and **ground 112** (regarding Khmer Krom victims). [1385]

586. The Trial Chamber found that the crime against humanity of other inhumane acts was committed in Tram Kak District against a variety of persons, through "the arrest, detention or abduction of loved ones in conditions which placed them outside the protection of the law and the refusal to provide access to, or convey information, on the fate or whereabouts of such persons."[1386]

587. The Lead Co-Lawyers note that Vietnamese and Khmer Krom victims were only two of several groups subjected to this conduct: former soldiers and teachers, political opponents and "serious offenders" were also found by the Trial Chamber to have disappeared.[1387] Accordingly, the Defence's challenges under this ground – which relate specifically to Vietnamese and Khmer Krom persons – would not suffice to displace the Trial Chamber's finding overall that the crime against humanity of other inhumane acts through enforced disappearances was established in respect of the Tram Kak Cooperatives. However, the Lead Co-Lawyers consider it necessary in the interests of the Civil Parties to address the Defence

[1383] **F54** Appeal Brief, paras 756 (**ground 111)**, 757 (**ground 112**), 836-840 (**ground 127**), 887-891 (**ground 135)**; challenging findings at **E465** Trial Judgment, paras 1200-1204 (Tram Kak); paras 2852-2858 (Kraing Ta Chan); paras 3160-3166 (Phnom Kraol).
[1384] **F36** Case 002/01 Appeal Judgment, para. 589.
[1385] **F54** Appeal Brief, paras 756, 757.
[1386] **E465** Trial Judgment, para. 1200.
[1387] **E465** Trial Judgment, para. 1201.

submissions because of the importance of the Trial Chamber's findings to Vietnamese and Khmer Krom Civil Parties.

9.6.2.1.1 Disappearance of Khmer Krom victims

588. **Ground 112**, which concerns the enforced disappearance of Khmer Krom people, is a version of the Defence's arguments about scope.[1388] The Defence attempts to argue that any crime with Khmer Krom victims falls outside the case.[1389]

589. This misunderstands the Trial Chamber's decisions and the Closing Order. In 2015, responding to objections about evidence concerning Khmer Krom victims, the Trial Chamber issued an oral ruling on this subject.[1390] The ruling clarified that the case does not include charges of persecution of Khmer Krom people. However it made clear that it would consider evidence of "other crimes which are charged, and certain of the victims happen to be Khmer Krom."[1391] One such crime is that of other inhumane acts through conduct characterised as enforced disappearance in the Tram Kak Cooperatives, which falls within the Closing Order and the Additional Severance Annex.[1392] There is no reason why these charges would not include disappearances of Khmer Krom people: such crimes were not excluded by the Additional Severance Decision. The paragraph of the Closing Order dealing with disappearances from Tram Kak District also does not purport to limit those to any particular group or groups of victims[1393] – whether the victims belong to a particular group or not is irrelevant. Nor is there any reason why the Closing Order would have had to specify exhaustively the ethnicities or other personal characteristics of the victims of the crime.

9.6.2.1.2 Disappearance of Vietnamese victims

590. In **ground 111** the Defence challenges the Trial Chamber's factual findings regarding the disappearance of Vietnamese people from Tram Kak District. It argues that the Trial

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[1388] **F54** Appeal Brief, para. 757; **F54/1** OCP Response Brief, paras 593-595.
[1389] This appears to be a variant of the argument made about crimes involving Vietnamese victims in **ground 84**: see paras 177(vii) and 179 above.
[1390] **E1/304.1** [Corrected 2] T., 25 May 2015, p. 62 line 15 – p. 64 line 3 after [13.34.42].
[1391] **E1/304.1** [Corrected 2] T., 25 May 2015, p. 63 lines 2-20 after [13.34.42].
[1392] **D427** Closing Order, paras 1470-1478 and para. 318; **E301/9/1.1** Additional Severance Decision, Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, 4 April 2014, para. 3(ii) (incorporating Closing Order paragraphs 302-321 in the scope of Case 002/02) and para. 5(ii)(b)(14) (incorporating Closing Order paras 1470-1478 in the scope of Case 002/02).
[1393] **D427** Closing Order, para. 318.

Chamber's use of "and/or" in finding that "Vietnamese persons were rounded in 1975 and 1976, following which they were deported and/or disappeared from Tram Kak district" shows that neither enforced disappearances nor deportations had been established beyond a reasonable doubt.[1394] The Lead Co-Lawyers submit that this argument is premised on two errors.

591. First, it gives undue value to the particular wording of the Trial Chamber's conclusion, rather than looking to the substance of its conclusions in light of the evidence it assessed.[1395] The Trial Chamber made clear, unequivocal findings about a number of individuals who disappeared.[1396]

592. Secondly, it reveals a misunderstanding of the elements of the crime in question. The Defence appears to assume that a conviction could only be reached if the fate of the Vietnamese victims had been proved beyond reasonable doubt.

593. The relevant crime charged is the crime against humanity of other inhumane acts. This is because in 1975 enforced disappearances (and forcible transfers) "had not yet crystallised into separate categories of crimes against humanity."[1397] As noted above,[1398] the conduct in question – although it might conveniently be summarised as "disappearances" – would therefore only create criminal liability if it met the elements of the already existing crime against humanity of other inhumane acts. In these circumstances, as this Chamber has made clear, it is inappropriate to undertake an assessment of whether the conduct in question falls within a particular category or meets the definitions of another crime, such as "enforced disappearances".[1399] The only question is whether the conduct fulfils the elements of other inhumane acts as a crime against humanity.

594. In this light, the use of "and/or" by the Trial Chamber has no bearing on its conclusion that the arrest and removal of Vietnamese people in Tram Kak, who were never heard from again, constitutes the crime against humanity of other inhumane acts. The elements of this crime

[1394] **F54** Appeal Brief, para. 756 referring to **E465** Trial Judgment, para. 1201.
[1395] **F54** Appeal Brief, para. 756 (the Defence, in challenging the Trial Chamber's use of "and/or", only refers to paragraph 1201 of the Trial Judgment but fails to make any reference to the Trial Chamber's reliance on Civil Party and Witness evidence in paragraphs 1110-1125 of the Trial Chamber's Judgment).
[1396] **E465** Trial Judgment, paras 1117, 1120, 1125.
[1397] **F36** Case 002/01 Appeal Judgment, para. 589.
[1398] See above in Section 9.6.1 at paras 515 *et seq.*, esp. para. 529.
[1399] **F36** Case 002/01 Appeal Judgment, paras 589, 651.

are established regardless of whether, immediately after their arrest, these individuals were deported, transferred internally, or executed. The Trial Chamber's conclusions were based on evidence from Civil Parties and witnesses testifying to persons who were taken away and never seen or heard from again.[1400] In Case 002/01, this Chamber upheld the Trial Chamber's conclusion that conduct of this nature was of similar seriousness to the other acts enumerated as crimes against humanity.[1401]

595. The remaining elements – that the conduct caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and that it was performed intentionally – were established beyond reasonable doubt on the evidence considered by the Trial Chamber. The evidence discussed at paragraphs 1201-1204 explains how the practice of forcibly disappearing people led to serious mental and physical suffering.

596. The Lead Co-Lawyers also clarify that, as with disappearances of Khmer Krom people, addressed above, the ethnicity of the victims is here not an element of the crime, nor a limiting aspect of the factual matters set out in the Closing Order.[1402]

9.6.2.1.3 Evidence concerning the disappearances

597. The Defence arguments in these grounds, which artificially interpret the Closing Order and the Trial Chamber's reasons, do nothing to displace the weight of evidence which supported the findings in the Trial Judgment concerning disappearances in Tram Kak.[1403]

598. The evidence concerning the disappearance of victims who were Vietnamese was considerable. The Trial Chamber detailed this evidence at length[1404] and concluded that "large numbers" of Vietnamese people were gathered up and disappeared in Tram Kak in late 1975 and early 1976.[1405]

599. The Trial Chamber also had before it evidence concerning the disappearance of Khmer Krom victims. Several Civil Parties testified about hearing about Khmer Krom families being sent

[1400] **E465** Trial Judgment, para. 1201 referring to para. 1125.
[1401] **F36** Case 002/01 Appeal Judgment, paras 586, 652-660. Decisions from other international courts confirm this approach: SCSL *The Prosecutor v Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para. 184; ICTY *Prosecutor v Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 566; *Prosecutor v Kvočka et al.*, IT-98-30/1-T, Judgement, 2 November 2001, para. 208.
[1402] Paras 588-589 above.
[1403] See at **E465** Trial Judgment, paras 1200-1204.
[1404] **E465** Trial Judgment, paras 1110-1125.
[1405] **E465** Trial Judgment, para. 1125.

away as part of an exchange, being separated from their families, and about never seeing them again.[1406]

600. In relation to both categories of evidence it is clear that the ethnicity of the victims is immaterial to establishing the crime, as is the ultimate fate of the disappeared persons. What establishes the crime is the fact of their disappearance and the "serious mental or physical suffering [caused] to those left behind without any information as to their fate."[1407] The Trial Chamber's handling of the evidence of Civil Party YEM Khonny is instructive. Civil Party YEM Khonny arrived in Tram Kak District from Kampuchea Krom and worked in a children's unit.[1408] In Section 10.1.7.5.3. of the Trial Judgment, entitled "Dislocation of families", the Trial Chamber recounted, "YEM Khonny's family members, including her mother were placed onto a truck and left with many other people. She never saw them again."[1409] She became ill as she did not know what their fate was. She testified that she was deprived of her family and ever since, she has been living alone.[1410] The Trial Chamber viewed Civil Party YEM Khonny as a person who experienced the disappearance of her family members. The Trial Chamber did not consider her, or the other impugned evidence to be related to charges which depend on their group identification (such as persecution),[1411] and did not consider the Khmer Krom as a targeted group within the scope of Case 002.[1412] Rather, the evidence was properly treated as other inhumane acts in the form of enforced disappearance.[1413]

601. Civil Party TAK Sann arrived in Tram Kak from Vietnam with her two children and husband in 1976.[1414] One day, her husband was asked to go and collect rice seeds with others on an ox cart. The ox cart returned but the people did not. She did not know where they had taken her husband but she believed that he was killed.[1415] Civil Party TAK Sann lived in constant

[1406] **E465** Trial Judgment, paras 1120, 1121, 1123 (recounting evidence of Civil Parties RY Pov, TAK Sann, BENG Boeun, and THANN Thim) and 1036 (recounting the evidence of Civil Parties YEM Khonny and OEM Saroeurn).
[1407] **E465** Trial Judgment, para. 1204.
[1408] **E465** Trial Judgment, para. 825.
[1409] **E465** Trial Judgment, para. 1036.
[1410] **E1/287.1** [Corrected 1] T., 2 April 2015 (Civil Party YEM Khonny), p. 94 lines 4-19 after [15.49.49].
[1411] **E465** Trial Judgment, para. 816.
[1412] **E465** Trial Judgment, para. 816.
[1413] **E465** Trial Judgment, para. 1201 (relying in part on paragraphs 1123-1125 and 1036).
[1414] **E465** Trial Judgment, paras 825, 1078.
[1415] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 29 lines 16-23 after [13.27.27], p. 47 line 3 – p. 48 line 1 after [14.16.15]; **E465** Trial Judgment, paras 1078, 1120.

fear that she would be taken away and killed.[1416] As a result, she worked hard, dared not to rest,[1417] and dared not to complain even if she was starving.[1418] The loss of her husband was very difficult for her.[1419] Because she missed her husband, she decided to not remarry and focused on taking care of her children.[1420]

602. These examples highlight that the Trial Chamber did not need to be certain of the eventual fate of the disappeared individuals to find that the conduct had caused great suffering to their family members or that the elements of the crime against humanity of other inhumane acts were established. The Defence has not demonstrated that these factual conclusions were unreasonable. This ground should be rejected.

603. The Trial Chamber was required to consider these facts, did consider them, and determined that the elements of other inhumane acts based on conduct characterised as enforced disappearance were established beyond reasonable doubt. The Defence has demonstrated no error in this regard.

9.6.2.2 Kraing Ta Chan

604. In **ground 127** the Defence argues that the Trial Chamber erred by finding that "the underlying conduct of enforced disappearance can be committed more than once in relation to the same person."[1421]

605. The findings of the Trial Chamber concerning disappearances from Kraing Ta Chan are important to Civil Parties affected by this crime, such as Civil Party OEM Saroeurn. She testified that her brother UNG Lim asked for food at Kraing Ta Chan and then was scolded. He was consequently sent for re-education and was disappeared.[1422] She also learned from an ex-detainee at Kraing Ta Chan that when her husband OY Mut was arrested and disappeared, he was taken to Kraing Ta Chan where he later was killed.[1423] From a report at

[1416] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 31 lines 20-24 after [13.32.58].
[1417] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 30 lines 16-18 after [13.29.15].
[1418] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 31 lines 18-24 after [13.32.58].
[1419] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 36 lines 1-4 after [13.46.17].
[1420] **E1/286.1** [Corrected 2] T., 1 April 2015 (Civil Party TAK Sann), p. 36 lines 1-4 after [13.46.17].
[1421] **F54** Appeal Brief, paras 836-840.
[1422] **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 25 lines 3-7 after [10.04.25].
[1423] **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 14 line 8 – p. 15 line 16 after [09.38.50].

Kraing Ta Chan, she also learned that her uncle, IM Chat, and her elder brother, UNG Lim, were taken there and killed as well.[1424]

606. The Lead Co-Lawyers share the OCP's analysis[1425] that the Defence has repeated the mistake of misconstruing the elements of the relevant crime. The crime in question is the crime against humanity of other inhumane acts. The Defence has shown no legal authority for the proposition that this crime can only be committed once in respect of a particular individual. Nor has the Defence shown that any particular type of conduct constituting the crime could only be relevant the first time that it is committed against a particular victim.

607. The Defence's contention is not only without a basis in law, but would undermine the objectives of criminalising such conduct. It would provide a shield from liability to those who oversee repeated further atrocities against the same group of people, simply because the individuals targeted have already been subjected to at least one crime. There can be no reason in policy why a repeat offender should benefit from such protection. Neither should victims be deprived of a right to justice just because the individual who was disappeared suffered the same treatment multiple times.

608. The OCP correctly identifies that the events addressed by this argument involve cases where a particular person disappeared on two separate occasions, but from two distinct environments and with the disappearance carried out by two different sets of direct perpetrators.[1426] The Lead Co-Lawyers add that in respect of each disappearance there are also separate groups of *indirect* victims. As the Trial Chamber explained, the serious suffering occasioned by disappearances affects not only the persons who are disappeared, but also "those left behind without any information as to their fate."[1427] Thus, in respect of the findings challenged by the Defence in this ground, the Lead Co-Lawyers note that each occasion of disappearance created an environment of fear and suffering; one in Tram Kak and the other in Kraing Ta Chan. The incidents of disappearance are entirely distinct and separate instances of criminal conduct. The fact that some of those victimised are the same is, if anything, an aggravating consideration, not a basis for exculpation.

[1424] **E1/283.1** [Corrected 1] T., 26 March 2015 (Civil Party OEM Saroeurn), p. 25 lines 9-17 after [10.06.27].
[1425] **F54/1** OCP Response Brief, paras 851-857.
[1426] **F54/1** OCP Response Brief, para. 857.
[1427] **E465** Trial Judgment, para. 1204.

9.6.2.3 Phnom Kraol Security Centre

609. In **ground 135** the Defence argues that the Trial Chamber committed a factual error in finding that the crime against humanity of other inhumane acts was committed at K-17, K-11 and Phnom Kraol through disappearances.[1428]

610. First, the Defence claims that Witness CHAN Toi and Civil Party UONG Dos were the only two persons heard on the subject of enforced disappearances at K-17, and goes on to claim that they were detained at Phnom Kraol rather than K-17, and accordingly that there was no evidence before the Trial Chamber relating to enforced disappearances at K-17.[1429] These claims by the Defence are confused and incorrect.

611. First, it is unclear why the Defence mentioned Civil Party UONG Dos. He did not testify before the Trial Chamber. Although he was interviewed by the OCIJ in relation to his detention at Phnom Kraol,[1430] he gave no evidence in relation to K-17 and is not mentioned in the portions of the Trial Judgment which deal with K-17.[1431]

612. It is also unclear why the Defence claims that Witness CHAN Toi was not detained at K-17. In support of this assertion, the Defence refers to a portion of its Closing Brief where the same assertion is made but likewise without any reasoning or reference to evidence.[1432] In fact Witness CHAN Toi spoke repeatedly in his testimony about having been detained at K-17,[1433] and the Trial Chamber accordingly concluded that he was detained there.[1434] The Defence has given no reason why that finding should be disturbed.

613. Contrary to the Defence's assertion that there was no evidence relating to enforced disappearances at K-17, the Trial Chamber relied upon evidence from Witness CHAN Toi, Witness NETH Savat, and Witness SAO Sarun.[1435] Witness CHAN Toi testified with personal knowledge that he saw approximately eight prisoners taken to be killed.[1436] The

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[1428] **F54** Appeal Brief, paras 887-891.
[1429] **F54** Appeal Brief, para. 888.
[1430] **E3/7703** Written Record of Interview (Civil Party UONG Dos), 29 October 2008.
[1431] Regarding Civil Party UONG Dos see also further below, Section 10.4 at paras 752-758.
[1432] **F54** Appeal Brief, para. 888 fn. 1604 referring to **E457/6/4/1** KHIEU Samphân Closing Brief, paras 1407-1410.
[1433] **E1/399.1** T., 10 March 2016 (Witness CHAN Toi *alias* CHAN Tauch), p. 65 lines 4-20 after [13.52.59], p. 81 line 5 – p. 82 line 15 after [14.36.49], p. 87 line 6 – p. 88 line 8 after [15.08.43], p. 89 line 21 – p. 91 line 25 after [15.14.10].
[1434] **E465** Trial Judgment, paras 3020, 3026-3028.
[1435] **E465** Trial Judgment, para. 3090.
[1436] **E465** Trial Judgment, para. 3090 referring to **E3/7694** [Corrected 1] Written Record of Interview (Witness CHAN Toi *alias* CHAN Tauch), 23 October 2008, ERN (En) 00242144.

Trial Chamber's finding of enforced disappearances was corroborated by Witness NETH Savat who heard that people on the upper floor of K-17 were transported in the direction of Kratie and killed.[1437] Witness SAO Sarun testified that personnel at K-17 were transported to Kratie.[1438] The Defence has given no reason why the Trial Chamber's findings based on this evidence should be considered unreasonable.

614. The Defence further argues that the only evidence relating to the K-11 and Phnom Kraol sites was hearsay, implying (without explaining why) that the Trial Chamber erred by relying on this evidence.[1439] The Lead Co-Lawyers contest the Defence's assumption that hearsay evidence should always be treated as unreliable.[1440] In any event, its characterisation of this evidence as hearsay is mistaken. The Defence quotes the Trial Judgment and underlines phrases that it believes indicates the Trial Chamber's reliance on hearsay evidence:[1441]

> At the Security Centre, prisoners were subjected to the disappearance of fellow inmates without being told the reasons for their disappearances, leaving them with the belief that they had been killed. One account before the Chamber revealed that prisoners were told that they were being returned to their home villages, after which time they were never seen again." Other witnesses variously heard, either at the time or shortly after the fall of the DK regime, that prisoners had been transported in the direction of Kratie, with some accounts specifying that prisoners were taken there to be killed…"[1442]

615. This exercise demonstrates a misunderstanding of the concept of hearsay.[1443] The criminal conduct which the Trial Chamber was speaking to here was the practice of removing people and concealing their fate, thus creating a "climate of uncertainty and terror".[1444] The evidence described in the first two phrases underlined by the Defence (and some of that described in the third) is *direct* evidence of this, from prisoners who directly experienced the terror created by observing their fellow prisoners disappeared. Civil Party KUL Nem testified about his time in K-11 and said that he was constantly in fear as a result of having seen many people

[1437] **E465** Trial Judgment, para. 3090 referring to **E1/400.1** T., 11 March 2016 (Witness NETH Savat), p. 38 lines 9-20 after [11.12.20].
[1438] **E465** Trial Judgment, para. 3090 referring to **E1/410.1** T., 29 March 2016 (Witness SAO Sarun), p. 100 line 6 – p. 102 line 1 after [15.52.16].
[1439] **F54** Appeal Brief, para. 888.
[1440] See Section 8.3.1 above at paras 216-228.
[1441] **F54** Appeal Brief, para. 888.
[1442] **F54** Appeal Brief, para. 888 referring to **E465** Trial Judgment, para. 3161.
[1443] See Section 8.3.1 above at paras 216-228.
[1444] **D427** Closing Order, paras 1470-1478 esp. para. 1476.

disappearing.[1445] Civil Party UONG Dos stated that prisoners were transported away during the night from Phnom Kraol and were never seen to return.[1446] He directly witnessed prisoners being taken away many times.[1447] These Civil Parties, and other persons cited as sources by the Trial Chamber, might have had indirect knowledge from other sources regarding the *eventual fate* of the disappeared prisoners, however that fact is not what the evidence is setting out to prove in this instance, nor is it necessary to demonstrate the actual fate of the prisoners in order to establish this crime.

616. The Trial Chamber had direct and credible evidence from a range of sources that prisoners disappeared from the Phnom Kraol security centres. The Lead Co-Lawyers note that in establishing the credibility of these accounts, the Trial Chamber found that the evidence about conditions (including "unexplained disappearance of fellow inmates") at K-11 and Phnom Kraol Prison was corroborated by similar evidence relating to K-17.[1448]

617. The Defence's arguments on this issue misrepresent the Trial Chamber's approach and give no reason for treating its findings as unreasonable.

9.6.3 Conclusions regarding forced movement of the Cham

618. The Defence brings a narrow challenge concerning the Trial Chamber's conclusion that the forced movement of Cham people during MOP Phase Two constituted the crime against humanity of other inhumane acts.[1449] In three separate but seemingly identical grounds (**ground 5, ground 83** and **ground 150**) the Defence argues that the principle of *ne bis in idem* was violated by KHIEU Samphân's conviction of the crime against humanity of other inhumane acts through the forcible transfer of Cham people, on the basis that the conduct in question was part of KHIEU Samphân's Case 002/01 conviction in respect of MOP Phase Two.[1450] The claim is that the Cham whose forced movement is charged in the present case were part of the "300,000 to 400,000 people" whom the Trial Chamber found in Case 002/01

[1445] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 92 lines 4-10 after [14.28.57] cited in **E465** Trial Judgment, para. 3095.
[1446] **E3/7703** Written Record of Interview (Civil Party UONG Dos), 29 October 2008, ERN (En) 00242172 cited in **E465** Trial Judgment, para. 3097.
[1447] **E3/7703** Written Record of Interview (Civil Party UONG Dos), 29 October 2008, ERN (En) 00242171.
[1448] **E465** Trial Judgment, para. 3102.
[1449] **E465** Trial Judgment, paras 3335-3340.
[1450] **F54** Appeal Brief, paras 134, 546, 964-965.

to have been "transferred between September 1975 and early 1977" as a part of MOP Phase Two.[1451]

619. This argument is based on a misunderstanding of the Case 002/01 Trial Judgment. In it, the Trial Chamber decided that because the forced movement and religious persecution of the Cham were inextricably linked, and given that the religious persecution charges were outside the scope of Case 002/01, it would "not make findings in this judgement concerning allegations of the forced movement of the Cham that are also charged as religious persecution."[1452]

620. The Lead Co-Lawyers note the submissions of the OCP on this point,[1453] which they agree with. However they add a crucial clarification: this decision from the Trial Chamber is correctly understood as having excluded from Case 002/01 not only specific *legal characterisations* concerning the Cham, but indeed any consideration of *facts* relating to the forced movement of Cham people. This is clear from three factors, elaborated below: (i) the different and separate nature of the charges concerning forced movement of Cham people, as distinct from the facts considered as part of the Case 002/01 Trial Judgment (ii) the fact that testimony on movement of Cham people was excluded from the Case 002/01 Trial Judgment and (iii) a holistic reading of the Case 002/01 Trial Judgment.

621. First, it is clear from the Closing Order that the charges concerning movement of the Cham during MOP Phase Two were factually distinct from the rest of that population movement: this was not a case of Cham people simply being included in a wider uniform forced transfer along with various other groups.

622. MOP Phase Two began around September 1975,[1454] and largely involved movements of people towards the North and Northwest.[1455] The principal objective was to develop food production in the North and Northwest,[1456] although later the outbreak of war with Vietnam also provided a reason for moving populations away from the East.[1457] The decision to initiate

[1451] **F54** Appeal Brief, paras 546, 965 referring to **F36** Case 002/01 Appeal Judgment, para. 658.
[1452] **E313** Case 002/01 Trial Judgment, para. 627; see also **F54/1** OCP Response Brief, para. 544.
[1453] **F54/1** OCP Response Brief, para. 544.
[1454] **D427** Closing Order, para. 262; see also **E465** Trial Judgment, para 3262, **E313** Case 002/01 Trial Judgment, para. 588.
[1455] **D427** Closing Order, paras 262-263; see also **E313** Case 002/01 Trial Judgment, paras 590, 596-599.
[1456] **D427** Closing Order, paras 165, 276-277; see also **E313** Case 002/01 Trial Judgment, paras 584-587.
[1457] **D427** Closing Order, para. 278; see also **E313** Case 002/01 Trial Judgment, paras 624-626.

the population movement appears to have been taken in August 1975.[1458] Some more local movements were carried out within regions[1459] with the goals of allocating labour for food production[1460] and of "re-fashioning" the New People into peasants through hard labour.[1461]

623. Mass evacuations of Cham people began later, after the Cham rebellions which occurred in September and October 1975.[1462] The objective was to "break them up",[1463] and accordingly they were dispersed into Khmer villages, with only a minority of Cham permitted in each village.[1464]

624. Secondly, as identified by the OCP,[1465] the Trial Chamber declined to hear witnesses concerning the movement of Cham people during Case 002/01.

625. Thirdly, it is clear from the Case 002/01 Trial Judgment itself that the Trial Chamber had not only declined to undertake separate legal characterisations concerning the treatment of the Cham during MOP Phase Two, but that it had excised from the facts before it any material concerning Cham people during MOP Phase Two. In the introduction to Section 11 of the Case 002/01 Trial Judgment, which deals with MOP Phase Two, the Trial Chamber identified the charges from the Closing Order which it went on to consider. It did not include any reference to the facts concerning the movements of the Cham, which (as set out above) are described separately in the Closing Order.[1466] No facts identified as concerning Cham people are mentioned in Section 11. This is in contrast to Section 10, dealing with MOP Phase One, which includes several references to Cham people who were part of those forced transfers.[1467] The Trial Chamber's explicit explanation of its approach is that it would not engage with any "allegations" concerning the forced movement of the Cham during MOP Phase Two,[1468]

[1458] **D427** Closing Order, para. 279; see also **E313** Case 002/01 Trial Judgment, para. 585.
[1459] **D427** Closing Order, para. 263.
[1460] **E313** Case 002/01 Trial Judgment, paras 602-612.
[1461] **E313** Case 002/01 Trial Judgment, paras 613-623.
[1462] **D427** Closing Order, para. 266; see also **E465** Trial Judgment, paras 3210, 3262.
[1463] **D427** Closing Order, para. 281; see also **E465** Trial Judgment, paras 3210, 3268.
[1464] **D427** Closing Order, para. 268; see also **E465** Trial Judgment, para. 3264.
[1465] **F54/1** OCP Response Brief, para. 544.
[1466] **E313** Case 002/01 Trial Judgment, para. 575. The Trial Chamber refers to Closing Order paragraphs 165, 262, 263, 276-277, 278. In describing the scope of the charges, it does not include material from or references to those paragraphs concerning the movement of the Cham: paragraphs 266, 268, 281.
[1467] See **E313** Case 002/01 Trial Judgment, fns 1373, 1499.
[1468] **E313** Case 002/01 Trial Judgment, para. 627.

making clear that the movements it ruled on did not include any of the facts alleged in the charges concerning Cham people.

626. The Lead Co-Lawyers consider that in effect this argument from the Defence repeats an argument which was unsuccessful before the Trial Chamber, namely that the forced movement of the Cham was merely one indistinguishable part of the broader MOP Phase Two.[1469] However, that contention was rejected by the Trial Chamber. While the Trial Judgment concludes that the forced movements of the Cham did occur as part of the wider MOP Phase Two, it also recognised the special and discriminatory purpose of the movements, with Cham targeted specifically as a result of the rebellions, and "in order for their communities to be broken up rather than to simply displace the labour force."[1470] The Defence has given no reason why that factual finding by the Trial Chamber was unreasonable, and it therefore must stand.

9.6.4 Factual Conclusions Concerning Forced Marriage and Forced Sexual Intercourse in the Context of Marriage

9.6.4.1 Overview

627. As an alternative to its arguments, addressed above,[1471] that forced marriage and marital rape were not unlawful at the relevant time, the Defence also argues that the Trial Chamber erred in finding that the elements of the crime against humanity of other inhumane acts were established in respect of this conduct (**grounds 161-170** and **grounds 173-174**).[1472]

628. The Civil Parties have a particularly strong interest in these challenges. A number of Civil Parties gave evidence before the Trial Chamber in relation to forced marriage, or forced sexual intercourse within marriage, or both. Many of these Civil Parties have had their evidence directly attacked by the Defence. In the following Response, the Lead Co-Lawyers defend the credibility of these Civil Parties and address inaccurate descriptions or misleading uses of their evidence.

629. More broadly, many members of the consolidated group who did not testify also experienced forced marriage and forced marital sex. The CIJs admitted 664 Civil Parties specifically in

[1469] See **E465** Trial Judgment, para. 3211.
[1470] **E465** Trial Judgment, paras 3212, 3268.
[1471] See Section 9.6 at paras 513 *et seq.* esp. Sections 9.6.1.4 and 9.6.1.5 at paras 543-583.
[1472] **F54** Appeal Brief, paras 1117-1280 and 1301-1398.

relation to the regulation of marriage.[1473] However, other Civil Parties, admitted in relation to different crimes, were also affected by the DK's regulation of marriage. Arguments concerning the gravity of the crimes and the suffering they caused are a matter of personal interest to these Civil Parties: they are among the persons who directly experienced that suffering.

630. The Lead Co-Lawyers note that this case involves charges concerning the system of forced marriages, as well as the practice of forcing sexual intercourse following marriage. Although these two sets of underlying conduct are each charged separately as a basis for the crime against humanity of other inhumane acts, they are dealt with together in the following submissions. That is because challenges made in respect of each charge are similar, and the facts themselves are closely interlinked.

631. The twelve numbered grounds **(grounds 161-170** and **grounds 173-174)**[1474] which cover this part of the Appeal Brief contain overlapping and interrelated arguments. As elaborated earlier in this Brief, the individual grounds attributed by Annex A of the Appeal Brief are somewhat arbitrary,[1475] and this is particularly evident in this section. Since the separate ground numbers are not clearly associated with distinct arguments, the Lead Co-Lawyers will treat them together as a single group of arguments. The submissions which follow therefore refer to Defence arguments by reference to paragraphs in the Appeal Brief rather than ground number.

632. Before turning to the alleged factual errors, the Lead Co-Lawyers emphasise again that the DK's regulation of marriage was charged as the crime against humanity of other inhumane acts. It is through the framework of that crime and its elements that the facts concerning forced marriage and forced sexual intercourse must be analysed.

9.6.4.2 Element 1: Act or omission of similar seriousness to other crimes against humanity

633. The Defence challenges the Trial Chamber's finding that the regulation of marriage and forced sexual intercourse were of similar nature and gravity to the enumerated crimes against humanity.[1476] It argues that the Trial Chamber erred by: (i) finding that couples did not

[1473] **D427** Closing Order, para. 861.
[1474] **F54** Appeal Brief, paras 1117-1280 and 1301-1398.
[1475] See above at paras 12-13 and 67-68. See also Annex A of the Appeal Brief.
[1476] **F54** Appeal Brief, para. 1118-1155, 1288-1300; **E465** Trial Judgment, paras 3688-3691.

consent to marriage and sexual intercourse, despite what the Defence claims to be an absence of reliable evidence; (ii) ignoring aspects of the cultural context relevant to the evaluation of seriousness; and (iii) failing to recognise that if the conduct was of sufficient seriousness, it would have already been criminalised.

634. None of these arguments succeeds in demonstrating error in the Trial Chamber's conclusions.

9.6.4.2.1 The absence of consent to marriage and to sexual intercourse within marriage

635. The Trial Chamber found that the DK authorities forced people into non-consensual marriages.[1477] It also found that couples were forced to consummate their marriages through threats and monitoring,[1478] conditions it considered to have been designed "specifically to force the consummation of marriages".[1479]

636. The Defence raises several arguments about consent, addressed in this section, which concern: the context of coercion in which couples were forced to marry and submit to sexual intercourse; the incidence and purpose of monitoring newlyweds; and the representativeness and reliability of Civil Parties' testimony about consent. Its arguments fail to establish that the Trial Chamber's conclusions about the regulation of marriage and forced sexual intercourse were unreasonable.

637. The Defence submits first that the Trial Chamber erred by finding that a context of fear and coercion negated people's ability to consent to marriage and to consent to sexual intercourse within those marriages.[1480] As the OCP has submitted, the totality of the circumstances showed that a "prevailing climate of fear" was used to force people to marry, and then to consummate those marriages.[1481]

638. In addition to the constant implicit threat of punishment imposed through the coercive environment, in some cases more explicit threats and actual violence were used to force couples to marry and have sexual intercourse.[1482] One example of this was described by Civil

[1477] **E465** Trial Judgment, para. 3690.
[1478] **E465** Trial Judgment, para. 3696.
[1479] **E465** Trial Judgment, para. 3697.
[1480] **F54** Appeal Brief, paras 1259-1280, 1341-1377; **E465** Trial Judgment, paras 3620-3621, 3623, 3646-3647, 3661, 3673-3674, 3676, and 3677-3678.
[1481] **F54/1** OCP Response Brief, paras 715-721, 743-750.
[1482] See for example **E465** Trial Judgment, paras 3618, 3621-3622.

Party MOM Vun, who spoke of being raped by a group of cadre after she refused to marry.[1483] The Defence argues that the Trial Chamber should have rejected this evidence as unrepresentative in the level of overt violence she described.[1484] However, contrary to the Defence's claims,[1485] the Trial Chamber did not generalise Civil Party MOM Vun's specific experience of being raped for refusing marriage.[1486] Rather, it relied on her testimony to corroborate its findings about the context and environment in which such events could take place.[1487] Indeed, Civil Party MOM Vun spoke directly to the way that fear of violence compelled other people into marriages:

> There were other couples who refused to get married, but they had no choice, so they had to marry like in my case. If a woman refused, then that woman would die or if a man refused, that man would die, as well, so it applied to both sides. And because we were afraid to be killed, that's why we accepted to get married.[1488]

639. Civil Party MOM Vun's testimony on this point was corroborated by numerous Civil Parties. For example, Civil Party SOU Sotheavy described being warned against resisting marriage: "[m]y in-law told me that I had to agree because if I continued to refuse I also would be taken away to be killed."[1489] Civil Party YOS Phal testified, "[b]ecause we were afraid we had to say that we loved each other… We would live with each other forever."[1490] Civil Party SENG Soeun, who despite his relatively privileged position married out of fear of his District Committee Chief, said: "[i]t is difficult to describe about the situation of fear during the regime," because "[e]veryone was under their leadership, and it is a very difficult situation during the regime. Sometimes, people died or disappeared without reasons, and that's what made us think that if we were forced or instructed to marry, then we just simply did."[1491] The

[1483] See Section 10.7 at paras 779-785.
[1484] **F54** Appeal Brief, paras 1262-1263; see also **F54/1** OCP Response Brief**,** paras 715-721.
[1485] **F54** Appeal Brief, paras 1262-1263.
[1486] **E465** Trial Judgment, paras 3621, 3658.
[1487] See further Section 10.7 below at paras 779-785; **E465** Trial Judgment, paras 3620-3621, 3623.
[1488] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 52 lines 11-15 after [11.28.09].
[1489] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 75 lines 17-19 after [14.37.09].
[1490] **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 31 line 25 – p. 32 line 5 before [10.53.00].
[1491] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 28 lines 16-21 after [10.14.35].

Defence's assertion that Civil Party SENG Soeun testified to the need for consent to marriage is manifestly false,[1492] and fails to consider the totality of his evidence.[1493]

640. In relation to forced sexual intercourse, the Defence states falsely that Civil Party CHEA Deap testified that her husband chose to engage in sexual intercourse with her, and that the environment of coercion had no bearing on her entry into a sexual relationship with her husband.[1494] In fact, Civil Party CHEA Deap testified to having sexual intercourse with her husband because she was afraid of being accused of committing moral misconduct,[1495] because she knew that she was being monitored,[1496] and because she was afraid of both her husband and the militiamen.[1497] She described how people disappeared for committing moral offences[1498] and explained that she was afraid that if she did not have sexual intercourse with her husband, they would both be sanctioned with re-education or refashioning.[1499] Her evidence paints a clear picture of the threats and violence that forced couples to have sexual intercourse.

641. These Civil Parties' testimonies reveals the error in the Defence's suggestion that marriages and sexual intercourse under the DK could be assumed to be consensual wherever victims "had not expressed a refusal."[1500] Voicing refusal was effectively impossible when any resistance raised the possibility of serious violence or death. Similarly flawed is the Defence's assertion that the Trial Chamber reasoned that sexual intercourse was *ipso facto* forced in any case where marriage was forced.[1501] The Defence fails to substantiate this claim

[1492] **F54** Appeal Brief, paras 1197, 1246.
[1493] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 16 line 8 – p. 17 line 22 after [09.39.50], p. 18 line 25 – p. 19 line 8 after [09.47.06], p. 20 line 19 – p. 21 line 12 before [09.55.14], p. 22 lines 3-18 after [09.56.58], p. 41 lines 15-21 after [11.09.18],p. 42 lines 14-21 after [11.12.41].
[1494] **F54** Appeal Brief, para. 1391.
[1495] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 76 lines 20-24 after [14.12.28]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 38 lines 20-23 after [10.18.45].
[1496] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 73 lines 12-13 after [14.04.01]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 31 lines 15-18 before [10.04.16], p. 32 line 24 – p. 33 line 2 after [10.05.50].
[1497] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 73 line 25 – p. 74 line 2 before [14.06.10].
[1498] **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 36 lines 21-23 after [10.14.58], p. 37 lines 8-15 before [10.16.35], p. 37 line 22 – p. 38 line 3 before [10.17.38], p. 38 lines 5-9 after [10.17.38].
[1499] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 74 line 25 – p. 75 line 2 before [14.09.19], p. 103 lines 2-6 after [15.37.42].
[1500] **F54** Appeal Brief, paras 1250.
[1501] **F54** Appeal Brief, paras 1306-1307; 1337-1338, 1381-1382.

(beyond challenging the credibility of the Civil Parties' evidence),[1502] and ignores the specific tools of compulsion identified by the Trial Chamber. They included the direct orders given to couples at marriage ceremonies,[1503] threats of punishment,[1504] and monitoring by militiamen tasked with ensuring that couples consummated their marriages.[1505]

642. On the matter of surveillance, the Defence argues that the evidence did not support the Trial Chamber's finding of a practice of monitoring couples to ensure that they engaged in sexual intercourse.[1506] The Defence ignores Civil Party evidence of militia patrols systematically monitoring couples.[1507] It argues that one Civil Party account indicates that monitoring was only carried out in cases of marital discord,[1508] and that a number of Civil Parties testified to monitoring being carried out by young cadres who were abusing, rather than implementing, party policy.[1509] While Civil Party HENG Lai Heang did testify that couples who agreed to be together would not be monitored,[1510] her evidence is not inconsistent with the Trial Chamber's findings. To the contrary, it confirms the purpose of monitoring (to ensure that couples consummated their marriages),[1511] and was appropriately considered by the Chamber alongside evidence from other Civil Parties.[1512] The fact that some Civil Parties were unaware of *why* they were being monitored or made to have sexual intercourse[1513] does not undermine evidence supporting the existence of a consistent practice. Nor does the fact that

[1502] **F54** Appeal Brief, paras 1306-1307, 1337-1338, 1381, citing **E465** Trial Judgment, paras 3648-3661. In relation to Civil Party SENG Soeun, the Defence argues that he did not mention consummating his marriage under duress although he testified to marrying against his will (see **F54** Appeal Brief, para. 1372). Civil Party SENG Soeun did not give any evidence about the consummation of his marriage, conclusions cannot be drawn from his silence on this issue.
[1503] **E465** Trial Judgment, paras 3633, 3635.
[1504] **E465** Trial Judgment, paras 3645-3647.
[1505] **E465** Trial Judgment, paras 3641-3644.
[1506] **F54** Appeal Brief, paras 1341-1377; **E465** Trial Judgment, paras 3641-3644, 3660.
[1507] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 44 line 1 – p. 48 line 16 after [11.21.58]; **E1/463.1** T., 24 August 2016 (Civil Party SOU Sotheavy), p. 45 lines 9-16 after [11.02.03], p. 54 lines 10-23 after [11.22.50]; **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 31 lines 4-19 after [10.48.34]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 31 line 11 – p. 32 line 20 after [10.02.40].
[1508] **F54** Appeal Brief, paras 1345-1346.
[1509] **F54** Appeal Brief, paras 1345-1346.
[1510] **E1.476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 40 lines 16-24 after [11.18.45].
[1511] **E465** Trial Judgment, para. 3644.
[1512] **E465** Trial Judgment, paras 3641-3644, esp. para. 3643.
[1513] For example, the Defence argues at **F54** Appeal Brief, paragraph 1345 that although Civil Party OM Yoeurn saw militiamen monitoring her, her evidence could not have allowed the Chamber to draw conclusions about the purpose of the monitoring. It argues that Civil Party KHOEUN Choem, though she understood that she was required to have children, did not understand the reason why: **F54** Appeal Brief, para. 1231 fn. 2324.

some Civil Parties described the militiamen as "young"[1514] in itself raise doubt about the Trial Chamber's conclusions that a policy of monitoring existed. The Defence has not referred to evidence suggesting that the age of cadres meant they were likely to be acting contrary to policy.

643. The Defence's final argument about consent is contained in a series of assertions about the Trial Chamber's approach to Civil Party testimony.[1515] The Defence argues that the Trial Chamber relied on the evidence of Civil Parties who were not credible or whose evidence about consent did not reflect the totality of the evidence.[1516] The Defence's arguments concerning Civil Party evidence are addressed elsewhere in this Brief,[1517] and dealt with only in relation to other evidentiary questions here.

644. The Defence claims that the Trial Chamber gave insufficient weight to examples of members of "privileged" groups (such as former soldiers) consenting to marriage, and that it erred by treating these instances as outliers rather than the rule.[1518] The Lead Co-Lawyers support the OCP's response on this point,[1519] and add that the Defence overlooks the evidence of three women who testified to being forced to marry disabled soldiers – Civil Parties PREAP Sokhoeurn, OM Yoeurn, and CHEA Deap.[1520] The Defence is wrong to characterise such marriages as consensual when, on the part of the women at least, there was clearly no consent.[1521] Also flawed is the Defence's approach of isolating individual words or phrases from Civil Party testimony in support of its argument. For example, it argues that Civil Party

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[1514] It is not clear that all the sources cited by the Defence at **F54** Appeal Brief, paragraph 1346 even gave this evidence. The transcript reference given for Civil Party PEN Sochan makes no mention of the age of the militia (**E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), p. 88 lines 4-8 after [14.39.32] referred to in **F54** Appeal Brief, fn. 2552, and see also at para. 1368).

[1515] The Defence's arguments about the way that the Trial Chamber evaluated the testimony of Civil Parties who gave evidence about consent are dispersed through the Appeal Brief: see **F54** Appeal Brief, paras 1259, 1269, 1361, 1381. From **F54.1.1** Appeal Brief, Annex A, it seems that **ground 170** and **ground 174** are the primary grounds through which the Defence seeks to make this claim.

[1516] **F54** Appeal Brief, paras 1383-1389.

[1517] The Defence arguments about Civil Party evidence in general are addressed above at Section 8.2.1 at para. 185 *et seq*. Specific responses relating to the credibility of Civil Parties OM Yoeurn, PREAP Sokhoeurn and MOM Vun are found below in Section 10.

[1518] **F54** Appeal Brief, paras 1259-1280; **E465** Trial Judgment, para. 3623.

[1519] **F54/1** OCP Response Brief, para. 718-720.

[1520] **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn); **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap); **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn).

[1521] **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 99 line 17 after [15.56.06]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 27 line 23 – p. 28 line 2 after [09.54.56]; **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn) p. 9 lines 2-6 after [09.20.24].

SOU Sotheavy described the marriages of disabled soldiers as "not forced", in contradiction to the Trial Chamber's findings.[1522] However, the full quote it relies on shows that Civil Party SOU Sotheavy's intended meaning was different:

> I saw the disable soldiers coming to get married. It was not a -- it was not forced. The women were asked to get married to those disable soldiers and none of them dare to refuse.[1523]

645. The Defence also argues that Civil Party SENG Soeun, who was responsible for arranging marriages of handicapped soldiers in Takhmau,[1524] testified to the consensual nature of the marriages he oversaw.[1525] In fact, Civil Party SENG Soeun explained that an order had been issued "from above" that handicapped soldiers were to be married, which resulted in women being "brought in" to marry them.[1526] His testimony made clear that neither the men nor the women had any choice about whether to get married, even if some witnesses framed the disabled soldiers' marriages as beneficial to them.[1527]

646. Although the Defence is correct to note that Civil Party SENG Soeun stated that couples had the option to "withdraw" from their marriages,[1528] the Defence ignores his further testimony that couples did not take up the option because they thought that they would be killed.[1529] Later in his testimony, Civil Party SENG Soeun clarified that any ability to consent to marriage was not operative *prior* to marriage.[1530] It is also significant that despite his role in the process, Civil Party SENG Soeun did not know what happened to those who withdrew and whether "they faced issues later on".[1531]

[1522] **F54** Appeal Brief, para. 1266.
[1523] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 96 lines 2-4 after [15.48.43].
[1524] Civil Party SENG Soeun was moved to Takhmau in early 1977, and left in June 1978: **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 34, lines 7-14, before [10.51.15].
[1525] **F54** Appeal Brief, para. 1250.
[1526] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 18 lines 1-7 after [09.43.40], p. 19 lines 6-8 after [09.47.06].
[1527] **F54** Appeal Brief, para. 1264-1266; **E465** Trial Judgment, para. 3591.
[1528] **F54** Appeal Brief, para. 1250.
[1529] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 23 line 16 – p. 26 line 18, after [10.01.08].
[1530] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 19 lines 6-8 after [09.47.06], p. 20 line 19 – p. 21 line 12 before [09.55.14], p. 22 line 3 – p. 23 line 2 after [09.56.58], p. 41 lines 4-21 after [11.09.18], p. 42 lines 14-21 after [11.12.41], p. 78 line 3 – p. 79 line 12 after [15.01.55].
[1531] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 24 lines 5-9 before [10.03.20].

647. In any case, even if the evidence suggested that certain "privileged" people were able to resist marriage,[1532] that does not negate the incidence of forced marriages or suggest that these privileges extended widely. There is no requirement that the Trial Chamber rely only on perfectly uniform experiences to form its conclusions about the regulation of marriage.[1533] Conduct meeting the elements of the crime remains criminal whether or not it was universal.

648. The Defence argues further that the Trial Chamber erred by finding that instances where witnesses were able to refuse marriage without prejudicial consequences were exceptional.[1534] It is notable that even the Defence's own examples do not support this claim. The Defence argues that an "unbiased reading of [Civil Party] SUN Vuth's statement that he 'protested' the marriage proposal 'maybe' because he was young" was insufficient to find that such cases were exceptional.[1535] Contrary to the Defence's claim that Civil Party SUN Vuth was unable to say whether other people could also resist marriage, the Civil Party said clearly: "others could not protest against Angkar".[1536] The Defence also misrepresents the evidence of Civil Parties who initially refused to be married before subsequently being forced, suggesting that they, and others, could refuse marriage altogether.[1537] Civil Party HENG Lai Heang said "I refused three times and during my third refusal, they conveyed words to me that I was a stubborn person, that I did not follow the order and when I heard such words, I agreed to accept the marriage because I felt afraid I would be in trouble."[1538] Civil Party CHEA Deap's testimony similarly makes clear that she was able to resist for a time, but was ultimately forced to marry:

> …I told my supervisor that I did not want to get married and that he should arrange marriage for the old couples first because> I was still young and I wanted to serve <Angkar.> I could refuse for the first time and the second time I kept on refusing <by giving my supervisor the same answer.> And on the third occasion he instructed me to go to <the Office K6 at> Ou Ruessei market and I went there <>. Over there I was told that because I was the children of Angkar. <If you were

[1532] In **F54.1.9** Appeal Brief, Annex B8, 27 February 2020, ERN (En) 01652621, 01652622 (the Defence argues that not all marriages were forced, relying on Civil Party LAY Bony's testimony that some people in her unit could make requests to marry particular people).
[1533] The Trial Chamber correctly took into account the evidence of witnesses and Civil Parties who explained that they had refused to get married: **E465** Trial Judgment, para. 3624.
[1534] **F54** Appeal Brief, para. 1269.
[1535] **F54** Appeal Brief, para. 1269.
[1536] **E1/411.1** T., 30 March 2016 (Civil Party SUN Vuth), p. 79 lines 4-7 after [14.40.12].
[1537] **F54** Appeal Brief, para. 1269, fn. 2421.
[1538] **E1.476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 53 lines 16-19 before [13.46.01].

> with your parents, you had to respect them. If you were the children of Angkar, you had to respect Angkar. Therefore, you> had to follow the advice of Angkar. My refusal for the first time and second time were successful, but for the third time I could not refuse <anymore> so I simply followed the orders from Angkar.[1539]

As the OCP explained, the Defence falls into the error of confusing some people's ability to delay marriage with a freedom to refuse marriage altogether.[1540]

649. The Defence also argues, specifically in relation to forced sexual intercourse, that the Trial Chamber erred in finding that victims did not consent because the Civil Parties on whose evidence it relied were not credible.[1541]

650. The Defence claims that the Trial Chamber overlooked the fact that Civil Party OM Yoeurn only mentioned having been raped at a late stage in the proceedings.[1542] This argument simply restates an objection that was considered and dismissed by the Trial Chamber, which found that any discrepancies in Civil Party OM Yoeurn's account were minor (and reprimanded the Defence for misrepresenting her testimony).[1543] Further, the Lead Co-Lawyers note that the matter was addressed directly during Civil Party OM Yoeurn's testimony.[1544] The objection is misleading. Although Civil Party OM Yoeurn did not use the word "rape" in her initial application to be joined to the proceedings as a Civil Party,[1545] she did describe being coerced into sexual intercourse with her husband.[1546]

651. The Defence makes a similar argument in relation to Civil Party PREAP Sokhoeurn's statement about being forced to engage in sexual intercourse with her husband.[1547] Again, the Defence's arguments have already been rejected by the Trial Chamber as inaccurate and, contrary to the Defence submissions, the Trial Chamber set out clear reasons for finding Civil

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[1539] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 68 lines 6-20 before [13.53.11].
[1540] **F54/1** OCP Response Brief**,** para. 721.
[1541] **F54** Appeal Brief, paras 1361, 1381; **E465** Trial Judgment, paras 3648-3661.
[1542] **F54** Appeal Brief, para. 1386. In relation to Civil Party OM Yoeurn see also below in Section 10.8 at paras 786-794.
[1543] **E465** Trial Judgment, para. 3649.
[1544] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 60 line 22 – p. 61 line 16 after [13.57.32].
[1545] **E3/6011** Victim Information Form (Civil Party Om Yoeurn), 04 August 2009, ERN (En) 01339058.
[1546] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 60 line 22 – p. 61 line 16 after [13.57.32].
[1546] **E3/6011** Victim Information Form (Civil Party Om Yoeurn), 04 August 2009, ERN (En) 01339058.
[1547] **F54** Appeal Brief, paras 1382, 1387. Regarding Civil Party PREAP Sokhoeurn see more generally below at Section 10.10 at paras 799-813.

Party PREAP Sokhoeurn to be credible and reliable.[1548] Additionally, the Lead Co-Lawyers object to the Defence's repeated mischaracterisation of Civil Party PREAP Sokhoeurn's evidence: she said in a supplementary statement provided in 2009 that she did not dare oppose her marital arrangement, and "withstood living with [her husband]" until they separated. Civil Party PREAP Sokhoeurn's statements have consistently indicated that her marital relations were shaped by force.[1549]

652. The Defence also argues that the Trial Chamber carefully selected exceptional narratives to support its findings, and that the Civil Parties who testified about being forced to marry and have sexual intercourse were chosen to create a skewed picture.[1550] For instance, it argues that Civil Party MOM Vun's rape by militiamen breached all rules of morality, and that the only conclusion that the Trial Chamber could have drawn from her testimony was that the local cadre had acted abusively.[1551] It also argues that the fact that Civil Party PEN Sochan's story received media coverage proves that it was unusual,[1552] and that no findings could be drawn from Civil Party SOU Sotheavy's testimony because she is transgender.[1553] As above, these arguments fail to recognise how the Trial Chamber actually used the Civil Parties' evidence to support its factual findings.[1554] Contrary to the Defence's contentions, the Trial Chamber did not treat every aspect of these accounts as representative, but relied on their core aspects which were corroborated by other evidence.

653. The Defence has failed to demonstrate any error in the Trial Chamber's finding that couples did not consent to forced marriage.[1555] The evidence of the Civil Parties clearly supported that conclusion.

9.6.4.2.2 The relevance of cultural context to assessment of seriousness

654. The Defence submits that the Trial Chamber attempted to hide errors in its assessment of seriousness by artificially separating the regulation of marriage and sexual intercourse under

[1548] **E465** Trial Judgment, para. 3649.
[1549] **E3/6407a** Victim Information Form (Civil Party PREAP Sokhoeurn), 10 January 2009, ERN En (00850589).
[1550] **F54** Appeal Brief, paras 1374, 1382.
[1551] **F54** Appeal Brief, para. 1388.
[1552] **F54** Appeal Brief, para. 1390. See also below at para. 797.
[1553] **F54** Appeal Brief, para. 1390. See also below at paras 822-826.
[1554] **E465** Trial Judgment, paras 3660, 3661.
[1555] **E465** Trial Judgment, paras 3696, 3697.

the DK from the context of traditional Cambodian marriages.[1556] The Lead Co-Lawyers submit that the Trial Chamber correctly distinguished marriage under the DK regime from arranged marriage practices in Cambodian culture.[1557]

655. In principle, the Lead Co-Lawyers agree that the context in which acts are committed and the characteristics of the victims can be relevant to evaluating their seriousness, and therefore, whether they constitute other inhumane acts.[1558] However in practice it is difficult – perhaps impossible – to conceive of a situation in which the cultural context of conduct otherwise serious enough to constitute other inhumane acts would relieve it of such gravity. The Defence cites no instance where a court has taken that approach.

656. In any event, the question need not be decided in this case. The Defence does not establish error in the Trial Chamber's finding that "arranged marriage in Cambodian culture is very different from forced marriage in the DK regime".[1559] The Defence argument appears to be that the DK's forced marriages were so similar to accepted marriage practices in Cambodia that it could not be considered as grave conduct (or as conduct which would cause serious suffering).[1560] However the evidence demonstrates that the regulation of marriage during the DK was fundamentally different to traditional Cambodian marriages.

657. First, the Defence's argument fails to recognise that the violence accompanying the regulation of marriage had no antecedent in traditional Cambodian society.[1561] Nowhere is this clearer than in the fact that under the DK, people were threatened with re-education or death if they refused to marry or to engage in sexual intercourse within their marriage.[1562] For example, Civil Party MAO Kroeurn initially refused to marry, and was sent to a re-education camp for 3 or 4 months.[1563] She eventually agreed to marry because she was "afraid that this would happen again".[1564] Civil Party MOM Vun was raped by five militiamen for objecting to her marriage.[1565] She married two days later. She said: "I was threatened that I

[1556] **F54** Appeal Brief, paras 1136, 1150-1155.
[1557] **E465** Trial Judgment, paras 3688-3689.
[1558] **F54** Appeal Brief, paras 1126-1127.
[1559] **E465** Trial Judgment, para. 3688.
[1560] See at paras 654-663, 673. See also paras 556-560.
[1561] **E465** Trial Judgment, para. 3688. See also on this point **F54/1** OCP Response Brief, paras 684-686.
[1562] **E465** Trial Judgment, paras 3618, 3621-3622.
[1563] **F54** Appeal Brief, para. 1186, fn. 2213.
[1564] **E3/5561** Written Record of Interview (Civil Party MAO Kroeurn), 10 September 2009, ERN (En) 00384789.
[1565] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 49 lines 17-21 after [11.20.30].

had to marry and I was warned that if I said anything about that event, I would be dead. And for the sake of <survival and> my children, I had to marry, again, despite my tears."[1566] Civil Party OM Yoeurn stated that she consummated her marriage because she understood that if she refused to do so, militiamen she had seen monitoring her house would take her away to be killed.[1567] Civil Party SAY Naroeun had sexual intercourse with her husband out of fear that she would be taken away and killed.[1568]

658. In response to this testimony and to the consistent accounts of other Civil Parties,[1569] the Defence weakly suggests that violence was itself a feature of traditional Cambodian society.[1570] The Defence attempts to use evidence that Cambodian children in the 1970s were smacked by parents and teachers to argue that the violence used by the CPK – the murders, rapes, torture and physical labour – was inherent to Cambodian culture.[1571] That argument has no foundation in fact, reason, or in the evidence before the Trial Chamber.

659. The Defence's second argument – that, in practice, social pressure meant that individuals could not genuinely consent to traditional arranged marriages – also lacks merit.[1572] To make this point, the Defence misrepresents the testimony of Civil Parties OUM Suphany and OM Yoeurn:[1573] in the passage of her testimony relied on by the Defence, Civil Party OUM Suphany explained that at the start of the regime, her mother-in-law told her to say that she and her fiancé were already married, so that neither would be forcibly married to another person by the CPK.[1574] Civil Party OM Yoeurn did feel that she had to accept her parents' choice of spouse, but highlighted that this was because her parents would only arrange her marriage to a man they trusted and loved.[1575] It was clearly open to the Trial Chamber to

[1566] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 50 lines 5-8 before [11.23.04].
[1567] **E1/462.1** [Corrected 2] T., 23 August 2016 Civil Party OM Yoeurn), p. 48 lines 11-20 after [11.30.52].
[1568] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 49 lines 3-8 after [11.08.48].
[1569] See also **E3/9831** Written Record of Interview (Civil Party CHECH Sopha), 13 October 2014, A.115 at ERN (En) 01050637; **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 40 lines 4-9 after [11.18.45].
[1570] **F54** Appeal Brief, paras 1126-1129.
[1571] **F54** Appeal Brief, paras 1127-1128.
[1572] **F54** Appeal Brief, paras 1122-1125, 1159, 1160. Nor does the Defence provide any basis for its assertion at paragraph 1160, that the Trial Chamber was not entitled to rely on the expert testimony of Kasumi Nakagawa to conclude that arranged marriages were legitimised by individuals delegating consent to their families. The Trial Chamber carefully considered her expert evidence (**E465** Trial Judgment, paras 3687-3688) alongside the evidence of Civil Parties and witnesses (**E465** Trial Judgment, paras 3636-3640) in concluding that arranged marriages were unlike the regulation of marriage under the DK.
[1573] **F54** Appeal Brief, para. 1160.
[1574] **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party OUM Suphany) p. 22 lines 9-16 after [9.57.40].
[1575] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 27 lines 12-14 after [10.35.18].

weigh that evidence, and to take account of expert evidence,[1576] to conclude that consent was involved in arranged marriages, even if that consent was delegated to parents or families.[1577] This is particularly so given the evidence of the numerous Civil Parties who spoke directly to the role of consent in traditional arranged marriages. For example, Civil Party KEO Theary confirmed that, prior to the DK, her family would not have forced her to marry if she did not like a proposed husband.[1578] Civil Party PREAP Sokhoeurn explained that "[u]nder the regime, nobody dared to oppose the Angkar… It was not like <when our parents arranged marriage for us and> when we disliked one another, we could divorce <>, no…"[1579]

660. Nor is there any support for the Defence's claim that the first acts of sexual intercourse following marriage "were no different depending on whether they took place within a marriage arranged by the parents or in a marriage arranged by the local authorities under the DK."[1580] The Defence offers no evidence in support of its insinuation that spousal rape was prevalent in Cambodian society,[1581] referring only to Civil Party KEO Theary's unrelated statement that she did not want to discuss sexual intercourse with her interviewer.[1582] It also fails to engage with the testimony of Civil Parties who described the threats that compelled them to engage in sexual intercourse with their new spouses under the DK's regulation of marriage.[1583] The Defence's related argument, that forcing couples to marry before requiring them to have sexual intercourse legitimised their physical relationships,[1584] is seriously misguided. The fact that couples were forced to marry before being required to have sexual intercourse with one another, if anything, renders the acts charged *more* serious than conventional examples of rape, not less, by compounding the types of harm experienced.

[1576] **E465** Trial Judgment, para. 3688.
[1577] **E465** Trial Judgment, para. 3688.
[1578] **E3/9662** Written Record of Interview (Civil Party KEO Theary), 8 December 2014, A. 22-25 at ERN (En) 01057763-01057764.
[1579] **E1/487.1** [Corrected 2] T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 92 line 24 – p. 93 line 4 after [15.04.09].
[1580] **F54** Appeal Brief, para. 1321.
[1581] **F54** Appeal Brief, para. 1321, fn. 2503.
[1582] **F54** Appeal Brief, para. 1321, fn. 2503.
[1583] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 100 line 25 – p. 101 line 2 after [15.08.17]; **E1/488.1** T., 24 October 2016 (Civil Party NGET Chat) p. 125 line 13 – p. 126 line 14 after [16.03.42]; **E1/489.1** T., 25 October 2016 (Civil Party NGET Chat) p. 13 lines 2-10 after [09.30.48]; **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 49 lines 3-8 after [11.08.48].
[1584] **F54** Appeal Brief, para. 1305.

661. Thirdly, this Chamber should not accept the Defence's claim that the control imposed over relationships between men and women was carried over from traditional Cambodian social structures, and did not introduce new restrictions on sentimental or sexual interactions.[1585] In support of this argument, the Defence submits that Cambodian society had long discouraged sexual relations outside marriage,[1586] prohibited divorce,[1587] and was conservative about notions of purity and virginity for women.[1588] Even if, prior to the DK, Cambodian culture was conservative about intimate relationships between men and women, the evidence before the Trial Chamber showed that during the DK additional, more absolute, prohibitions were instituted that perverted traditional conceptions of modesty. One example was provided by Civil Party CHUM Samoeurn, who said "I refused [to marry] and I was threatened that if I <had> not <done> so, I would <have> never <dated> a man throughout my life, if I <had been> caught smiling at a man, I would <have risked> being killed."[1589] Civil Party KEO Theary recalled hearing that "[i]f [a woman] spoke to a man, they would accuse us of breaching morality and take us to be killed."[1590] Civil Party YOS Phal said: "If we said that we wanted to get separated both of us would be killed. So we did not dare to say that we would get divorced. We had to say that we loved each other."[1591] Civil Party SENG Soeun recalled two instances where couples who were in love were found to have "violated the morality" and were killed, for the reason that they had not reported their relationship to the upper echelon.[1592] There is no evidence that such rules had any counterpart in traditional cultural ideas.

662. Finally, the Defence fails to make out its claim that governmental oversight of marriage was a normalised practice, not only in pre-DK Cambodia but in societies around the world.[1593] The Lead Co-Lawyers agree that governmental recognition of individuals' decisions to marry

[1585] **F54** Appeal Brief, paras 1217, 1218.
[1586] **F54** Appeal Brief, paras 1217, 1218.
[1587] **F54** Appeal Brief, para. 1220.
[1588] **F54** Appeal Brief, para. 1218.
[1589] **E1/321.1** [Corrected 1] T., 24 June 2015 (Civil Party CHUM Samoeurn), p. 64 lines 15-18 after [14.25.08].
[1590] **E3/9662** Written Record of Interview (Civil Party KEO Theary), 08 December 2014, A. 68 at ERN (En) 01057771.
[1591] **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 31 line 25 – p. 32 line 5 after [10.50.13]. Even those couples who did get along were not able to live together in accordance with traditional notions of marriage. Civil Party KEO Theary describes how her husband lied to his unit chief to see her: **E3/9662** Written Record of Interview (Civil Party KEO Theary), 08 December 2014, A. 55 at ERN (En) 01057769.
[1592] **E1/465.1** [Corrected 2] T., 29 August 2016 (Civil Party SENG Soeun), p. 79 lines 5-12 after [15.06.45].
[1593] **F54** Appeal Brief, para. 1249.

is an innocuous and near universal practice. But to suggest that the DK regulation of marriage simply represented an officialisation of a decision taken by two individuals is clearly negated by the evidence before the court.[1594]

663. Underlying each of the Defence's attempts to equate the CPK's regulation of marriage with traditional marriages is the troubling suggestion that it is irrelevant whether harms are perpetrated by the state officials or by private citizens.[1595] This approach misunderstands the role that the state plays in people's lives, and the unique harms caused by unchecked state authority. The relationship between citizen and state is fundamentally different to that between child and parent. Checks exist on the power a parent can exercise over a child – not least by virtue of the role of the state itself. Therefore, even if the DK had simply transferred the role previously exercised in marriage from parents to itself (which it did not), that would not have been a neutral change.

9.6.4.2.3 Whether acts can be of sufficient seriousness if they have not been criminalised

664. In developing its claims about seriousness, the Defence repackages its arguments about "formal unlawfulness".[1596] It argues that because the underlying conduct – forced marriage – was not independently criminalised at the time, lawmakers must not have considered it to be serious.[1597] According to the Defence, this suggests that by the standards of the time, the DK's regulation of marriage and forced sexual intercourse did not satisfy the nature and gravity threshold for other inhumane acts.

665. The argument is incorrect factually and as a matter of principle. As set out above, both international and national law did regulate the conduct in question even at the time.[1598] The Trial Chamber correctly dismissed this line of reasoning in favour of the approach to assessing other inhumane acts set out by this Chamber.[1599]

666. In any event, the Defence has cited no authority for the proposition that the gravity element is to be assessed by reference to the cotemporaneous state of international and national law.

[1594] See the Trial Chamber's findings about the extensive oversight and reporting mechanisms through which the marriage policy was implemented: **E465** Trial Judgment, paras 3654-3658.
[1595] **F54** Appeal Brief, paras 1222, 1225
[1596] **F54** Appeal Brief, paras 1146-1147. See above at paras 530 and 539.
[1597] **F54** Appeal Brief, paras 1146-1147.
[1598] See generally Section 9.6.1 at para. 515 *et seq*.
[1599] **E465** Trial Judgment, para. 741.

It is unsurprising that no authority could be found for this: to assess gravity in this way, by effectively requiring independent criminalisation in order to find that conduct satisfies the elements of other inhumane acts, would render the existence of a "residual" category of crimes against humanity meaningless.[1600] The Defence's position would also throw into question the many decisions handed down by international courts recognising that a wide range of acts that have not been criminalised constitute other inhumane acts.

9.6.4.3 Element 2: Serious mental or physical harm or injury or serious attack on human dignity

667. The Defence fails to establish error in the Trial Chamber's conclusion that couples forced into marriage and sexual intercourse during the DK suffered serious mental and physical injury.[1601]

668. The Defence grounds this challenge on the claims that: (i) the Trial Chamber overlooked aspects of Cambodia's cultural context when assessing suffering; (ii) the Trial Chamber failed to account for victims' changing attitudes over time; (iii) the Trial Chamber erred in evaluating the testimony of the Civil Parties; and (iv) the evidence of suffering that the Trial Chamber relied on was not representative of victims' experiences. The Lead Co-Lawyers also address an additional issue raised implicitly by the Defence's challenge to the Trial Chamber's assessment of suffering: (v) that the evidence showed that the regulation of marriage and forced sexual intercourse constituted a serious attack on human dignity.

9.6.4.3.1 The relevance of Cambodia's cultural context to the Trial Chamber's assessment of suffering

669. The Trial Chamber found that the suffering caused to victims of the DK's regulation of marriage stemmed, in part, from its departure from traditional arranged marriage in Cambodian culture.[1602]

670. The Defence argues that, in assessing the suffering caused by the regulation of marriage and forced sexual intercourse, the Trial Chamber failed to take proper account of Cambodia's

[1600] Mettraux, *Crimes Against Humanity*, Section 6.10.1.2, p. 695. *Attachment 27*
[1601] **E465** Trial Judgment, para. 3692, 3698; **F54** Appeal Brief, paras 1156-1188. See also **F54/1** OCP Response Brief, paras 724-733. The Lead Co-Lawyers agree with the OCP that the Defence fails to construe the evidence holistically, and that its arguments simply amount to an alternative reading of evidence already considered by the Trial Chamber.
[1602] **E465** Trial Judgment, para. 3692 fn 12315; para. 3689.

social and cultural context.[1603] In the Defence's view, that context should have led the Trial Chamber to conclude that the suffering caused was not serious, or at least not more serious than the suffering newly married couples in Cambodia would otherwise have endured.[1604]

671. The Defence's arguments about the cultural context of the conduct are linked to those dealt with above concerning seriousness.[1605] As a matter of law, the Defence does not cite any authority for its proposition that suffering should be measured in relation to a person's social or cultural context - a suggestion that could introduce a strange, arguably impossible, calculation into the Court's analysis.[1606] While the caselaw of other international tribunals suggests that suffering may be assessed in light of the *immediate* context in which an act is committed (e.g. the violence of war, or food shortages associated with prolonged conflict),[1607] the Defence's approach goes further. In effect, the Defence suggests that suffering should be construed against a person's social background and privilege, importing a form of cultural relativism into the assessment of human pain.

672. The Trial Chamber was correct to reject an approach that would lead it to tolerate abuses in some communities, while characterising them as the most serious international crimes in other communities during the same time period. It should also avoid finding that unlawful conduct can be minimised by the occurrence or prevalence of *other* unlawful conduct in a society (such as coercing couples into traditional marriages without consent).

673. In any case, the Defence fails to show that traditional Cambodian marriage practices, including arranged marriages, by their nature caused suffering comparable to that caused by marriages under the DK.[1608] In fact, the Civil Party evidence before the Trial Chamber suggested precisely the opposite: couples forced to marry under the DK attributed their suffering in part to the fact that their marriages had not been arranged according to

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[1603] **F54** Appeal Brief, paras 1159-1162, 1316-1323.
[1604] **F54** Appeal Brief, paras 1316-1323.
[1605] See above at Section 9.6.4.2.2 at para. 654 *et seq*.
[1606] The jurisprudence of the ICC and ICTY suggests that suffering is to be assessed "on a case by case basis with due regard for individual circumstances": ICTY *Prosecutor v Kordić & Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 117; ICC *Prosecutor v Katanga*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 454. The analysis undertaken by each court does not suggest that "individual circumstances" include the cultural context which preceded the conduct.
[1607] ICTY *Prosecutor v Krnojelac*, IT-97-25-T, Judgment, para. 139; SCSL *The Prosecutor v Brima et al*., SCSL-2004-16-A, Judgment, 22 February 2008, para. 183.
[1608] **F54** Appeal Brief, para. 1160.

Cambodian tradition. The Trial Chamber correctly relied on Civil Party evidence about their parents' absence from wedding ceremonies,[1609] their marriage to spouses whom their families knew nothing about,[1610] and the abandonment of cultural traditions,[1611] as key factors that caused them distress.[1612] Contrary to the Defence's assertions, not one of the Civil Parties or witnesses suggested that sexual relations under traditional arranged marriages led them to experience any serious suffering or shame.

674. The Defence has failed to explain or justify its view that suffering is culturally relative, and has not identified any error in the Trial Chamber's assessment of the suffering caused by the regulation of marriage and forced sexual intercourse.

9.6.4.3.2 Victims' attitudes towards DK marriages over time

675. The Defence makes two arguments alleging that the passage of time was relevant to the Trial Chamber's deliberations about the suffering inflicted by marriage and forced sexual intercourse, challenging the Trial Chamber's finding that the DK's regulation of marriage inflicted serious and lasting effects on its victims.[1613] First, the Defence argues that the Trial Chamber erred by overlooking the fact that (in the Defence's view) the suffering of people who married under the DK lessened over time.[1614] Second, it points out that some couples stayed together, arguing that this shows that any suffering they experienced as a result of marriage or forced sexual intercourse was, when viewed in the longer term, inconsequential.[1615]

676. The Defence's claim that some victims' suffering lessened over time[1616] is of minimal relevance as a matter of law: there is no requirement that suffering is long-term (though where

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[1609] **E465** Trial Judgment, paras 3639-3640; **E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), p. 73 lines 13-20 before [13.58.03]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 71 lines 19-24 after [13.33.10]; **E1/487.1** [Corrected 2] T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 96 line 23 – p. 97 line 5 before [15.15.38].
[1610] **E465** Trial Judgment, para. 3612.
[1611] **E465** Trial Judgment, paras 3636-3640, 3681.
[1612] See e.g. **E3/9736** [Corrected 1] Written Record of Interview (Civil Party MEAS Saran), 29 December 2014, A.114 at ERN (En) 01057632-01057633; **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 50 line 24 – p. 51 line 4 after [11.24.42], p. 57 lines 16-22 before [13.43.25]; **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 77 lines 19-23 before [14.15.48], p. 78 lines 4-16 before [14.17.12]; **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 97 line 25 – p. 98 line 10 before [15.52.38].
[1613] **E465** Trial Judgment, paras 3679-3685, 3692, 3698.
[1614] **F54** Appeal Brief, paras 1169, 1171, 1173, 1174, 1186.
[1615] **F54** Appeal Brief, para. 1169.
[1616] **F54** Appeal Brief, paras 1169, 1171, 1173, 1174, 1186.

this does occur it may be relevant to the seriousness of the acts).[1617] The acceptance that some victims eventually found does not retroactively negate the suffering they endured as a result of being forced to marry and have sexual intercourse.[1618]

677. The testimony of Civil Parties illustrates this. For example, although he remained married to his wife, Civil Party KUL Nem testified that he was so worried by the prospect of being forced to marry that he could not eat; he said that he agreed to his marriage in order to survive to "see the open sky again".[1619] Civil Party KEO Theary, whom the Defence refers to as someone whose suffering faded over time,[1620] nonetheless spoke in her OCIJ interview of her initial fear, and the difficulty and shame of being forced to have sexual relations with a stranger.[1621]

678. However, the Lead Co-Lawyers also caution the Chamber that in some instances the Defence has mischaracterised the level of contentment found by Civil Parties in their forced marriages. For example, the Defence states that Civil Parties KHIEV Horn and HORNG Orn mentioned "developing feelings" for their forced spouses, or said that they had a "better life after their marriage[s]."[1622] In fact, although Civil Party KHIEV Horn said that she had agreed to stay with her husband after the DK, she said nothing about developing feelings for him or having a better life as a result.[1623] Civil Party HORNG Orn described the coercive circumstances of her marriage and its consummation, as well as her subsequent divorce.[1624] Her evidence suggests that she continues to suffer greatly from her experience of being forced to marry.

[1617] **E313** Case 002/01 Trial Judgment, para. 439; **Case 001 – E188** Case 001 Trial Judgment, para. 369; ICTY *Prosecutor v Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 501; ICTY *Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 131; ICTY *Prosecutor v Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 165; *Prosecutor v Lukić et al.*, IT-98-32/1-T, Judgement, 20 July 2009, para. 961.

[1618] SCSL *Prosecutor v Brima et al*., SCSL-04-16-T, Judgement, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages'), 20 June 2007, para. 41.

[1619] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 89 lines 18-25 after [14.24.56].

[1620] **F54** Appeal Brief, para. 1187, fn. 2216.

[1621] **E3/9662** Written Record of Interview (Civil Party KEO Theary), 08 December 2014, A. 66, 67, 74 at ERN (En) 01057771, 01057772.

[1622] **F54** Appeal Brief, para. 1186, fn. 2214.

[1623] **E3/5559** Written Record of Interview (Civil Party KHIEV Horn), 9 September 2009, ERN (En) 00377369-00377370.

[1624] **E3/5558** Written Record of Interview (Civil Party HORNG Orn), 9 September 2009 ERN (En) 00381009-00381010.

679. The Defence's second argument – that couples that stayed together after the DK fell could not be held to have suffered seriously[1625] – is similarly erroneous. The Defence ignores the evidence of the various reasons why people stayed in their marriages. For example, Civil Party KUL Nem stayed with his wife because he felt that he had an obligation to look after her.[1626] KHET Sokhan, a Civil Party who continued to live with her husband after the fall of the regime,[1627] said that she stayed with her husband because he was also a resident in her village, and she did not have parents to turn to for support.[1628] Civil Party OM Yoeurn was convinced to reunite with her husband through pressure from her family and village elders.[1629] Civil Party SAY Naroeun testified that she remained in her marriage for the sake of her child; she said that she did not want to see her child grow up with another father.[1630] Civil Party YOS Phal suggested that it was pressure from parents and siblings that convinced him to remain in his marriage.[1631] Civil Party TES Ding said, with circumspection, that after their marriage he and his wife "discussed what had to be done and decided that we had to accept this to stay alive".[1632] Acceptance and resignation are, in many cases, evidence of how people respond to suffering, rather than indications of its absence. This Chamber should not find that a decision to stay in a marriage somehow cured the original suffering caused by forced marriages.

680. The Defence also insinuates that Civil Parties who testified that they did not want to marry, but who nevertheless remained married after the regime, lacked credibility as a result.[1633] Again, the Defence ignores the complexity of human relationships, instead focusing baseless challenges on apparent inconsistencies. For example, Civil Party YOS Phal explained that he did not divorce his wife after the regime due to pressure from his family[1634] – an explanation

[1625] **F54** Appeal Brief, para. 1169.
[1626] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 90 lines 4-7 after [14.26.27].
[1627] **F54** Appeal Brief, para. 1171, fn. 2179.
[1628] **E3/9830** Written Record of Interview (Civil Party KHET Sokhan), 27 November 2014, A. 87-88 at ERN (En) 01077083.
[1629] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 12 lines 17-22 after [09.31.58].
[1630] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 51 line 23 – p. 52 line 5 after [11.15.50].
[1631] **E1/464.1** [Corrected 1] T., 25 August 2016 (Civil Party YOS Phal), p. 32 lines 10-18 after [10.53.00].
[1632] **E3/5560** Written Record of Interview (Civil Party TES Ding), 10 September 2009, ERN (En) 00377171. Note that the Defence falsely states that this answer was given in relation to forced sexual intercourse, and suggests that no implication of suffering as a result of being forced to have sexual intercourse with his wife can be drawn from Civil Party TES Ding's testimony: **F54** Appeal Brief, para. 1336.
[1633] See for example in relation to YOS Phal, **F54** Appeal Brief, para. 1220 fn. 2296.
[1634] **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 32 lines 10-22 after [10.53.00].

that in no way undermines his credibility as a witness in testifying about his fear of being killed if he divorced during the regime.

681. The Defence builds on these submissions by falsely claiming that Civil Parties who grew to love their spouses did not experience any physical or psychological issues as a result of having been forced to have sexual intercourse with them at the beginning of their marriage.[1635] Again, this statement misstates or disregards the testimony of multiple Civil Parties, who testified to severe suffering despite their subsequent decisions to remain with their forced spouses. While the Defence claims that Civil Party SREY Soeum's bad experiences had faded in her memory,[1636] she readily recalled the grief she experienced at having been forced to have sexual intercourse with her husband.[1637] Civil Party SUON Yim articulated her anger about being forced to have sexual intercourse with her husband out of fear of death.[1638] The isolated statements from her testimony highlighted by the Defence are decontextualised, and fail to represent her evidence as a whole.[1639] Civil Party VA Limhun, whom the Defence says did not experience any physical or psychological issues as a result of forced sexual intercourse,[1640] recalled her fear on the night of their wedding, which she explained was because she understood that if she did not have sexual intercourse with her husband she could be killed.[1641] She said that it was because of that fear that she came to accept her marriage, and resolved to live with her husband no matter how much she suffered.[1642] The Defence oversimplifies relationships by framing them through a simple binary: victims either loved their spouses, or they suffered. This overlooks the reality, reflected in Civil Parties' testimony, that human relationships are complicated.

682. The Defence argues even more tenuously that Civil Parties who did not immediately consummate their marriages on the night of their marriage, but waited for days or weeks, did not seriously suffer.[1643] The reasoning underlying this argument is difficult to understand:

[1635] **F54** Appeal Brief, fn. 2179, para. 1337.
[1636] **F54** Appeal Brief, para. 1187.
[1637] **E3/9826** Written Record of Interview (Civil Party SREY Soeum), 16 December 2014, A. 151, 168 at ERN (En) 01067746, 01067748.
[1638] **E3/9829** Written Record of Interview (Civil Party SUON Yim), 24 November 2014, A. 25, 26, 28 at ERN (En) 01054035-01054036.
[1639] **F54** Appeal Brief, fn. 2179.
[1640] **F54** Appeal Brief, fn. 2163, para. 1164.
[1641] **E3/9756** Written Record of Interview (Civil Party Va Limhun), 15 September 2014, A. 37 at ERN (En) 01046945.
[1642] **E3/9756** Written Record of Interview (Civil Party Va Limhun), 15 September 2014, A. 44 at ERN (En) 01046946.
[1643] **F54** Appeal Brief, para. 1337, fn. 2538.

the ability to delay forced sexual intercourse does not cure suffering associated with it. In any case, as might be expected, the Civil Parties referred to by the Defence who did not immediately consummate their marriages *did* describe serious suffering from the forced sexual intercourse. For example, Civil Party KHET Sokhan stated that her suffering included sexual "abuse" – a clear indication of how she reflects on being forced to have sexual intercourse with her husband – and described her fear of being killed.[1644] This is corroborated by her WRI, in which she explained that she had "felt very upset" and "secretly cried".[1645] Civil Party KHOEUN Choeum said that she eventually agreed to consummate her marriage because she was afraid of being taken away to be re-educated;[1646] evidence which is again corroborated by her VIF, in which she said that she was extremely upset by being forced to marry a man she didn't love.[1647] Civil Party CHUM Samoeurn, described her fear of being forced to have sexual intercourse, though in the end she never consummated her marriage with her husband.[1648] Contrary to the Defence's argument,[1649] Civil Party CHUM Samoeurn's husband's disappearance does not negate her genuine suffering in anticipation of forced sexual intercourse in the days after her wedding – she was nevertheless a victim of the policy.

9.6.4.3.3 The correct approach to evaluating victim evidence

683. The Defence fails to establish that the Trial Chamber erred by overlooking inconsistencies or omissions in evidence from victims (many of them Civil Parties) when evaluating suffering, and by overstating the extent of their pain.[1650] The Lead Co-Lawyers address three aspects of these arguments: (i) need for sensitivity when evaluating evidence about certain matters; (ii) the need for a holistic approach to evaluating suffering; and (iii) the representativeness of the evidence on suffering.

[1644] **E3/6214** Victim Information Form (Civil Party KHET Sokhan), 27 June 2009, ERN (En) 01325670, 01325671.
[1645] **E3/9830** Written Record of Interview (Civil Party KHET Sokhan), 27 November 2014, A. 73, 83-84 at ERN (En) 01077082-01077083.
[1646] **E3/9828** Written Record of Interview (Civil Party KHOEUN Choem), 06 May 2015, A. 11 at ERN (En) 01111894.
[1647] **E3/6872** Victim Information Form (Civil Party KHOEUN Choem), [date unclear] 2009, ERN (En) 01194871.
[1648] **E1/321.1** [Corrected 1] T., 24 June 2015 (Civil Party CHUM Samoeurn), p. 67 lines 1-5 before [14.32.40].
[1649] **F54** Appeal Brief, para. 1334.
[1650] **F54** Appeal Brief, paras 1163, 1166, 1175; **E465** Trial Judgment, paras 3679-3685. See also the Lead Co-Lawyers' response to the particular challenges made to individual Civil Parties in Section 10 at paras 727 *et seq*.

9.6.4.3.3.1 The sensitivity of evidence about marriage and forced sexual intercourse

684. The Trial Chamber correctly took into account that sexual issues are a taboo subject and that Civil Parties may have been reluctant to speak about them unless directly questioned.[1651] This is evident, for example, in Civil Party PREAP Sokhoeurn's explanation for her failure to raise sexual violence until she was asked: she said that she was shy, and did not want to speak about such intimate issues.[1652] It is also well-recognised that, in addition to social taboos, trauma can create barriers to speaking about sexual violence and other painful events.[1653] Regarding trauma in the Cambodian context, the Trial Chamber had expert evidence before it which highlighted avoidance as a common trauma response, including from victims of sexual violence during the DK period.[1654]

685. This Chamber's consideration of the sensitivity of such evidence should apply regardless of gender. The Civil Parties' evidence reveals that it was not only women who suffered as a result of being forced to marry and to consummate their marriages. For example, Civil Party EM Oeun said, of being forced to have sexual intercourse with his wife, "I suffer from it, but I could also imagine the feeling of the lady; she was suffering from it as well."[1655] He said that both he and his wife forced themselves, because if they refused "they would be killed eventually".[1656] Civil Party KUL Nem said that he waited three days before consummating his marriage, and then only did so because of the threat posed by monitoring.[1657] Civil Party MEY Savoeun described the measures taken against couples who did not consummate their marriages, and indicated that he also engaged in sexual intercourse with his wife because he had no choice.[1658] He said that he and his wife never spoke about their feelings, and that they

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[1651] **E465** Trial Judgment, para. 3649.
[1652] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn) p. 57 line 16 – p. 58 line 3 before [11.29.44]. Regarding Civil Party PREAP Sokhoeurn see further at Section 10.10 below at paras 799-813.
[1653] See Ellie Smith, "Victim Testimony at the ICC: Trauma, Memory and Credibility" in Rudina Jasini and Gregory Townsend (eds) *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (UK Economic and Social Research Council), 2020, pp. 125-136. *Attachment 28*; ICTR *Prosecutor v Seromba*, ICTR-01-66-T, Transcript of Continued Trial, 4 April 2006, pp. 44-46.
[1654] **E1/201.1** T., 5 June 2013 (Expert CHIMM Sotheara), p. 71 lines 1-15 before [13.57.35], p.77 lines 2-14 before [14.14.05].
[1655] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 105 line 20 – p. 106 line 5 after [15.57.58].
[1656] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 105 line 24 – p. 106 line 1 after [15.57.58]. see further at Section 10.13 at paras 832-841.
[1657] **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 89 line 18 – p. 90 line 2 before [14.26.27].
[1658] **E1/459.1** T., 17 August 2016 (Civil Party MEY Savoeun), p. 63 lines 10-18 before [14.13.38].

thought "they should just follow the instructions and orders of Angkar."[1659] When asked whether he loved his wife, he said "How could I have such feelings at the time? I myself was so exhausted… I would do whatever I was asked."[1660]

686. The Lead Co-Lawyers submit that additional care is required when evaluating the testimony of those who remain in marriages that they were forced to enter, or who have children from those marriages. In those circumstances, victims may be reluctant to express dissatisfaction about their relationships.

687. In light of these multiple sensitivities, the Defence's arguments that the Civil Parties were not sufficiently explicit or forthright to justify the Trial Chamber's findings about their suffering[1661] should be dismissed. More troubling is the Defence's insinuation that the Civil Parties should have testified at greater length on these subjects *unprompted.* The Defence repeatedly passed on opportunities to seek more detail from Civil Parties about their suffering in questioning,[1662] yet urges this Chamber to draw adverse conclusions from some Civil Parties' restraint or reserve, or the fact that they wanted to address other aspects of their suffering. Given the sensitivity of the evidence, it is unreasonable to expect Civil Parties to have expanded on their pain spontaneously.[1663] A particular Civil Party of witness's silence on a subject is not a basis for drawing inferences where questions have not been put. This does not mean the Civil Party or witness did not suffer, it simply means there is no evidence on that question, something which does not undermine the Trial Chamber's findings given the considerable amount of evidence from other sources.

9.6.4.3.3.2 The need for a holistic assessment of suffering

688. In arguing that the Trial Chamber did not correctly determine the level of suffering experienced by victims of forced marriage, the Defence proposes an artificially fragmented assessment of suffering.[1664] Rather than considering whether victims suffered in any way, or

[1659] **E1/459.1** T., 17 August 2016 (Civil Party MEY Savoeun), p. 66 lines 13-22 after [14.20.50].
[1660] **E1/459.1** T., 17 August 2016 (Civil Party MEY Savoeun), p. 27 lines 1-7 after [10.12.05].
[1661] **F54** Appeal Brief, paras 1164, 1182.
[1662] For example, see **E1/464.1** T., 25 August 2016 (Civil Party YOS Phal), p. 56 lines 11-15 after [13.47.57]; **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 59 lines 11-15 before [11.35.16].
[1663] See above at paras 684-687.
[1664] The Trial Chamber correctly approached evidence of Civil Parties' suffering holistically: **E465** Trial Judgment, paras 3692, 3698.

at any point in their marriage, the Defence highlights specific aspects of the regulation of marriage and seeks to argue that not *every* victim mentioned suffering in respect of it.

689. The Defence argues that some Civil Parties did not specifically complain of suffering in relation to the way that marriage ceremonies were held.[1665] This ignores that these Civil Parties did speak of suffering from other parts of their forced marriages. For example, the Defence argues that certain selectively highlighted parts of Civil Party MOM Vun's testimony (her statement that victims cried during ceremonies because they did not have their parents' permission to marry) indicated minimal suffering.[1666] However, taking her evidence as a whole, it is clear that Civil Party MOM Vun's description of the ongoing shame she feels about her marriage,[1667] and evocation of her genuine fear that she would be killed if she protested,[1668] are indications of the trauma inflicted on her by being forced to marry. The Defence also misstates the evidence of Civil Parties VA Limhun, MEAS Saran, and MAO Kroeurn.[1669] It claims that, although they described suffering, their statements lacked the flourish that the Defence expects would accompany descriptions of *severe* suffering. The Defence denies Civil Party VA Limhun's clarity in stating that she felt "scared and horrified" when she was told that she had to marry.[1670] She said that because of her fear of being killed by the authorities, she came to accept her marriage and the fact that she would have to live with her husband "no matter how I suffered."[1671] In addition to erroneously stating that Civil Party MEAS Saran wanted to see her own husband executed in reparation for the CPK's conduct,[1672] the Defence overlooked her descriptions of the emotional distress caused by being forced to marry.[1673] Her interview was paused by investigators to allow her time to compose herself.[1674] The Defence's suggestion that Civil Party MAO Kroeurn did not suffer significantly because she and her husband were not living together, and so was only forced

[1665] **F54** Appeal Brief, paras 1163-1165.
[1666] **F54** Appeal Brief, para. 1164; **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 101 lines 10-13 after [15.49.18].
[1667] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 47. lines 11-16 before [11.16.02].
[1668] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 79 lines 10-13 before [14.41.26].
[1669] **F54** Appeal Brief, para. 1164, fns 2163, 2540.
[1670] **E3/9756** Written Record of Interview (Civil Party Va Limhun), 15 September 2014, A. 22 at ERN (En) 01046941.
[1671] **E3/9756** Written Record of Interview (Civil Party Va Limhun), 15 September 2014, A. 44 at ERN (En) 01046946.
[1672] **F54** Appeal Brief, para. 1164, fn. 2163.
[1673] **E3/9736** [Corrected 1] Written Record of Interview (Civil Party MEAS Saran), 29 December 2014, A. 41-56 at ERN (En) 01057624-01057625.
[1674] **E3/9736** [Corrected 1] Written Record of Interview (Civil Party MEAS Saran), 29 December 2014, A. 113-114 at ERN (En) 01057632.

to have sexual intercourse a few times,[1675] misunderstands the intense suffering that can be caused to individuals even during relatively short periods of time.

690. The Lead Co-Lawyers submit that different people suffered in different ways from their forced marriages, and also expressed their suffering in different ways. The Trial Chamber was correct to take a holistic approach to assessing evidence of harm.[1676]

9.6.4.3.3.3 The representativeness of the evidence of suffering

691. The Defence argues that the evidence of suffering that the Trial Chamber relied on was not representative of general experiences of marriage under the DK.[1677] It does so by using its "statistical" approach to argue that Civil Parties and witnesses heard during the marriage segment gave different evidence on marriage than those from other segments, and were disproportionately relied on by the Trial Chamber.

692. As noted elsewhere in this Brief, the "statistical" approach is fundamentally flawed and these arguments therefore fail.[1678]

693. Additionally, the Lead Co-Lawyers note that there may be reasons why stronger evidence of suffering was adduced during the marriage segment, other than the Defence theory that those from other segments suffered less. The Civil Parties and witnesses in the marriage segment were asked directly about their experiences of marriage, and were encouraged to elaborate at length. That is despite the fact that many of them initially exhibited reluctance to speak about such sensitive subjects.[1679] By contrast, many of those Civil Parties and witnesses in other segments of the trial who themselves raised the subject were not asked follow-up questions about their marriages.[1680]

694. Moreover, to the extent that the marriage segment may have been predominated by witnesses and Civil Parties who gave inculpatory evidence, this was in part a result of the decision by the Defence not to propose sources of exculpatory material. Like all parties to the case, the Defence was able to propose witnesses, experts and Civil Parties to be included in the

[1675] **F54** Appeal Brief, para. 1336, fn. 2536.
[1676] See **E465** Trial Judgment, paras 3692, 3698.
[1677] **F54** Appeal Brief, paras 1204, 1278, 1360.
[1678] See above, Section 8.5 at paras 260-275.
[1679] See above at paras 684-687.
[1680] For example, Civil Party SOS Min who testified during the trial segment on the treatment of the Cham, **E1/343.1** [Corrected 1] T., 8 September 2015 (Civil Party SOS Min), p. 103 lines 5-10 after [15.53.38].

marriage segment of the trial.[1681] Despite being given every opportunity, the Defence did not put forward witnesses or Civil Parties to testify about the regulation of marriage, proposing only one expert (who was heard).[1682] While the Defence was entitled to pursue that strategy, and adverse inferences should not be drawn from it, nonetheless it had the consequence that the pool of witnesses, Civil Parties and experts were largely put forward by the OCP and the Lead Co-Lawyers. The Defence claim that the proceedings were biased because the witnesses heard were proposed by the OCP and Lead Co-Lawyers is unconvincing.

9.6.4.3.4 The regulation of marriage and forced sexual intercourse as a profound attack on human dignity

695. Even if this Chamber were to agree with the Defence that the testimony of the Civil Parties and other witnesses did not contain sufficient evidence of suffering from forced marriage and forced sexual intercourse to be characterised as other inhumane acts, it remains that both aspects of the DK's regulation of marriage constituted a profound attack on human dignity.[1683] On that basis, this Chamber can be further assured that the second element of other inhumane acts has been satisfied.

696. At its core, the basic harm of the regulation of marriage and forced marital sexual intercourse during the DK was in its denial of people's humanity. The regime served to bureaucratise and depersonalise people's most intimate relationships, rendering that aspect of their lives, like all others, part of the institutional mechanisms of the DK. While the Defence, at times, seems to defend that degree of institutionalisation as a benign political tool, it undeniably degraded victims by treating them as nothing more than instruments of the regime.

697. The dehumanising nature of the regulation of marriage was evident in the testimony of the Civil Parties. For example, Civil Party SAY Naroeun recalled her pain at being forced to marry someone she didn't know, and at being paired off like "cattle".[1684] At the end of her testimony, she asked the Accused "why there was such law to force people to marry others

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[1681] **E305** Order to File Updated Material in Preparation for Trial in Case 002/02, 8 April 2014, paras 1-8; Internal Rule 87(4).
[1682] **E459** Decision on Witnesses, Civil Parties and Experts Proposed to be heard during Case 002/02, 18 July 2017, para. 145.
[1683] As the OCP argues, the conjunction "or" in the second element would allow a finding that forced sexual intercourse constituted a serious attack on human dignity to satisfy the second element of OIA: **F50** OCP Appeal Against Trial Judgment, para. 18.
[1684] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 38 lines 7-12 after [10.41.54].

whom they never knew, why there was such law because love came out of the feeling and not from such law".[1685] Similarly, Civil Party PREAP Sokhoeurn explained that "[u]nder the regime, nobody dared to oppose the Angkar… if we did not obey the disciplines or orders, then we would be killed like animals."[1686] Civil Party MEAN Loeuy asked pointedly "why people were forced to marry in a flock, like cattle".[1687] Civil Party MOM Vun testified to feeling suicidal and ashamed after being raped for refusing to proceed with her marriage, and said that her children were the only reason she did not take her own life.[1688]

698. The system of forced sexual intercourse amounted to an even more serious attack on human dignity. The testimony of the Civil Parties again makes this clear. Civil Party MOM Vun described being forced to have sexual intercourse with her husband by militiamen:

> <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.[1689]

699. She subsequently described the incident in the following terms:

> I was forced to consummate my marriage with my husband <like a pig>. It is a <indefinable> shame for me. I bear all the suffering and pain in my heart…. It is a <indefinable> shame…. I was looked down by others. I had suffering in my life. Nothing could compare.[1690]

700. Civil Party OM Yoeurn was raped as punishment for refusing to consummate her marriage to her husband:

> I was called to a <quiet> room <>, and when I was in the room, I was questioned why I didn't consent to have sex with my husband. <He did not ask me further, then> he simply forced upon me and raped me in that very room.[1691]

[1685] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 60 lines 6-8 before [11.36.22].
[1686] **E1/487.1** [Corrected 2] T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 92 line 22 – p. 93 line 6 after [15.04.09].
[1687] **E1/340.1** [Corrected 2] T., 2 September 2015 (Civil Party MEAN Loeuy), p. 74, lines 7-13 before [14.31.52].
[1688] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 80 lines 12-17 after [15.01.22].
[1689] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 58 lines 6-18 before [13.46.03].
[1690] **E1/477.1** T., 20 September 2016 (Civil Party MOM Vun), p. 24 lines 9-17 after [09.49.26].
[1691] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 6 lines 3-6 after [09.12.36].

701. After repeatedly refusing to have sexual intercourse with her husband, Civil Party PEN Sochan was tied to a pillar and undressed by militiamen, who then watched as her husband forcibly had sexual intercourse with her.[1692] Before leaving, the militiamen laughed and said that Civil Party PEN Sochan and her husband were "producing children for Angkar".[1693] She said, "[i]t was a game to them".[1694]

9.6.4.4 Element 3: Intent

702. The Trial Chamber correctly held that the DK's system of forced marriages and forced sexual intercourse was imposed intentionally.[1695] The Defence makes a series of unclear arguments apparently challenging the *mens rea* element of the crime against humanity of other inhuman acts by arguing that unspecified errors "sullied" the Trial Chamber's findings on the existence of a marriage policy.[1696]

703. The Lead Co-Lawyers agree with the OCP's Response to the Defence's arguments,[1697] and elsewhere in this Brief have addressed arguments about the credibility of Civil Parties SENG Soeun and HENG Lai Heang (on whose testimony the Defence focuses in making these arguments).[1698] Here the Lead Co-Lawyers add only limited submissions on two points: the first addresses the Defence's attempts to refute the existence of a CPK policy through the use of its "statistical" approach; the second deals with the argument that the regulation of marriage was for the benefit of those married.

9.6.4.4.1 The Defence's "statistical" arguments refuting the existence of a policy

704. As elaborated above,[1699] the Defence has attempted to analyse the evidence regarding forced marriage quantitatively. This approach is used to argue that the Trial Chamber should not have found that the CPK had a coherent policy of forced marriage, because the evidence did not show that the practice was sufficiently widespread or nationally consistent.[1700] The

[1692] **E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), p. 84 lines 22-23 before [14.32.06], p. 87 lines 19-25 after [14.39.32].
[1693] **E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), p. 88 lines 17-19 after [14.41.30].
[1694] **E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), p. 88 lines 4-6 before [14.41.30].
[1695] **E465** Trial Judgment, paras 3693, 3699.
[1696] **F54** Appeal Brief, para. 1189. See also paras 1395-1398.
[1697] **F54/1** OCP Response Brief, especially at paras 688, 734-735, 759-760.
[1698] See esp. paras 387-393 and 722-726.
[1699] See Section 8.5 above, at paras 260-275.
[1700] **F54** Appeal Brief, paras 1177, 1273, 1276.

Defence argues that, to make this finding, the Trial Chamber focused on the evidence of the victims of the regulation of marriage, without having regard to the totality of the evidence on the Case File.[1701]

705. This argument fails because of the fundamental flaws in the "statistical" approach and its implementation, as detailed above.[1702] Additionally, the Defence misstates or misunderstands the Trial Chamber's findings.

706. Contrary to the Defence's suggestion, the Trial Chamber did not rely on a perfectly uniform regulation of marriage across the country to conclude that a policy existed. In fact, it repeatedly and explicitly recognised the variation in marriage practices across time and location under the DK.[1703] The Trial Chamber's findings about marriage practices included recognition that some couples were themselves able to request permission to marry,[1704] others held "privileged" roles by virtue of rank or disability,[1705] and some reported marriages only taking place where couples consented.[1706]

707. Moreover, to find that a policy existed, the Trial Chamber looked to sources beyond the testimony of victims of the regulation of marriage and of the Civil Parties and witnesses who testified in the marriage segment. The conclusion that the Defence seeks to draw from its analysis does not take account of the fact that the Trial Chamber's findings about CPK policy also relied on corroborative evidence contained in CPK documentation and propaganda,[1707] the DK Constitution,[1708] the evidence of CPK cadres,[1709] expert evidence,[1710] evidence of speeches given by the Accused and POL Pot,[1711] and testimony about the clear reporting structure for instructions to be given about marriages.[1712]

[1701] **F54** Appeal Brief, paras 1176, 1199, 1273.
[1702] See Section 8.5 above, at paras 260-275.
[1703] **E465** Trial Judgment, paras 3536, 3538, 3690-3691.
[1704] **E465** Trial Judgment, paras 3572-3576.
[1705] **E465** Trial Judgment, para. 3623.
[1706] **E465** Trial Judgment, para. 3617.
[1707] **E465** Trial Judgment, para. 3539, fns 11908 and 11910; see also paras 3540, 3541, 3542.
[1708] **E465** Trial Judgment, para. 3539, fn. 11909.
[1709] **E465** Trial Judgment, para. 3591, fn. 12022; see also paras 3603-3609, 3617.
[1710] **E465** Trial Judgment, para. 3592.
[1711] **E465** Trial Judgment, paras 3550-3558.
[1712] **E465** Trial Judgment, paras 3550, 3564-3568.

708. The Defence's arguments misstate the Trial Chamber's reasoning and conclusions. Had the Defence undertaken a reliable "statistical" analysis of the evidence, it would have nevertheless failed to demonstrate error in the Trial Chamber's findings about CPK policy.

9.6.4.4.2 The Defence's claims regarding the CPK's benevolent motivations

709. Lastly, the Lead Co-Lawyers are compelled to respond to the Appeal Brief's apparent claim that the DK's practices for the control of marital relationships were implemented for the *benefit* of those married under them, and particularly were intended to benefit women by reforming gender relations.[1713] That claim is wholly unsupported by the evidence before the Trial Chamber. The Defence also appears to attribute the serious violations of women's rights during the DK to the fact that "outrages against women [are ordinarily] caused by military combat" – an outdated idea. The argument is illogical given that the harms were perpetrated *by* the CPK, and were unrelated to conflict. In any event, the claim is irrelevant: it is the CPK's actions and intentions, not its claimed beneficent motives, that are at issue.

9.7 Genocide

710. The Trial Chamber convicted KHIEU Samphân of the crime of genocide against Vietnamese people by killings, referring to killings in Au Kanseng Security Centre, S-21, Svay Rieng, Kampong Chhnang, Wat Khsach, Kratie, and in Cambodian waters.[1714] In **ground 159** the Defence challenges this conclusion.[1715] Concerning the *actus reus*, the Defence contends that the killings in question were not sufficiently established on the evidence or – in some cases – that the victims were not members of the relevant group.[1716] A number of arguments are then raised in respect of genocidal intent.[1717]

711. The Lead Co-Lawyers respond particularly in relation to the sufficiency of the evidence regarding the *actus reus*, and the question of whether the Trial Chamber was entitled to find that the victims were members of the protected group. Regarding intent, the Lead Co-

[1713] **F54** Appeal Brief, paras 1151, 1212-1213, 1253.
[1714] **E465** Trial Judgment, paras 3515-3519.
[1715] **F54** Appeal Brief, paras 1051-1097.
[1716] **F54** Appeal Brief, paras 1052-1057.
[1717] **F54** Appeal Brief, paras 1058-1097.

Lawyers add submissions only in response to challenges made by the Defence concerning the Trial Chamber's use of evidence given by Civil Party HENG Lai Heang.[1718]

9.7.1 *Actus reus:* killing of members of the Vietnamese group

9.7.1.1 Whether killings were sufficiently proved

712. In making its legal determination about genocide against the Vietnamese, the Trial Chamber established that killings had occurred by referring back to its legal conclusions elsewhere in the Trial Judgment that the crimes against humanity of murder and extermination had been established in various locations.[1719] The Defence argues that most of those findings were tainted by factual errors, and that the killings were not sufficiently proven to have occurred at Au Kanseng and Wat Khsach, in Svay Rieng, Kratie, Kampong Chhnang, and at sea. [1720]

713. The Lead Co-Lawyers agree with the OCP's submissions on this question,[1721] but add the following. First, the Lead Co-Lawyers highlight their submissions made elsewhere in this Brief on the killings of Vietnamese people in Kratie and Kampong Chhnang.[1722] Civil Party UCH Sunlay's Vietnamese wife and their children were killed, along with the other Vietnamese members of mixed families in his unit in Kratie Province in September 1978.[1723] Civil Party PRAK Doeun's Vietnamese wife, his mother-in-law, and one of his children were killed along with the Vietnamese members of the six other mixed families from his village in Kampong Chhnang Province in late 1977.[1724] For the reasons set out above, no error has been demonstrated by the Defence in the Trial Chamber's findings regarding those killings.[1725]

714. The Lead Co-Lawyers add that the Trial Chamber also considered the killing of Vietnamese families in Svay Rieng which are relevant to the genocide charge.[1726] In late 1977 Civil Party SIENG Chanthy heard from people in her village that members of two Vietnamese families

[1718] **F54** Appeal Brief, para. 1095.
[1719] **E465** Trial Judgment, para. 3515.
[1720] **F54** Appeal Brief, paras 1052-1053.
[1721] **F54/1** OCP Response Brief, para. 652, and referring to its responses on linked grounds.
[1722] See above at paras 301-307.
[1723] **E465** Trial Judgment, paras 3496-3497 and 3488.
[1724] **E465** Trial Judgment, paras 3471, 3494, 3497 and 3499.
[1725] See above at paras 301-307.
[1726] **E465** Trial Judgment, paras 3452 and 3455.

had been taken away and killed at Tuol Sngnuon.[1727] Her father told her he had witnessed two of the daughters of one of the Vietnamese families being raped. Being Vietnamese himself, Civil Party SIENG Chanthy's father feared that he would also be killed and that his family was in danger. He hung himself to avoid this.[1728] The Trial Chamber considered the suicide of Civil Party SIENG Chanthy's father and the reasons for it to have been established, but did not make a legal finding in respect of the suicide because it fell outside the facts in the Closing Order.[1729] For reasons which are not clear, it also did not make legal findings regarding the killings of the two other Vietnamese families in the village.[1730] The Lead Co-Lawyers submit that they are also relevant in demonstrating that the Trial Chamber did not err in its finding regarding the *actus reus* of genocide.

715. Concerning S-21, the Defence does not appear to challenge that executions of Vietnamese prisoners occurred there,[1731] but makes the puzzling claim that these killings are irrelevant to genocide because they were legally characterised as grave breaches (wilful killing) rather than as the crime against humanity of murder.[1732] As the OCP points out,[1733] the Trial Chamber made numerous factual findings concerning the killing of Vietnamese people at S-21. The *actus reus* of genocide is satisfied where members of the relevant group are *killed*. It is irrelevant whether the killing meets the requirements of a separate crime or whether a finding to that effect has been made. It suffices that the Trial Chamber found that Vietnamese people were killed in S-21.

716. The Defence has demonstrated no error in the Trial Chamber's findings that killings relevant to the charge of genocide occurred.

9.7.1.2 Whether those killed were members of the protected group

717. The Defence then raises a series of arguments in the alternative that the Vietnamese victims of these various killings were not members of the protected group. It reaches this position by

[1727] **E465** Trial Judgment, para. 3452.
[1728] **E1/394.1** [Corrected 2] T., 1 March 2016 (Civil Party SIENG Chanthy), p. 19 line 1 – p. 20 line 12 before [09.48.14].
[1729] **E465** Trial Judgment, paras 3452 and 3492.
[1730] **E465** Trial Judgment, para. 3492.
[1731] **F54** Appeal Brief, para. 1052
[1732] **F54** Appeal Brief, para. 1052.
[1733] **F54/1** OCP Response Brief, para. 652.

characterising the group in question as "Vietnamese living in Cambodia."[1734] This approach is not supported by the Closing Order or the Trial Judgment. The Closing Order refers to "the Vietnamese group (an ethnic and national group, who may also have been considered as a racial group by the CPK)".[1735] The Trial Chamber found that "the Vietnamese constituted a racial, national and ethnic group at the relevant time, and thus a protected group."[1736]

718. The Lead Co-Lawyers refer to their submissions above concerning the definition of the protected group for the purpose of the crime against humanity of persecution.[1737] The same reasoning applies here. The group targeted in a genocide must be a national, ethnical, racial or religious group. It may be possible for a genocide to occur by targeting a "part" of such a group which was defined by reference to residence, but this was never the case argued in the present case, nor does it represent the finding of the Trial Chamber. The question of the victims' residence was often not addressed in the evidence: there was no reason for it to be, since it was not relevant to the crime of genocide as set out in the Closing Order.

719. In any event, even if this Chamber agrees with the Defence that the protected group was "Vietnamese living in Cambodia", it is clear that many of those killed fell within that category.[1738]

720. The Defence also appears to argue that the protected group can only include civilians, claiming that some of those killed in S-21 or at sea "could not be regarded as the victims of genocide" because they were soldiers.[1739] The Defence offers no authority or legal argument in favour of this entirely novel proposition that genocide can only be committed against civilians. The ICTY Appeals Chamber has ruled clearly that the military or civilians status of victims is not legally relevant to a finding of genocide: "there is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group."[1740]

[1734] **F54** Appeal Brief, paras 1055-1057; see also paras 1063-1064, 1066-1067, 1068-1069, 1086-1090, 1097.
[1735] **D427** Closing Order, para. 1343.
[1736] **E465** Trial Judgment, para. 3514.
[1737] See section 9.5.3.6.2 at paras 480-485.
[1738] See for example **E465** Trial Judgment, paras 3453 and 3483.
[1739] **F54** Appeal Brief, paras 1056-1057.
[1740] ICTY *Prosecutor v Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 226.

721. The Defence arguments fail to demonstrate that the Trial Chamber erred in finding that members of the protected group were killed.

9.7.2 *Mens rea:* genocidal intent

722. The Defence seeks to challenge the Trial Chamber's finding that the killing of Vietnamese people was accompanied by an intent to destroy the group.[1741] On this question the Lead Co-Lawyers agree with and rely on the submissions made by the OCP.[1742] However, they are compelled to respond to the Defence submissions which attack the credibility of Civil Party HENG Lai Heang.

723. The Defence argues that the Trial Chamber improperly used Civil Party HENG Lai Heang's evidence about the existence of a policy to eliminate the Vietnamese.[1743] Leaving aside the incorrect claim that she was the only person to speak of a policy of eliminating the Vietnamese,[1744] the Defence attempts to diminish the evidence of Civil Party HENG Lai Heang in three ways.

724. First, the Defence makes the unsubstantiated and illogical claim that the Civil Party's evidence lacked objectivity and should be disregarded because her Vietnamese family members had been killed.[1745] No authority is offered in support and the approach runs counter to this Court's jurisprudence: all civil parties have suffered harm (many of a comparable nature), and yet this Chamber has refused to endorse Defence suggestions that Civil Party evidence should be treated as less reliable.[1746] In the case of Civil Party HENG Lai Heang, there is no reason to believe that she was not objective in her evidence. Indeed, she was clear and honest about the matters she did not know or could not remember, including regarding the policy on Vietnamese people.[1747]

725. Secondly, the Defence argues that Civil Party HENG Lai Heang's evidence should have been accorded little value because she did not personally witness executions and her evidence was

[1741] **F54** Appeal Brief, paras 1058-1097.
[1742] **F54/1** OCP Response Brief, paras 654-664.
[1743] **F54** Appeal Brief, para. 1095.
[1744] Responded to by the OCP: **F54/1** OCP Response Brief, para. 664.
[1745] **F54** Appeal Brief, para. 1095.
[1746] **F36** Case 002/01 Appeal Judgment, paras 305-324. See further above in Section 8.2.1 at paras 185-195.
[1747] See for example **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 74 lines 13-16 before and after [14.43.46], p. 81 lines 1-2 after [15.20.29], p. 82 line 23 after [15.24.48], p. 83 line 6 before [15.26.50], p. 95 lines 20-22 after [16.00.22].

"nothing but hearsay".[1748] This part of the Appeal Brief unhelpfully conflates Civil Party HENG Lai Heang's evidence about the existence of a policy with her evidence about actions taken in the implementation of that policy. Regarding the latter, it is true that her evidence was largely hearsay. She did not witness executions.[1749] However this is not what the Trial Chamber used her evidence for. Rather, her evidence was used to establish that a policy existed and was disseminated throughout the CPK hierarchy. She gave direct testimony about what commune leaders were directed to do on the subject of Vietnamese people.[1750]

726. Thirdly, the Defence claims that the Trial Chamber erred because it "ignored" Civil Party HENG Lai Heang's evidence that the Khmer Rouge killed everybody who was a detractor, meaning "anyone who was against the revolution regardless of their ethnicity, Vietnamese or whatever".[1751] However this evidence is not relevant to genocidal intent. As discussed above in the context of persecution, the targeting of a particular group is not negated by demonstrating that other groups were also targeted.[1752] The fact that the CPK also systematically targeted its political enemies only demonstrates that an additional crime (political persecution) occurred. It is not an exculpatory factor that the Trial Chamber had to consider in determining the existence of genocidal intent.

10 SUBMISSIONS CONCERNING SPECIFIC CIVIL PARTIES

727. The Appeal Brief challenges the credibility or use of evidence from numerous Civil Parties. Responses to many of those challenges are contained in other parts of this Brief. As the Chamber has recognised, the Civil Parties have an interest in defending the credibility and correct understanding of their evidence.[1753]

728. In this section the Lead Co-Lawyers respond to the Appeal Brief in relation to 14 specific Civil Parties. These responses encompass various issues that otherwise do not fall neatly within a subject covered elsewhere by this Brief.

[1748] **F54** Appeal Brief, para. 1095
[1749] **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 74 line 16 after [14.43.46].
[1750] **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 67 line 20 – p. 68 line 22 after [14.22.02] and p. 71 line 23 – p. 73 line 1 after [14.34.12], p. 95 line 23 – p. 96 line 3 before [16.02.04].
[1751] **E1/476.1** T., 19 September 2016 (Civil Party HENG Lai Heang), p. 99 line 14 – p. 100 line 4 before [16.10.48].
[1752] See above at paras 365-370.
[1753] **F50/1/1/2** Decision on KHIEU Samphân's Request to Reject the Civil Parties Submission, 29 January 2020, para. 10.

729. As well as defending the personal interests of several individual Civil Parties, this section of the Response Brief also provides a picture of the problematic approach that the Defence has taken to critiquing evidence and arguing factual errors.

730. The Defence's approach is an opportunistic and incoherent one. This is made clear in instances where the Defence attacks the credibility of a particular Civil Party, but then seeks to rely on a distorted version of that Civil Party's evidence to advance its position on a different matter (see for example the summaries below regarding Civil Parties CHEA Deap,[1754] OM Yoeurn[1755] and PREAP Sokhoeurn[1756]). In numerous cases the Defence has made attacks which are simply unfounded;[1757] others are incomprehensible.[1758]

731. However a more significant failing than this taints the Defence's allegations of factual errors. That is that the Defence consistently fails to demonstrate how its challenges would impact the verdict. It is thus often unclear why the evidence of a given Civil Party is being critiqued. The challenges are not only weak, they appear to be immaterial. To bring such challenges overlooks the Chamber's reminder that appeal grounds must demonstrate "lasting gravamen".[1759] It also disregards the potential impact on Civil Parties of having their credibility publicly questioned, particularly on sensitive matters such as their testimony about sexual violence. While it is the Defence's right to challenge the evidence against him, it is regrettable that here that right has been exercised at the cost of Civil Parties, even where there is no real prospect of success on these points for the Defence.

10.1 Civil Party PREAP Chhon

732. Civil Party PREAP Chhon testified over two days during the trial segment on the Role of the Accused.[1760] The Trial Chamber relied on his evidence in finding that the CPK had a policy of identifying, isolating, and executing its perceived enemies. It referred to Civil Party PREAP Chhon's testimony regarding a speech made by KHIEU Samphân in Phnom Penh,

[1754] See below at paras 768-778.
[1755] See below at paras 786-794.
[1756] See below at paras 799-813.
[1757] See for example below concerning Civil Party PEN Sochan at para. 797.
[1758] See for example below concerning Civil Party PREAP Chhon at para. 735.
[1759] **F49** Decision on KHIEU Samphan's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, para. 16.
[1760] **E1/504.1** T., 30 November 2016 (Civil Party PREAP Chhon); **E1/505.1** T., 1 December 2016 (Civil Party PREAP Chhon). A summary of the key aspects of Civil Party PREAP Chhon's evidence at trial are contained in **E457/6/2/3** Lead Co-Lawyers' Amended Closing Brief, paras 1455-1460.

in which KHIEU Samphân spoke of the need to eliminate members of the Lon Nol regime, capitalists, feudalists, intellectuals and others who had betrayed the revolution.[1761]

733. In two sections of the Appeal Brief (**ground 184** and **ground 243**),[1762] the Defence argues that the Trial Chamber erred in its use of this evidence and its assessment of Civil Party PREAP Chhon's credibility.[1763] The Defence relies on the fact that the Civil Party's VIF "made no mention" of KHIEU Samphân's speech.[1764] It claims that the Civil Party had a "sudden, comfortable, memory of KHIEU Samphân right after Case 002/01, even though [he] was questioned during the first case."[1765] The Defence also argues that, as a Civil Party, PREAP Chhon "had an interest in the procedure."[1766] Finally, the Defence claims that the evidence in question is uncorroborated, going so far as to assert not only that the Case File lacks corroboration regarding the specific speech described by Civil Party PREAP Chhon, but also claiming that "none of the speeches given by KHIEU Samphân in the Case File express similar ideas".[1767]

734. The Lead Co-Lawyers have not understood the Defence's claim that Civil Party PREAP Chhon was "questioned during the first case".[1768] He neither appeared at a hearing during Case 002/01, nor was he interviewed by the OCIJ. The only prior statement made by Civil Party PREAP Chhon, which did not refer to the contested speech, was his VIF. Under questioning from Defence counsel, Civil Party PREAP Chhon explained why his VIF did not make reference to the speech: "I, myself, did not fill in the information. It was the person <> from <an organisation> who wrote about it. Questions were put to me and I gave my answers…";[1769] "to my recollection, when I was interviewed, no such questions were put to me about my meeting with Khieu Samphan. It was later on that I was asked about my meeting with him. It was after that time I told the information about the meeting and I, myself, did not know if the meeting with him was included in my application";[1770] and "I did not recall

[1761] **E465** Trial Judgment, paras 3961 and 3965.
[1762] **F54** Appeal Brief, paras 1523-1550, 2099-2113.
[1763] **F54** Appeal Brief, paras 1534-1535 and para. 2110. The OCP addresses these arguments at **F54/1** OCP Response Brief, para. 1017.
[1764] **F54** Appeal Brief, para. 1534.
[1765] **F54** Appeal Brief, para. 1534.
[1766] **F54** Appeal Brief, para. 1535.
[1767] **F54** Appeal Brief, para. 1535.
[1768] **F54** Appeal Brief, para. 1534.
[1769] **E1/505.1** T., 1 December 2016 (Civil Party PREAP Chhon), p. 14 lines 18-21 after [09.34.15].
[1770] **E1/505.1** T., 1 December 2016 (Civil Party PREAP Chhon), p. 18 lines 10-15 before [09.43.45].

<whether or not I was read that> application <.> [before signing]".[1771] The Trial Chamber specifically addressed these matters in its reasons, and concluded that Civil Party PREAP Chhon's in-court testimony was credible and consistent.[1772]

735. The Defence's treatment of Civil Party PREAP Chhon is illustrative of its flawed arguments concerning VIFs (which have been addressed above[1773]). These documents are typically not created by trained investigators or lawyers familiar with the issues in the case and following rigorous procedures. Moreover, the focus of the process is on the Civil Party's experience of the crimes and the harm caused, meaning that the organisations who collect them are more likely to ask about facts concerning the crime-base than about national policies or particular encounters with the accused. In addition, many Civil Parties experienced crimes and harms far too numerous to permit a comprehensive account of their experiences in the VIF. Civil Party PREAP Chhon's VIF details his experience of the deaths of his parents and four of his five siblings, his "reduction" at Ta Chey pagoda, harsh living and working conditions in various locations and repeated forced transfers.[1774] Those who assisted Civil Party PREAP Chhon to complete his VIF could not be expected to detail all aspects of these events comprehensively, and indeed this would better be done by a professional investigator if considered appropriate. Indeed, there is no indication either on the VIF form itself or in the caselaw of the ECCC that suggests that this document is expected to be exhaustive of a civil party applicant's experiences and material knowledge.

736. Contrary to the Defence's assertions, a review of Civil Party PREAP Chhon's evidence reveals a consistent and credible account. He was open about where he was unable to recall details or had previously made errors in details of the account.[1775] He was confident and consistent on numerous small details about the disputed speech, such as his description of the market and the microphone used by KHIEU Samphân.[1776]

[1771] **E1/505.1** T., 1 December 2016 (Civil Party PREAP Chhon), p. 15 lines 1-2 before [09.35.20].
[1772] **E465** Trial Judgment, fn. 13185.
[1773] See Section 8.2.4 at para. 204 *et seq*., esp. at paras 207-211.
[1774] See **E3/1070a** Victim Information Form (Civil Party PREAP Chhon), ERN (En) 00422201, 00422202, 00422204. An otherwise identical version of the Civil Party's VIF is also on the Case File with the document number **E3/10670a**.
[1775] See for example **E1/504.1** T., 30 November 2016 (Civil Party PREAP Chhon), p. 90 lines 14-16 before [15.17.16], p. 96 lines 3-4 before [15.32.00]; **E1/505.1** T., 1 December 2016 (Civil Party PREAP Chhon), p. 8 line 7 – p. 9 line 1 after [09.18.35], p. 29 lines 12-15 before [10.11.51].
[1776] **E1/504.1** T., 30 November 2016 (Civil Party PREAP Chhon), p. 91 line 24 – p. 93 line 10 before [15.24.30]; **E1/505.1** T., 1 December 2016 (Civil Party PREAP Chhon), p. 32 line 23 – p. 33 line 13 after [10.16.12].

737. Finally, the Defence's claim that the Case File contains no other material of a similar nature to corroborate Civil Party PREAP Chhon's evidence is incorrect. The evidence before the Trial Chamber included 17 April anniversary speeches as well as other statements made by KHIEU Samphân in which he spoke about eliminating enemies.[1777]

738. The Trial Chamber carefully weighed the various issues relating to Civil Party PREAP Chhon's evidence, and found it to be credible.[1778] The Defence has not demonstrated that this was unreasonable.

10.2 Civil Party HIM Man

739. Civil Party HIM Man testified over two days during the trial segment on the Treatment of the Cham.[1779] Civil Party HIM Man is Cham and lived in Sach Sou village, Kang Meas district, Kampong Cham province.[1780] He testified about the massacre of Cham people at Wat Au Trakuon, explaining that one day Cham people from his village[1781] were rounded up by the Long Sword Group and walked towards Wat Au Trakuon.[1782] He and his wife managed to separate themselves from the group[1783] and hid in nearby bushes where they later heard the people screaming "in agony" and calling out for Allah.[1784]

740. The Trial Chamber found that a large number of Cham people from Kang Meas district were arrested and subsequently executed at Wat Au Trakuon in 1977.[1785] The Trial Chamber relied on Civil Party HIM Man's testimony regarding the crime of murder, and also to establish that the killings were the result of systematic arrests and executions of Cham people.[1786]

[1777] For a summary of these, see **E457/6/1** OCP Amended Closing Brief, paras 536-538. As the OCP notes in paragraph 536 and fn. 2222 of its Closing Brief, KHIEU Samphân has admitted that he gave the anniversary speeches and generally agreed with their content.
[1778] **E465** Trial Judgment, para. 3961 fn. 13185.
[1779] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man); **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party HIM Man). A summary of the key aspects of Civil Party HIM Man's evidence at trial are contained in the Lead Co-Lawyers' Closing Brief, see **E457/6/2/3** Lead Co-Lawyers' Amended Closing Brief, paras 685-688.
[1780] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 34 lines 4-9 before [10.45.18], p. 35 lines 5-8 after [10.47.32].
[1781] **E465** Trial Judgment, para. 3239 ("only about 30 Cham families remained in the village from the 200 to 300 that usually lived there", citing to **E1/349.1** T. 17 September 2015 (Civil Party HIM Man), pp. 32, 35, 37), and para. 3293.
[1782] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 45 lines 2-8 before [11.22.37], referenced in **E465** Trial Judgment, para. 3293.
[1783] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 45 line 10 – p. 46 line 5 after [11.22.37].
[1784] **E465** Trial Judgment, para. 3293; **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 82 lines 1-11 after [14.51.44].
[1785] **E465** Trial Judgment, paras 3305-3308.
[1786] **E465** Trial Judgment, para. 3306 fn. 11222 (referencing paras 3302 and 3304).

741. In **ground 137**[1787] the Defence argues that the Trial Chamber had insufficient evidence to support its findings on the executions at Wat Au Trakuon. It makes two claims about Civil Party HIM Man's evidence.[1788] The Defence first argues that Civil Party HIM Man's evidence undermines a finding that Cham people were executed based on their religion, referring to the fact that Civil Party HIM Man was spared when he re-emerged after hiding in various locations for three months and 29 days,[1789] and to the fact that Khmer people were also later killed.[1790] The Defence secondly submits that his evidence of the Wat Au Trakuon executions was not corroborated by evidence from members of the security forces.[1791]

742. On the first issue, the Defence argues that Civil Party HIM Man was spared "on the ground, amongst others," that he had not done anything wrong.[1792] The Defence thus argues that Civil Party HIM Man's evidence shows that arrests were made based on individual wrongdoing.

743. However, the Lead Co-Lawyers note that the Defence has selectively chosen two phrases from Civil Party HIM Man's testimony and taken them out of context. He gave other reasons for why he was not arrested and killed at the point when he re-emerged from hiding, including that he had no associations and he had useful skills which he was subsequently made to use for the regime.[1793] The Defence also fails to consider Civil Party HIM Man's evidence that after he and his wife were spared, the villagers in Sambuor Meas gave them Khmer names "to show that [there were] no more Cham anymore living in the village".[1794]

744. Perhaps more significantly, the Defence conflates the reasons why Civil Party HIM Man survived the executions at Wat Au Trakuon with the reasons why he was not killed four

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[1787] **F54** Appeal Brief, para. 899-910.
[1788] **F54** Appeal Brief, paras 903 and 907.
[1789] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 56 lines 15-16 after [13.48.31], p. 59 line 6 below [13.55.14].
[1790] **F54** Appeal Brief, para. 903.
[1791] **F54** Appeal Brief, para. 907.
[1792] **F54** Appeal Brief, para. 903.
[1793] See **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 62 line 7 – p. 63 line 1 before [14.04.36]. Civil Party HIM Man explained twice that amongst the reasons why Kan chose to spare him and his wife were that all of the other Cham were gone and he had no associations; he had been hiding in the pond away from other people. He also explained that he had multiple useful skills such as swimming under water, making spoons, melting steel and the ability to retrieve tangled nets at the bottom of the river. His skills were put to use and he was assigned the task of being a boat driver. See **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 64 lines 7-12 after [14.07.31].
[1794] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 63 line 18 – p. 64 line 1 before [14.07.31].

months later when he was rediscovered.[1795] It is clear from his evidence that the only reason he and his wife survived the massacre at Wat Au Trakuon was because they hid. There is no support in Civil Party HIM Man's testimony (or in any other evidence) for the suggestion that every single Cham person who was arrested from Sach Sou village was arrested based on an individual assessment of personal wrongdoing. To the contrary, Civil Party HIM Man explained that a system was used to ensure that only Cham people were rounded up.[1796] As the Trial Chamber noted, another witness also corroborated the fact that Civil Party HIM Man and his wife were the only Cham to survive from their village.[1797]

745. The Defence also argues that because Civil Party HIM Man mentioned that some Khmer people were also later killed, this negates the finding that Cham were targeted for execution at Wat Au Trakuon.[1798] However, as the Lead Co-Lawyers have argued elsewhere in this Brief,[1799] the fact that multiple groups of people are targeted does not mean that each has not been the object of persecutory discrimination. The fact that some Khmer living in the village were killed at a later time does not have any bearing on whether Cham people were targeted for execution at Wat Au Trakuon.

746. More generally, the Lead Co-Lawyers note that although these arguments concerning Civil Party HIM Man are contained within a ground which challenges the Trial Chamber's factual finding that killings occurred at Wat Au Trakuon, in fact these Defence arguments raise no questions about that finding. They only challenge (unsuccessfully) whether those killings targeted Cham people.

747. In its second argument within this ground,[1800] the Defence claims that Civil Party HIM Man's evidence was not corroborated by evidence from members of the security forces about killings at Wat Au Trakuon because Civil Party HIM Man's evidence concerned different

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[1795] **F54** Appeal Brief, para. 903. Civil Party HIM Man is consistent throughout his testimony that he and his wife were hiding for three months and 29 days between the original day of the mass arrests until they were eventually found and arrested. See **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 56 line 9 – p. 57 line 11 after 13.48.31, p. 59 lines 5-21 before [13.57.29], p. 60 line 16 before [14.00.03], p. 87 lines 5-11 before [15.04.21].
[1796] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 46 lines 17-22 after [11.25.17].
[1797] **E465** Trial Judgment, para. 3295 fn. 11181 referencing **E3/8750** Written Record of Interview (Witness CHEA Maly), 14 July 2011, ERN (En) 00722232 ("Kang Meas district. In the commune where we are now, only one [Cham] family survived for it ran away to live in the lake.").
[1798] **F54** Appeal Brief, para. 903.
[1799] See above at paras 365-370.
[1800] **F54** Appeal Brief, para. 907.

facts.[1801] The Defence appears to be saying that Civil Party HIM Man only spoke of executions he heard at his village, without specifying Wat Au Trakuon, and more than two months before he met Kan and the Long Sword Group. The Lead Co-Lawyers have difficulty understanding the Defence's point. The Trial Chamber evaluated various pieces of evidence relevant to the executions at Wat Au Trakuon[1802] before noting that they were corroborated by security forces' evidence.[1803] Some of Civil Party HIM Man's evidence which is mentioned in this section is directly concerned with the killings at Wat Au Trakuon (for example, he describes having seen grave pits near the Wat).[1804] Moreover, there is no reason to doubt that from where he was hiding, he could hear killings that were taking place at Wat Au Trakuon. To the contrary, Civil Party HIM Man's evidence was that the bush he was hiding in during the executions was only about 100 metres away from Wat Au Trakuon.[1805] In any event, there is evidence in this section from other sources corroborating Civil Party HIM Man's testimony. For example, Witness SAMRETH Muy also heard the cries for help from Wat Au Trakuon, which was 200 metres away from him.[1806] The Trial Chamber carefully weighed the various pieces of evidence it had before it pertaining to the executions at Wat Au Trakuon and properly relied on Civil Party HIM Man's evidence, finding it to be credible. The Defence has not demonstrated that this was unreasonable.

10.3 Civil Party RY Pov

748. Civil Party RY Pov testified for a full day during the trial segment on the Tram Kak Cooperatives and Kraing Ta Chan Security Centre.[1807] He is Khmer Krom[1808] and in 1976 was living in Kampuchea Krom when his family was moved to Cambodia as part of an exchange programme between Vietnam and Cambodia.[1809] Among other things, he testified

[1801] The Trial Chamber found that killings at Wat Au Trakuon were further corroborated by members of the security forces operating at the pagoda at the relevant time. See **E465** Trial Judgment, paras 3297-3298 and 3302.
[1802] **E465** Trial Judgment, paras 3291-3296.
[1803] **E465** Trial Judgment, para. 3302; see also paras 3297 and 3298.
[1804] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 67 line 25 – p. 70 line 12 after [14.13.48], cited at **E465** Trial Judgment, para. 3295 fn. 11180.
[1805] **E1/349.1** [Corrected 2] T., 17 September 2015 (Civil Party HIM Man), p. 47 line 24 – p. 48 line 5 after [11.28.14]; **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party HIM Man), p. 21 lines 8-25 after [09.56.10].
[1806] **E465** Trial Judgment, para. 3299 referencing **E1/347.1** [Corrected 3] T., 15 September 2015 (Witness SAMRETH Muy), p. 33 line 17 – p. 36 line 7 after [10.44.58], p. 86 lines 5-22 after [15.21.02].
[1807] **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov).
[1808] **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 49 lines 7-12 after [11.23.02].
[1809] **E465** Trial Judgment, para. 1119.

about working in a youth mobile unit, how he was overworked, how he was not provided with enough food, and how both New People and Vietnamese people were "equally suffering".[1810]

749. Other challenges concerning Civil Party RY Pov are made in the Appeal Brief, several of which have been dealt with elsewhere in this brief.[1811] This section focuses on two specific Defence arguments which claim that key parts of Civil Party RY Pov's evidence lack credibility. The Lead Co-Lawyers note that these challenges focus on aspects of his evidence which were particularly important to the Trial Chamber's findings. They relate to the discriminatory treatment of New People in the Tram Kak District,[1812] and the monitoring of newlywed couples by militia.[1813] However on neither point has the Defence demonstrated any basis for doubting the credibility of the evidence; they merely disagree with its content.

750. In **ground 107**[1814] the Defence claims that Civil Party RY Pov's evidence that New People in Tram Kak were subjected to "miserable treatment"[1815] was "vague and unsubstantiated".[1816] The Defence submits that the Chamber erred by not conducting a "credibility analysis", but does not explain why Civil Party RY Pov's credibility should have been doubted. The Defence appears to suggest that this portion of his evidence is unreliable because he did not give specific incidents as examples of the types of mistreatment he listed. He was not asked to do so.[1817] His evidence on this point was clear, and the Trial Chamber had no reason to doubt it. The Defence has shown no error in the Trial Chamber's use of it.

751. In **ground 174**[1818] the Defence takes issue with the Trial Chamber's reliance on Civil Party RY Pov's evidence that his unit was tasked with monitoring newlywed couples and reporting back to nearby units.[1819] The Defence suggests that this evidence was not credible by

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[1810] **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 6 lines 3-8 after [09.19.04] (referenced in **E465** Trial Judgment, para. 1020), p. 15 lines 20-25 before [09.45.19].
[1811] See esp. paras 418 and 420-422.
[1812] **E465** Trial Judgment, paras 1014, 1020, 1023, 1037 and 1050.
[1813] **E465** Trial Judgment, para. 3643.
[1814] **F54** Appeal Brief, paras 727-742.
[1815] **F54** Appeal Brief, paras 735 and 738 (referring to **E465** Trial Judgment, para. 1177).
[1816] **F54** Appeal Brief, paras 735-738, esp. at para. 738.
[1817] See generally **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov) (no party asked the Civil Party to elaborate on his mistreatment in the manner suggested by the Defence).
[1818] **F54** Appeal Brief, paras 1341-1398.
[1819] **F54** Appeal Brief, para. 1350; **E465** Trial Judgment, para. 3643 fn. 12184 (referring to **E1/262.1** [Corrected 1] T., 12 February 2015 (Civil Party RY Pov), p. 63 lines 1-4 after [13.52.54]).

speculating about the "large number of personnel movements" that this would have entailed.[1820] No evidence is given to support the assertion that the operation which Civil Party RY Pov described would have been unfeasible. The claim is mere speculation. Moreover, the Defence had the opportunity to question Civil Party Ry Pov on the logistics of this task but no questions were put to him on this topic.

10.4 Civil Parties UONG Dos and SOK El

752. Civil Parties UONG Dos and SOK El did not testify during the trial. Indeed, both died before the Trial Chamber could hear them.[1821] However, the Trial Chamber relied on both Civil Parties' WRIs and VIFs to establish killings in the Phnom Kraol Prison.[1822] Specifically, the Trial Chamber found that their evidence was consistent and credible with regard to the killing of fellow inmate Heus by Phnom Kraol Prison guards, which the Trial Chamber found to constitute the crime against humanity of murder.[1823] The Trial Chamber also relied on Civil Party SOK El's description of another prisoner, Touch, an ethnic Phnorng "lying dead with his head hanging down and his tongue sticking out".[1824] The Trial Chamber found that Touch's death was the result of Phnom Kraol Prison's conditions, establishing the crime against humanity of murder for his death as well.[1825]

753. The Defence argues (in **ground 131** and **ground 132**)[1826] that the Trial Chamber erred by relying on this evidence, and that the findings regarding both murders should be set aside.[1827] In part, that submission is based on the arguments repeated throughout the Appeal Brief concerning the use of written evidence as being inherently weak.[1828] The Lead Co-Lawyers have responded to these general arguments elsewhere in this Response Brief.[1829] Regarding arguments made by the Defence that the Trial Chamber erred by relying on SOK El's

[1820] **F54** Appeal Brief, para. 1350.
[1821] **E465** Trial Judgment, para. 3094.
[1822] **E465** Trial Judgment, paras 3115-3117 (referring to paras 3100-3102).
[1823] **E465** Trial Judgment, paras 3100, 3115.
[1824] **E465** Trial Judgment, paras 3101, 3116.
[1825] **E465** Trial Judgment, para. 3116.
[1826] **F54** Appeal Brief, paras 862-875.
[1827] **F54** Appeal Brief, paras 863-875.
[1828] **F54** Appeal Brief, paras 865-869, 871-872.
[1829] See Section 8.3.2 at paras 229-241.

statement regarding the death of Touch, the Lead Co-Lawyers agree with the detailed response provided by the OCP.[1830]

754. The Lead Co-Lawyers therefore limit these submissions to Defence arguments that the evidence of Civil Parties SOK El and UONG Dos should be treated as unreliable because of the "possibility of collusion" or "at the very least of 'contamination'".[1831] The Defence points to the fact that Civil Parties UONG Dos and SOK El were both interviewed on 29 October 2008 in Raing Sy Village, Mondolkiri Province, their interviews commencing at 10:15 AM and 10:10 AM respectively.[1832]

755. These circumstances fall well short of demonstrating contamination, much less the serious allegation of collusion. It is usual for the OCIJ to conduct multiple interviews during a single trip. Given the imperatives to conduct an efficient and expeditious investigation, it would be surprising and worrisome if it did not do so. The details of this particular trip are contained in a Rogatory Report dated 31 October 2008, identifying the 13 individuals who provided crime-base evidence on Phnom Kraol, including both SOK El and UONG Dos.[1833] The interviews of Civil Parties UONG Dos and SOK El were conducted at the same time by different investigators.[1834] Although the interviews occurred in the same village, there is no evidence to suggest that they took place within audible range of each other. Indeed, given that the interviews largely occurred at the same time it is difficult to conceive of how they could have involved collusion.

756. In addition, although the accounts given by Civil Party UONG Dos and Civil Party SOK El corroborate each other on the material facts, they focused on different details. Civil Party UONG Dos described how the prison guards beat an ethnic minority prisoner named Heus using a rectangular piece of wood and later stabbed him to death using a bayonet.[1835] Civil Party UONG Dos also described the questioning of Heus.[1836] Civil Party SOK El, in his

[1830] **F54/1** OCP Response Brief, paras 868-870
[1831] **F54** Appeal Brief, para. 866.
[1832] *Ibid*.
[1833] **E3/8329** Report of the Execution of Rogatory Letter (Mondolkiri Province), 31 October 2008.
[1834] **E3/7703** Written Record of Interview (Civil Party UONG Dos), 29 October 2008; **E3/7702** Written Record of Interview (Civil Party SOK El), 29 October 2008. Civil Party UONG Dos's interview ran from 10:15 AM to 12:15 PM; Civil Party SOK El's interview ran from 10:10 AM to 11:55 AM.
[1835] **E3/7703** Written Record of Interview (Civil Party UONG Dos), 29 October 2008, ERN (En) 00242171-00242172.
[1836] **E3/7703** Written Record of Interview (Civil Party UONG Dos), 29 October 2008, ERN (En) 00242171.

interview, did not describe the beating or the questioning, but he explained that the guard Phai killed a prisoner who was his current wife's former husband.[1837] Subsequently, in his VIF, he explained that his current wife's former husband was named Heus.[1838] The WRIs show no unusual similarities such as might give rise to a concern about contamination.

757. Finally, the Lead Co-Lawyers note the Defence observation that "[f]ollowing this testimony before the CIJ, the two men were joined as civil parties."[1839] This fact has no relevance. Evidence given by a civil party does not carry less weight than the evidence of a witness.[1840] And in this instance, the interviews in question were given before Civil Party status was even sought.[1841]

758. The Defence has demonstrated no reason why the Trial Chamber should have doubted or discounted the evidence contained in the WRIs of Civil Parties UONG Dos and SOK El.

10.5 Civil Party NO Sates

759. Civil Party NO Sates, a Cham woman, testified over two days during the trial segment on the Treatment of the Cham.[1842] Her evidence covered a range of subjects including discriminatory measures against the Cham; the Cham rebellion at Svay Khleang and its aftermath, including forced movement of the Cham population; and the detention and execution of Cham people at Trea Village. The Trial Chamber relied extensively upon Civil Party NO Sates's testimony. It used her evidence to find that a large number of Cham people from Kroch Chhmar District were arrested and taken to Trea Village Security Centre, verified as Cham, and then killed.[1843] The Trial Chamber relied upon this evidence to establish the

[1837] **E3/7702** Written Record of Interview (Civil Party SOK El), 29 October 2008, ERN (En) 00239510.
[1838] **E3/7702** Written Record of Interview (Civil Party SOK El), 29 October 2008, ERN (En) 00239509 (indicating the name of Civil Party SOK El's wife); **E3/6314** Victim Information Form (Civil Party SOK El), 18 May 2009, ERN (En) 01323057 (where Civil Party SOK El states that Heus was the former husband of the woman he identified as his wife in his WRI).
[1839] **F54** Appeal Brief, para. 865.
[1840] See Section 8.2.1 above at paras 185-195.
[1841] Civil Party SOK El signed his VIF on 18 May 2009. Civil Party UONG Dos signed his VIF on 19 May 2009: **E3/6314** Victim Information Form (Civil Party SOK El), 18 May 2009, ERN (Kh) 00532366; **E3/6260** Victim Information Form (Civil Party UONG Dos), 19 May 2009, ERN (Kh) 00528966.
[1842] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates); **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates).
[1843] **E465** Trial Judgment, paras 3278 and 3281.

actus reus of the crimes against humanity of murder[1844] and persecution.[1845] The Trial Chamber also relied upon Civil Party NO Sates's evidence to find, as part of the prohibitions on Cham religious practices, copies of the Koran were confiscated.[1846] The Lead Co-Lawyers have elsewhere in this Brief responded to Defence arguments concerning those restrictions on religious practices.[1847] Submissions are made here regarding Defence arguments challenging Civil Party NO Sates's evidence concerning killings at Trea Village.

760. In **ground 136**[1848] the Defence argues that the Trial Chamber erred in relying on three sources, including Civil Party NO Sates, to find "that in 1978 a large number of Cham from Kroch Chhmar district were arrested and executed in Trea village because they were Cham."[1849] The Defence does not make clear which part of this finding is challenged. The Lead Co-Lawyers have elsewhere elaborated on why the Trial Chamber was correct to find that victims at Trea Village were targeted on the basis of being Cham.[1850] They here make submissions concerning the Trial Chamber's finding that a large number of people were arrested and killed at Trea Village Security Centre.

761. On this point the Defence submissions (i) claim that the evidence of Civil Party NO Sates and Witness MATH Sor do not corroborate each other; [1851] and (ii) insinuate that Civil Party NO Sates was not credible.[1852]

762. The Lead Co-Lawyers note that Civil Party NO Sates and Witness MATH Sor *alias* AHMAD Sofiyah were in the same mobile unit when they were sent to Trea Village Security Centre in 1978. The Trial Chamber noted that their evidence had much in common.[1853] The Lead Co-Lawyers note that the commonalities in their accounts go even beyond those that the Trial Chamber noted: both testified that the men were first sent away from the village first, before

[1844] **E465** Trial Judgment, para. 3306 (referring to para. 3281).
[1845] **E465** Trial Judgment, paras 3331-3332, referring to its findings on murder as well as its findings on imprisonment (which rely on the evidence of Civil Party NO Sates at **E465** Trial Judgment, paras 3314-3315).
[1846] **E465** Trial Judgment, paras 3234-3238.
[1847] See paras 452-460 above.
[1848] **F54** Appeal Brief, para. 892-898.
[1849] **F54** Appeal Brief, para. 894 (referring to **E465** Trial Judgment para. 3306, fns 11223 and 3281).
[1850] See paras 455-460. See also Section 9.5.3.4.3 at paras 465-468.
[1851] **F54** Appeal Brief, para. 894.
[1852] **F54** Appeal Brief, para. 898.
[1853] **E465** Trial Judgment, para. 3279.

the women, under the pretence that they would build houses;[1854] that they were evacuated or walked to Trea Village Security Centre by soldiers;[1855] that they arrived at the house in Trea Village around dusk;[1856] that the house was a wooden building on stilts;[1857] that they observed soldiers sharpening their knives;[1858] that they were tied up;[1859] that once tied up they were asked whether they were Cham or Khmer;[1860] that the women who replied that they were Cham were taken away;[1861] that because they said they were Khmer they were forced to eat pork to prove it;[1862] and that the following morning they were given gruel.[1863]

763. As against multiple common aspects of the accounts, the Defence focuses on the fact that the women differently estimated the number of detainees held with them at Trea Village.[1864] However, this detail was not material, and is understandable in light of the passage of time and difficulty in accurately estimating numbers of people from observation.[1865] The credibility of Civil Party NO Sates (or, for that matter, of Witness MATH Sor) cannot reasonably be called into doubt by this discrepancy when seen in the context of all the commonalities between their evidence. The Trial Chamber appropriately considered Defence submissions regarding discrepancies in the evidence, but was not convinced by them.[1866]

[1854] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 88 lines 7-17 after [15.56.59]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 44 lines 8-10, p. 45 lines 14-25 after [11.13.13].
[1855] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 59 line 25 – p. 60 line 2 after [14.18.51]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 17 lines 15-20 after [09.50.45].
[1856] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 58 lines 4-11 after [14.12.01]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 26 lines 12-13 after [10.11.16].
[1857] **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates), p. 41 lines 14-25 after [11.07.30]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 86 lines 1-4 before [15.18.00].
[1858] **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates), p. 26 lines 1-9 after [10.07.22]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 26 lines 17-18 after [10.11.16], p. 48 line 11 – p. 49 line 8 after [11.20.53].
[1859] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 58 lines 18-23 after [14.14.56]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 27 line 4 – p. 28 line 24 after [10.14.00].
[1860] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 58 line 21 – p. 59 line 10 after [14.14.56]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 28 lines 22-24 after [10.33.16].
[1861] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 58 line 23 – p. 59 line 3 after [14.14.56]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 30 line 17 – p. 31 line 2 after [10.37.02].
[1862] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 75 line 17 – p. 76 line 6 after [15.21.54]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 51 line 23 – p. 52 line 2 after [11.32.42].
[1863] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 59 lines 15-20 after [14.16.35]; **E1/375.1** [Corrected 1] T., 13 January 2016 (Witness MATH Sor), p. 35 lines 2-6 after [10.47.11].
[1864] **F54** Appeal Brief, para. 897.
[1865] The Lead Co-Lawyers note that this issue is not unknown in international criminal proceedings. See for example ICTR *Prosecutor v Hategekimana*, ICTR-00-55B-T, Judgement and Sentence, 6 December 2010, fn. 1183.
[1866] **E465** Trial Judgment, para. 3280.

764. The Defence further argues that Civil Party NO Sates's testimony should only have been used to prove "that about 10 women from Khsach Prachheh Kandal were taken away by a soldier after they said they were Cham."[1867] The origins of the number 10 in this argument are unknown. Civil Party NO Sates testified that at Trea Village she was detained in a house with a large number of other women – she estimated that there were around 300 of them.[1868] She consistently stated that only around 30 women who claimed to be Khmer remained after the others were taken away.[1869] Therefore, and as she expressly confirmed in her testimony, this meant she saw an estimated 270 women taken away after saying they were Cham.[1870] While these numbers are clearly approximations, Civil Party NO Sates's evidence clearly referred to significantly more than 10 individuals being taken away after it was established that they were Cham. The Defence is therefore also wrong to claim that "unreasonable extrapolation"[1871] was involved in the Trial Chamber's finding that a "large number" of Cham people were executed at Trea Village.[1872]

765. The Defence is also incorrect in asserting that Civil Party NO Sates's evidence could not support the Trial Chamber's finding that the women who were taken away were killed. Although Civil Party NO Sates did not see the killings, the Trial Chamber was entitled to rely on her testimony that none of these women had been seen alive again.[1873] Civil Party NO Sates also testified that after being relocated from the house and assigned to work nearby along the riverbank, she saw dead bodies floating in the river.[1874] She recognised one of the

[1867] **F54** Appeal Brief, para. 896.
[1868] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates) p. 58 lines 20-21 after [14.14.56], p. 69 line 25 – p. 70 line 1 after [15.07.13], p. 75 lines 4-15 before [15.21.54]; **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates), p. 39 lines 6-12 after [11.02.48], p. 43 lines 16-17 after [11.14.37].
[1869] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 59 line 10-12 after [14.16.35], p. 59 line 18 before [14.18.51], p. 60 line 17 after [14.21.20], p. 70 lines 2-3 after [15.07.13], p. 70 lines 13-14 before [15.09.30], p. 75 line 25 after [15.21.54]; **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates), p. 44 lines 2-4 before [11.16.20], p. 47 lines 20-22 before [11.24.44].
[1870] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 75 lines 4-15 before [15.21.54].
[1871] **F54** Appeal Brief, para. 898, referring to **E465** Trial Judgment, paras 3306 and 3281.
[1872] **F54** Appeal Brief, para. 898.
[1873] **E465** Trial Judgment, para. 3278; **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 58 line 13 – p. 59 line 3. See also: **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 71 lines 18-25 after [15.11.12].
[1874] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 62 line 8 – p. 11 after [14.25.26]; **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates), p. 22 lines 5-20 before [09.58.54].

bodies as a woman she knew, and could see that her throat had been cut.[1875] Taken together with the other evidence, particularly that of Witness MATH Sor, the Trial Chamber was certainly able to reasonably conclude that the Cham women who were taken away were executed.

766. Lastly, the Defence refers to the inconsistent statement which Civil Party NO Sates gave to YSA Osman, claiming that she admitted that she had lied.[1876] It is true that Civil Party NO Sates corrected the statement recorded by YSA Osman, making clear that contrary to what was written in that statement she did not see executions.[1877] However Civil Party NO Sates did not say that she lied. She stated that she could not recall the statements she had made earlier and that her account before the Trial Chamber was the truth.[1878] The Trial Chamber was entitled to give weight to her evidence, particularly considering her willingness to correct the YSA Osman statement and acknowledge the imperfection of her memory.

767. The Lead Co-Lawyers note that the points now taken by the Defence in this appeal ground, against Civil Party NO Sates's evidence, have been raised before and were considered and rejected by the Trial Chamber.[1879] The Defence is simply re-asserting an argument which was unsuccessful at trial. The Trial Chamber provided reasons for its conclusions, all of which were reasonable. The Defence has shown no error.

10.6 Civil Party CHEA Deap

768. Civil Party CHEA Deap testified over two days in the trial segment concerning the Regulation of Marriage. In addition to speaking about her forced marriage, she also described her various roles as a cadre, encounters with KHIEU Samphân, and how later she was arrested. The Trial Chamber relied on Civil Party CHEA Deap's testimony about marriage and forced sexual intercourse, as well as about KHIEU Samphân's knowledge of, and role in

[1875] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 62 lines 13-20 after [14.25.26], p. 63 lines 3-4 before [14.28.34], p. 64 lines 7-8 before [14.32.46], p. 73 lines 17-23 before [15.18.24]; **E1/351.1** [Corrected 1] T., 29 September 2015 (Civil Party NO Sates), p. 22 lines 8-13 before [09.58.54].
[1876] **F54** Appeal Brief, para. 896.
[1877] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 73 line 10 – p. 74 line 10 after [15.16.50].
[1878] **E1/350.1** [Corrected 1] T., 28 September 2015 (Civil Party NO Sates), p. 73 lines 10-23 after [15.16.50] ("Of course, I want to see justice. And frankly speaking, I cannot recall the statements that I made earlier. I still recall what I saw with my own eyes. And my main purpose is to seek justice. I lost everything. And of course, my memory is not that perfect.").
[1879] **E465** Trial Judgment, para. 3280.

implementing, marriage policy.[1880] The Defence brings a considerable number of challenges to Civil Party CHEA Deap's evidence, attacking its overall credibility as well as various specific aspects of her testimony, and even questioning whether she truly suffered as she claimed. The Lead Co-Lawyers have above addressed some of these Defence challenges in the context of arguments on the regulation of marriage.[1881]

769. The following submissions address (i) the Defence's general attacks on Civil Party CHEA Deap's credibility; (ii) the misrepresentation of her evidence regarding the possibility to refuse marriage; (iii) the misrepresentation of her evidence regarding monitoring of the consummation of marriages; and (iv) the contention that Civil Party CHEA Deap did not suffer (sufficiently).

10.6.1 Arguments relating to Civil Party CHEA Deap's credibility

770. Throughout its Appeal Brief the Defence repeatedly attacks the credibility of Civil Party CHEA Deap.[1882] The core argument is set out in **ground 166**.[1883]

771. The Lead Co-Lawyers refute this attack. Much of it is based on a legally flawed concept of how Civil Party evidence and VIFs should be treated, which the Lead Co-Lawyers have addressed above. In short: no legal authority or point of principle supports the view that evidence from Civil Parties carries less value.[1884] Likewise, the process by which VIFs are produced has been correctly taken into account by the Trial Chamber in assessing inconsistencies between those documents and subsequent testimony, including omissions.[1885]

772. The Defence raises a series of unconvincing arguments about aspects of Civil Party CHEA Deap's evidence, which it claims are a basis for discrediting her evidence overall. However, matters such as a person's "ambiguous responses" on a single topic,[1886] her inability to precisely date an event which took place 40 years previously,[1887] or a lack of similar evidence

[1880] For example **E465** Trial Judgment, paras 3569, 3581-3582, 3646, 3655, 3679 and fns 11943, 12001, 12003, 12081, 12083, 12085, 12140, 12142, 12160, 12175, 12176, 12241, 12287.
[1881] See paras 640, 644, 648.
[1882] **F54** Appeal Brief, paras 319, 1233-1242, 1815, 1866, 2117.
[1883] **F54** Appeal Brief, paras 1233-1242.
[1884] See Section 8.2.1 at paras 185-195.
[1885] See Section 8.2.4 at paras 204-211.
[1886] **F54** Appeal Brief, para. 1236.
[1887] **F54** Appeal Brief, para. 1237.

from other sources[1888] cannot be fatal to a Civil Party's overall credibility, particularly where overshadowed by significant other evidence on material questions which is clear and well-corroborated.[1889]

10.6.2 Misrepresentation of Civil Party CHEA Deap's evidence regarding the possibility to refuse marriage

773. Civil Party CHEA Deap testified that when she was first told to marry she refused twice. The third time she was told to marry (within approximately one week),[1890] she understood that she could no longer refuse. The Defence seeks to use this evidence to challenge the Trial Chamber's finding that refusing marriage under the DK would lead to detrimental consequences except in exceptional and specific circumstances (in **ground 170**).[1891] This argument misinterprets Civil Party CHEA Deap's evidence. She clearly explained that at the third order she was unable to refuse and was forced to be married.[1892] She did not want to be

[1888] **F54** Appeal Brief, para. 1234 fn. 2334 and paras 1239-1242. The Lead Co-Lawyers note in this respect that the Defence somewhat misleadingly refers to "contradictions" in the evidence from other sources (the testimony of witnesses PHAN Him, BEIT Boeurn, and RUOS Suy), where in fact they refer to witnesses or Civil Parties who testified that they were not aware of the matters addressed by Civil Party CHEA Deap. Thus witness PHAN Him merely said that he was not aware of the matter: (**F54** Appeal Brief, para. 1234 fn. 2334 referring to **E1/467.1** T., 31 August 2016 (Witness PHAN Him), p. 102 line 3 at [15.07.21]). Witness BEIT Boeurn simply did not mention Wat Ounalom (**F54** Appeal Brief, para. 1234 fn. 2334 referring to **E1/502.1** T., 28 November 2016 (Witness BEIT Boeurn), p. 53 lines 2-17 after [13.42.15]), although the Lead Co-Lawyers note that she also testified that she had forgotten the locations of some of the meetings she had attended with KHIEU Samphân as she was not very familiar with places in Phnom Penh (**E1/502.1** T., 28 November 2016 (Witness BEIT Boeurn), p. 53 lines 2-23 after [13.42.15]). Witness RUOS Suy's interview did not reject or deny that a meeting at Wat Ounalom had occurred, and in fact he stated that separate sessions were held for workers and military (**E3/10620** Written Record of Interview (Witness RUOS Suy), 07 July 2015, A.30 at ERN (En) 01147800), indicating that he would likely not have attended the same sessions as Civil Party CHEA Deap.

[1889] On the central issue of whether marriages were forced, Civil Party CHEA Deap's evidence is corroborated by an extensive volume of other material: see above esp. at paras 635-653. On the more specific question of the age at which marriages were imposed, despite the Defence claim that Civil Party CHEA Deap's evidence on this is contradicted by other evidence (**F54** Appeal Brief, para. 1238), a significant number of witnesses and Civil Parties testified to being married when aged 21 or younger. For example: Civil Party PEN Sochan was "roughly 15 or 16 years old at that time", see **E1/482.1**, T., 12 October 2016 (Civil Party PEN Sochan), p. 68 lines 3-4 after [13.42.57]; Civil Party KUL Nem estimated that his wife was "around 20 or a little bit over 20 years old", see **E1/488.1**, T., (Civil Party KUL Nem) p. 101 lines 9-10 after [15.10.02]; Civil Party SEANG Sovida's sister was forced to marry when she was 15 or 16 years old: see **E1/308.1** [Corrected 1] T., 2 June 2015 (Civil Party SEANG Sovida), p. 8 lines 8-9 before [09.22.06]; Civil Party PREAP Sokhoeurn estimated that she must have been around 18 when she was forced to marry, see **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), p. 4 lines 2-15 before [09.10.44]; Civil Party NGET Chat was 20, see **E1/488.1** T., 24 October 2016 (Civil Party NGET Chat), p. 124 lines 19-24 after [16.02.04]; Civil Party MEY Savoeun also testified that his wife was around 20 when they were married, see **E1/459.1** T., 17 August 2016 (Civil Party MEY Savoeun), p. 82 line 24 – p. 83 line 8 after [15.26.12].

[1890] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 96 lines 7-10 before [15.23.29].

[1891] **F54** Appeal Brief, para. 1269 fn. 2421 (referring to **E465** Trial Judgment, para. 3625).

[1892] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 68 lines 6-20 after [13.51.10], p. 96 lines 7-10 before [15.23.29].

a married woman but because *Angkar* had ordered it, she had no other choice.[1893] After the third order she felt too frightened to refuse.[1894] She was afraid that refusing might lead to an accusation against her, knowing that such accusations meant being "removed".[1895]

10.6.3 Misrepresentation of Civil Party CHEA Deap's evidence regarding monitoring of consummation of marriage

774. In **ground 174** the Defence claims that the Trial Chamber erred in relying upon Civil Party CHEA Deap's testimony to find that newly married couples were monitored to ensure they had sex.[1896] The Defence has demonstrated no error. Civil Party CHEA Deap heard footsteps outside her room.[1897] She was warned to be careful as they were being monitored.[1898] Both she and her husband were afraid of the militiamen who monitored them.[1899]

775. The Defence also claims that the Trial Chamber should not have found that Civil Party CHEA Deap was forced to have sexual intercourse with her husband, claiming that this conclusion was deduced only from her lack of consent to marry.[1900] It again misrepresents her evidence, suggesting that at the time the marriage was consummated there was no "context of fear", and that it was her husband's "choice".[1901] Civil Party CHEA Deap stated clearly that she consummated with her husband because she was fearful as they were both being monitored. She testified that they did not consummate the marriage for the first three nights, as both of them heard the militiamen monitoring them.[1902] She explained that if a couple did not "stay with one another" they would be sent for re-education or re-fashioning,[1903] and described an example she knew of where this had occurred.[1904]

[1893] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 77 lines 4-7 after [14.12.28].
[1894] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 97 line 20 – p. 98 line 8 before [15.27.51]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 24 lines 5-10 after [09.46.31]; p. 37 lines 8-15 before [10.16.35].
[1895] **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 37 line 22 – p. 38 line 23 after [10.16.35].
[1896] **F54** Appeal Brief, para. 1347, referring to **E465** Trial Judgment, para. 3641.
[1897] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 73 lines 12-21 after [14.04.01]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 31 lines 15-18 before [10.04.16]; p. 32 lines 12-15 before [10.05.50].
[1898] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 73 lines 12-21 after [14.04.01]; **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 32 lines 6-12 before [10.05.50]. See also **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 32 line 21 – p. 33 line 2 after [10.05.50].
[1899] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 100 line 23 – p. 101 line 4 after [15.32.37].
[1900] **F54** Appeal Brief, para. 1391.
[1901] **F54** Appeal Brief, para. 1391.
[1902] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 100 line 23 – p. 101 line 4 after [15.32.37].
[1903] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 74 line 25 – p. 75 line 2 before [14.09.19].
[1904] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 101 line 20 – p. 102 line 3 after [15.35.46].

10.6.4 Contention that Civil Party CHEA Deap did not suffer sufficiently

776. In two separate grounds (**ground 163** and **ground 173**)[1905] the Defence questions the sufficiency of Civil Party CHEA Deap's suffering.

777. First, it argues (in **ground 163**) that although Civil Party CHEA Deap suffered from her forced marriage, this must be discounted because it is not what "caused [her] greatest suffering."[1906] Indeed, Civil Party CHEA Deap described feeling the "most pain" from the loss of her younger brother, who was tortured and murdered.[1907] She also described the loss of other siblings and family members.[1908] However, neither her evidence, nor ordinary human experience, supports the view that the murder of her family members would in some way diminish the suffering she experienced from other crimes. Civil Party CHEA Deap was explicit about having suffered from being forced to marry: "When Angkar organized the marriages I was not happy and <I had only> tears – actually I wept almost every day. I felt the pain but I could not do anything."[1909] When making her statement of harm at the conclusion of her testimony she began by saying, "[i]t was so painful, particularly when I was forced to get married."[1910]

778. The Defence goes on to argue (in **ground 173**) that the Trial Chamber erred in finding that forced sexual intercourse caused suffering of severity similar to other crimes against humanity, and argues that Civil Party CHEA Deap did not speak of suffering as a result of forced sexual intercourse.[1911] This argument fails to recognise Civil Party CHEA Deap's evidence that she did not choose to have sexual intercourse[1912] and that her husband told her that if they did not "get along together" they "would be mistreated".[1913] Given that Civil Party CHEA Deap was not asked directly about how she had suffered from forced sexual

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[1905] **F54** Appeal Brief, paras 1156-1188 (**ground 163**), paras 1301-1340 (**ground 173**).
[1906] **F54** Appeal Brief, para. 1169.
[1907] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 80 lines 11-24 after [14.21.53], esp. line 11.
[1908] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 80 lines 10-11 after [14.21.53] and p. 80 lines 19-20 before [14.24.15].
[1909] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 77 lines 11-13 after [14.14.05]. She also stated that the pain continued. See **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 78 line 23 – p. 79 line 1 after [14.17.12] ("Every time I think of what happened that I did not like my husband, that I was organized to marry him by Angkar, I feel the pain in my chest. <I could not find the right words to describe the pain.>").
[1910] **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 71 line 19 after [13.33.10].
[1911] **F54** Appeal Brief, para. 1312.
[1912] **E1/466.1** [Corrected 2] T., 30 August 2016 (Civil Party CHEA Deap), p. 74 lines 15-19 after [14.07.17].
[1913] **E1/467.1** T., 31 August 2016 (Civil Party CHEA Deap), p. 31 lines 4-13 before [10.04.16].

intercourse, it is unsurprising that she did not discuss this in a more direct way.[1914] However her experience of forced sexual intercourse is evident from her clear statements about the suffering she experienced as a result of being forced to marry.[1915]

10.7 Civil Party MOM Vun

779. Civil Party MOM Vun was a mobile unit worker in Siem Reap, during the DK period. She testified over the course of two days during the trial segment on the Regulation of Marriage.[1916] She testified that after initially refusing to marry, she was raped by a group of cadres, and that after the forced marriage she was forced to have sexual intercourse with her new husband.[1917]

780. The Trial Chamber found Civil Party MOM Vun to be credible and relied on her testimony concerning marriage.[1918] In the Appeal Brief, the Defence criticises the Trial Chamber for this, attacking Civil Party MOM Vun's credibility in general and specifically in respect of the rape; and seeks to diminish the level of suffering she described. The Lead Co-Lawyers have responded to the latter points elsewhere in this Brief in the context of arguments about the regulation of marriage.[1919] They here respond overall to the Defence arguments concerning Civil Party MOM Vun.

10.7.1 Civil Party MOM Vun's Credibility

781. In **ground 163**, **ground 173** and **ground 174**,[1920] the Defence wrongfully claims that Civil Party MOM Vun's evidence is not credible,[1921] and that the Trial Chamber should not have made use of it.[1922] However, as the Trial Chamber noted in respect of her evidence: "[M]inor inconsistencies are common with respect to the details of events which occurred more than 30 years ago, such as the dates or duration of gaps between sexual intercourse, specifically when they are related to traumatic event[s]."[1923] Other matters on which her testimony lacked

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[1914] See generally on this issue, Section 9.6.4.3.3.1 at paras 684-687.
[1915] See para. 777 above.
[1916] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun); **E1/477.1** T., 20 September 2016 (Civil Party MOM Vun).
[1917] **E465** Trial Judgment, paras 3621, 3650.
[1918] **E465** Trial Judgment, paras 3649, 3658-3659.
[1919] See paras above 638-639, 652, 657, 689, 697-698.
[1920] **F54** Appeal Brief, paras 1156-1188, 1301-1340, 1341-1377.
[1921] **F54** Appeal Brief, para. 1173.
[1922] **F54** Appeal Brief, paras 1164, 1309, 1173, 1382.
[1923] **E465** Trial Judgment, para. 3649.

clarity were similarly immaterial, and this may have been caused by the passage of time and imprecise recollection of dates. As the Trial Chamber noted, the Defence had the opportunity to question her.[1924] During her testimony she clarified details of her evidence where she could, but where she did not know how to respond she said so frankly – for example to the question of why her VIF was inaccurate.[1925] Most significantly, the Trial Chamber assessed Civil Party MOM Vun's evidence as a whole, considering arguments from the Defence, and concluding that her evidence was credible.[1926] The Defence has not demonstrated any error.

782. The Defence also more specifically attacks Civil Party MOM Vun's evidence about her experience of rape after at first refusing to marry. It claims that the Trial Chamber erred by relying on this testimony in support of its findings regarding forced marriage (**ground 170**).[1927] As explained elsewhere in this Brief, the Defence has misunderstood or misrepresented the Trial Chamber's use of Civil Party MOM Vun's evidence.[1928] No finding of rape as a system used by cadre was made, and the Trial Chamber expressly recognised that the rape did not constitute a crime within scope in its own right.[1929] Rather, Civil Party MOM Vun's evidence corroborated the evidence of numerous other sources that intimidation, threats and violence were used to force people to marry. In this instance the method used was rape.

783. Finally on this point, there is no basis for the Defence assertion that Civil Party MOM Vun's testimony should have been discounted because the OCP had "put the words into [her] mouth" on the subject of a connection between her forced marriage and the rape which preceded it.[1930] Earlier in her testimony, Civil Party MOM Vun linked the rape to her forced

[1924] **E465** Trial Judgment, para. 3649.
[1925] **E1/477.1** T., 20 September 2016 (Civil Party MOM Vun), p. 9 line 22 – p. 10 line 14 after [09.23.03]. Regarding the general question of inconsistencies between Victim Information Forms and subsequent Civil Party testimony, see above at paras 205-211.
[1926] **E465** Trial Judgment, paras 3649, 3658-3659.
[1927] **F54** Appeal Brief, paras 1259-1280, esp. 1262-1263.
[1928] See paras above 638-639, 652.
[1929] **E465** Trial Judgment, para. 3658 ("these events are beyond the scope of rape within the context of marriage as they were not committed by a husband on his wife…").
[1930] **F54** Appeal Brief, para. 1263 fn. 2402.

marriage.[1931] The later OCP questions which the Defence appears to refer to[1932] were references back to that evidence, and were not improperly leading.

10.7.2 Civil Party MOM Vun's suffering

784. The Defence also seeks to undermine Civil Party MOM Vun's evidence as part of an argument that the suffering caused by forced marriage was not grave (in **ground 163**) and could not justify the Trial Chamber's findings of "serious mental harm with lasting effects".[1933]

785. In seeking to diminish Civil Party MOM Vun's suffering for the purpose of this argument, the Defence has misrepresented her evidence and taken an artificially fragmented approach to her experience of forced marriage. The Defence focuses here solely on her evidence regarding the ceremony and the lack of parental involvement.[1934] While this is certainly one part of her experience and must be taken into account, the Civil Party's suffering from forced marriage must be considered as a whole. Civil Party MOM Vun testified that she was ashamed of her marriage,[1935] and that after she had been raped she felt pain and humiliation.[1936] She said, "I was forced to consummate my marriage with my husband <like a pig>. It is an <indefinable> shame for me. I bear all the suffering and pain in my heart….

[1931] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 48 line 21 – p. 50 line 2 after [11.18.38]. Having said that she was called to the unit chief and told she had to remarry, she was asked how many times she was called (p. 48 lines 18-19). Civil Party MOM Vun responded: "They came to tell me once and the second time was on the day of the marriage itself; however, there were events that took place before the marriage day and it was painful. Two days before the marriage, at night time at around 7 p.m., a group of comrades called me to go to the rice storage. There were five of them and it was about 7 p.m. and I could not see their faces. *When I arrived there, I was told that in two days' time, I would remarry* and I was called up into the rice storage. I did not go, but then my hand was pulled to go up and *they planned to mistreat me before the -- the wedding day*. There were five of them and they planned to rape me, one by one. And I was raped and the last one told me to leave after they committed the act. I could hardly walk…" (p. 48 line 18 – p. 49 line 9) [*emphasis added*].

[1932] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 80 lines 3-9 before [15.01.22] ("Q. Civil party, earlier you said that before your forced marriage you first refused to get married once and then you were raped by five people in the night, two days, I believe, before your marriage. And I think that you made a link between this rape and the fact that you refused to get married. So on what do you base yourself to make this connection between the fact that you were raped and the fact that you <initially> refused to get married?") and **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 85 line 24 – p. 86 line 3 after [15.15.30] ("Q. So let me get back to your personal experience. You said that you were raped, maybe because you refused to get married and then they forced you to get married. So did this happen to other young women <or girls>? Were they also raped before they were forced to get married?").

[1933] **F54** Appeal Brief, para. 1164, referring to **E465** Trial Judgment, para. 3692.

[1934] **F54** Appeal Brief, para. 1164.

[1935] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 47 lines 11-16 after [11.13.35].

[1936] **E1/475.1** [Corrected 2] T., 16 September 2016 (Civil Party MOM Vun), p. 79 lines 10-13 after [14.39.23].

It is a <indefinable> shame<>…. I was looked down by others. I had suffering in my life. Nothing could compare."[1937]

10.8 Civil Party OM Yoeurn

786. Civil Party OM Yoeurn was forcibly married during the DK regime when she was around 23 or 24 years old to her husband who was around 47 or 48 years old.[1938] She testified over the course of two days during the trial segment on the Regulation of Marriage.[1939] She spoke of being raped by a military cadre, Comrade Phan, when she tried to refuse to consummate her forced marriage. She also spoke of the suffering she endured as a result of her forced marriage.

787. The Trial Chamber relied on Civil Party OM Yoeurn's testimony concerning the marriage regime.[1940] The Defence challenges the Trial Chamber's findings on that topic in part by attacking Civil Party OM Yoeurn's evidence on rape and suffering.

788. The Lead Co-Lawyers have made submissions elsewhere in this Brief regarding the Defence's misuse of Civil Party OM Yoeurn's evidence on traditional arranged marriages and its attacks on her credibility.[1941] Here, the Lead Co-Lawyers respond to the Defence's claims that the Trial Chamber erred in its use of Civil Party MOM Vun's evidence about her rape and suffering.

10.8.1 Civil Party OM Yoeurn's evidence about rape as punishment for failing to consummate

789. The Defence argues (in **ground 174**)[1942] that the Trial Chamber erred by relying on Civil Party OM Yoeurn's evidence on rape for its findings,[1943] claiming that her rape was not representative of CPK policy. The Defence submission misunderstands the Trial Chamber's use of her evidence. The Trial Chamber did not treat the rape as representative of systemic rape by the CPK; nor did it consider it as a part, in its own right, of the charges concerning

[1937] **E1/477.1** T., 20 September 2016 (Civil Party MOM Vun), p. 24 lines 9-17 after [09.49.26].
[1938] **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn), p. 93 lines 17-18 after [15.36.47], p. 99 line 20 after [15.56.06].
[1939] **E1/461.1** T., 22 August 2016 (Civil Party OM Yoeurn); **E1/462.1** T., [Corrected 2] 23 August 2016 (Civil Party OM Yoeurn).
[1940] For example **E465** Trial Judgment, paras 3582, 3599, 3601, 3620, 3636, 3646-3649.
[1941] See esp. at paras 650, 657-659, 679, 700.
[1942] **F54** Appeal Brief, paras 1341-1398.
[1943] **F54** Appeal Brief, paras 1367-1369.

rape within marriage. Rather it assessed the rape as being the means, in this instance, by which marital rape was coerced. The Trial Chamber explicitly recognized that the rape was relevant for this limited purpose of "explain[ing] a context of fear and of violence in which [forced marital sex] took place."[1944]

790. Civil Party OM Yoeurn was raped directly in response to her failure to comply with orders to consummate the marriage. She testified that her husband tried to force her to have sexual intercourse with him, and when she refused he reported her to his military commander, Comrade Phan. That same night Comrade Phan called her to see him, asked her why she did not have sexual intercourse with her husband, and then raped her.[1945]

791. Civil Party OM Yoeurn's evidence is consistent with evidence from numerous other sources that intimidation, threats and violence were used to force people to marry and then to consummate those marriages.[1946] In this instance, as with Civil Party MOM Vun's account, rape was the method of intimidation, threat, and violence.

10.8.2 Misrepresentation of Civil Party OM Yoeurn's evidence on suffering

792. The Defence argues (in **grounds 163** and **173**) that the Trial Chamber erred by considering that Civil Party OM Yoeurn had suffered, given that after the fall of the DK she reunited with her husband from the forced marriage.[1947] The Defence's arguments again misrepresent the evidence. Civil Party OM Yoeurn did not say that she and her husband had "found each other"[1948] or that they had been content together.[1949] Civil Party OM Yoeurn testified that they reunited only because of social and cultural pressures and the fact that they had a child together, and that she did not feel happy.[1950] Her feelings remained unchanged up until, and even after, her husband's death.[1951] The Defence's attempts to paint a different picture of Civil Party OM Yoeurn's relationship therefore do not withstand scrutiny.

[1944] **E465** Trial Judgment, para. 3658.
[1945] **E1/462.1** T., [Corrected 2] 23 August 2016 (Civil Party OM Yoeurn), p. 4 line 24 – p. 6 line 22 after [09.08.47].
[1946] See Section 9.6.4.2.1 at paras 635 *et seq*., esp. at paras 637-641.
[1947] **F54** Appeal Brief, paras 1168-1169, 1307.
[1948] **F54** Appeal Brief, para. 1307.
[1949] **F54** Appeal Brief, para. 1307.
[1950] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 12 line 17 – p. 13 line 1 after [09.31.58]. See also **E1/462.1** T., [Corrected 2] 23 August 2016 (Civil Party OM Yoeurn), p. 52 lines 14-20 after [13.39.08], p. 53 lines 4-18 before [13.41.52].
[1951] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 52 lines 14-20 after [13.39.08].

793. In any event, suffering can be substantial without demonstrating that it is lifelong.[1952] Civil Party OM Yoeurn testified clearly to the suffering she experienced at the time of her marriage, saying that she was "terribly worried", "angry" and "could not eat."[1953] Her husband tried to rape her on her wedding night, then reported her to his superior who raped her that same night.[1954] She testified that she had refused to have sexual intercourse with her husband "[b]ecause I disliked him, and he -- he didn't try to console me or to comfort me at all. He simply wanted to <rape> me <violently>."[1955] The Trial Chamber's use of this evidence to establish suffering from forced marriage was clearly reasonable and no error has been established.

794. Lastly, the Lead Co-Lawyers note the Defence's claim that "[a]bove all" Civil Party OM Yoeurn's suffering must be dismissed because she did not mention it in her statement of harm at the end of the hearing.[1956] This argument, which has no basis in law or logic, has been addressed elsewhere in this Brief.[1957]

10.9 Civil Party PEN Sochan

795. Civil Party PEN Sochan was forcibly married during the DK regime when she was 15 or 16 years old.[1958] She testified over the course of two days during the trial segment on the Regulation of Marriage.[1959] The Trial Chamber relied on her evidence extensively.[1960]

796. The Defence argues that the Trial Chamber erred in relying on her evidence, both attacking her credibility and claiming that her experience was isolated and unrepresentative.[1961] The Defence's particular focus is on Civil Party PEN Sochan's very young age when she was forced to marry, and on her account of being raped by militiamen.[1962] The Trial Chamber accepted her account that after she had refused to consummate the marriage for two nights,

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[1952] See above at para. 676.
[1953] **E1/461.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 98 line 25 after [15.54.28] and p. 99 lines 4-5 before [15.56.06].
[1954] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 4 line 24 – p. 6 line 22 after [09.08.47].
[1955] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party OM Yoeurn), p. 5 lines 8-10 before [09.11.33].
[1956] **F54** Appeal Brief, para. 1307; see also para. 1169 fn. 2175.
[1957] See above at para. 199.
[1958] **E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), p. 98 lines 10-16 after [15.23.35]. See also **E465** Trial Judgment, paras 3583, 3605.
[1959] **E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), **E1/483.1** T., 13 October 2016 (Civil Party PEN Sochan).
[1960] **E465** Trial Judgment, paras 3356, 3583, 3605, 3615, 3618, 3620, 3635, 3641, 3646, 3648, 3652, 3679, 3682.
[1961] **F54** Appeal Brief, paras 1308, 1309.
[1962] *Ibid.*

militiamen tied her to up and stood watch while her husband raped her, an event which left Civil Party PEN Sochan bleeding for more than a month.[1963]

797. The Defence first makes a vague insinuation (in **ground 173**) that Civil Party PEN Sochan's account is not to be trusted because it was the subject of a film, and that the film-makers were interested in her because of her young age at the time of her forced marriage.[1964] The argument is unparticularised and baseless. The Lead Co-Lawyers can see no reason why this would call Civil Party PEN Sochan's credibility into question.

798. The Defence then argues that Civil Party PEN Sochan's case of rape was exceptional as it was against the moral principles advocated by the CPK (**ground 173**);[1965] and because "the young militiamen's behaviour" was guided by a "very archaic view of marriage" inconsistent with CPK policy (**ground 174**).[1966] The Defence offers no evidence to support its view that the behaviour or views of the militiamen were unusual or an aberration. It was equally open to the Trial Chamber to conclude – as corroborated by the testimony of Civil Parties MOM Vun and OM Yoeurn – that stated CPK policy and moral principles were not always followed in practice.[1967]

10.10 Civil Party PREAP Sokhoeurn

799. Civil Party PREAP Sokhoeurn worked in a cotton plantation in Kampong Cham during the DK period.[1968] She testified over the course of two days during the trial segment on the Regulation of Marriage.[1969] The Trial Chamber relied extensively on her evidence.[1970]

800. The Defence makes numerous attacks on Civil Party PREAP Sokhoeurn's evidence, in some places claiming she is not credible; in others distorting her evidence and seeking to rely on it as exculpatory. Earlier parts of this Brief have addressed some questions raised by the

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[1963] **E465** Trial Judgment, paras 3652, 3659. See **E1/482.1** T., 12 October 2016 (Civil Party PEN Sochan), p. 87 lines 22-25 after [14.39.32], p. 88 lines 12-19 after [14.41.30], p. 90 lines 2-23 after [15.05.01].
[1964] **F54** Appeal Brief, para. 1309.
[1965] **F54** Appeal Brief, paras 1308-1309. The Defence similarly argues that her forced marriage at a very young age was exceptional because it was contrary to the marriage regulations. See **F54** Appeal Brief, para. 1309.
[1966] **F54** Appeal Brief, para. 1368. As explained elsewhere in this Brief, Civil Party Pen Sochan did not describe the militiamen as "young", but in any event the relevance of their age is unclear: see at para. 642.
[1967] **E465** Trial Judgment para. 3548
[1968] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 80 line 22 – p. 81 line 2 after [14.19.40].
[1969] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn); **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn).
[1970] See for example **E465** Trial Judgment, paras 3217, 3589, 3622, 3629, 3634, 3639, 3648-3649, 3653, 3683.

Defence in connection with Civil Party PREAP Sokhoeurn's evidence.[1971] Here, the Lead Co-Lawyers respond to specific challenges to her credibility; her evidence on surveillance and the requirement to consummate the forced marriage; and her levels of suffering.

10.10.1 Arguments about "late report" of rape

801. The headline of the Defence attack on Civil Party PREAP Sokhoeurn's credibility (made in **ground 174**)[1972] is the argument that she was "very late" in speaking of being raped by her husband because she did not include it in her VIF.[1973] This outdated approach to dealing with victims of sexual violence is followed closely by a suggestion that the Civil Party was coached, claiming that she was "encouraged" and that it might have been in her interests "to lie or at least to exaggerate".[1974] These are grave allegations, and without substantiation. The Trial Chamber has already identified them as having "no basis".[1975] It is disappointing that they are repeated in this appeal.

802. As found by the Trial Chamber, and as explained at greater length above, there are numerous reasons why victims of sexual violence do not speak of their experiences.[1976] In addition to those general principles, Civil Party PREAP Sokhoeurn herself articulated that she was embarrassed and did not wish to share her personal issues.[1977] It was only when she was encouraged to share her story, so that it would be recorded as evidence, that she was able to speak about her rape.[1978]

803. The Trial Chamber assessed Civil Party PREAP Sokhoeurn's evidence and found it to be credible.[1979] The Defence merely repeats arguments which were unsuccessful at trial without demonstrating any error in the Trial Chamber's finding.

[1971] See above at 644, 651, 659, 697. In relation to the decision to hear her oral testimony, see above at paras 256-257.
[1972] **F54** Appeal Brief, paras 1341-1398.
[1973] **F54** Appeal Brief, para. 1314.
[1974] **F54** Appeal Brief, para. 1314. The claim that her evidence was not credible is repeated in the Appeal Brief at paras 1320, 1382 and 1387.
[1975] **E465** Trial Judgment, para. 3649.
[1976] **E465** Trial Judgment, para. 3649; see also above at para. 651.
[1977] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), p. 57 lines 19-25 after [11.27.57].
[1978] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), p. 58 lines 17-20 after [11.29.44].
[1979] **E465** Trial Judgment, paras 3649, 3653, 3659.

10.10.2 Misrepresentation of Civil Party PREAP Sokhoeurn's evidence regarding surveillance and forced consummation of marriage

804. The Defence also makes several arguments (mostly in **ground 174**) which distort Civil Party PREAP Sokhoeurn's evidence about forced sexual intercourse, in an attempt to suggest that she and her husband were not coerced into having sex.

805. First, the Defence misrepresents Civil Party PREAP Sokhoeurn's evidence regarding surveillance. It claims that her evidence refutes the finding that surveillance was specifically used to monitor consummation, citing her as saying that "during the regime, […] we were under constant surveillance".[1980] However that quote related to an entirely different subject.[1981] It may have been confused in error with Civil Party PREAP Sokhoeurn's testimony about her wedding night. The couples were made to stay in a long building, partitioned into separate rooms.[1982] When asked: "Were you instructed to consummate your marriage or were you under surveillance?" she replied that "we were <constantly> under surveillance, <they looked inside> the window, <they stood> outside and we were told to stay together and consummate our marriage. They conducted surveillance the whole night."[1983]

806. The Defence also criticizes the Trial Chamber's reliance on Civil Party PREAP Sokhoeurn's account about the events which preceded her first rape.[1984] She explained that after an initial period of "evad[ing]" her husband so that she would not have to have sexual intercourse, she was taken to meet her husband at a place where palm sugar was made.[1985] She said that there was:

> <an old couple there who made the palm sugar,>" and they said that comrade, <in this period,> after the marriage, you <had> to have sexual intercourse;

[1980] **F54** Appeal Brief, para. 1345 and fn. 2546 referring to **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn) p. 10 lines 2-6 before [09.23.08].
[1981] Civil Party PREAP Sokhoeurn was asked about a couple who were taken away and disappeared after the woman refused to consummate a forced marriage. She said it was hard to know what had happened because "during the regime, we could not speak to each other in details, as we were under constant surveillance". See **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn) p. 10 lines 2-6 before [09.23.08], p. 9 lines 14-20 after [09.21.45].
[1982] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 85 lines 8-14 after [14.29.27].
[1983] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 85 lines 16-21 after [14.31.22].
[1984] **F54** Appeal Brief, para. 1387.
[1985] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 87 lines 1-19 after [14.35.06].

> otherwise, you would be killed <if you opposed Angkar>. They repeatedly said that to me.[1986]

807. The Defence selectively refers to the Civil Party's subsequent testimony that afterwards the old woman "chit-chatted" with her as if to suggest that the conversation was immaterial.[1987] And while recognising that Civil Party PREAP Sokhoeurn asked the old lady "not to <> leave me alone <there because I could not sleep there alone>",[1988] the Defence ignores the context which made it clear why that request was made. She goes on immediately to speak of her husband's arrival and the first time he raped her, later that night.[1989]

808. The Defence also claims that Civil Party PREAP Sokhoeurn considered her husband to have acted voluntarily when he raped her, and that "[s]he did not testify to any outside threats or instruction to do so".[1990] This ignores Civil Party PREAP Sokhoeurn's testimony that after he raped her, her husband explained that he had done so "<…according to Angkar's order so that we would not die.>"[1991]

809. Perhaps most implausibly of all, the Defence attributes to Civil Party PREAP Sokhoeurn the view that couples who were forced to marry "got along well and lived together in harmony."[1992] The Civil Party's testimony is more nuanced than this:

> [M]any of them got along well with each other because they thought that they were arranged by Angkar, <they obeyed the Angkar's instruction,> so <many of them got along>. And they lived together well, but there were minority cases who did not get along well, and <> the Angkar found out about this.[1993]

She went on to speak of those who were "monitored and taken away to be killed by *Angkar*."[1994] The Civil Party's evidence more accurately demonstrates that people obeyed

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[1986] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 87 lines 20-24 before [14.37.33].
[1987] **F54** Appeal Brief, para. 1387.
[1988] **F54** Appeal Brief, para. 1387; **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 88 lines 3-4 before [14.37.33].
[1989] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 88 line 7 – p. 89 line 2 after [14.37.33].
[1990] **F54** Appeal Brief, para. 1372. The Defence refers to **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), pp. 88-89 around [14.38.09] and **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), pp. 54-55 before [11.23.27], pp. 75-76 after [13.51.22].
[1991] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), p. 75 lines 18-22 after [13.51.50]. See also **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 103 line 23 – p. 104 line 11 after [15.30.23].
[1992] **F54** Appeal Brief, para. 1387. See also para. 1165 fn. 2164.
[1993] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), p. 15 line 23 – p. 16 line 3 after [09.35.05]. The Lead Co-Lawyers note that reference to the Khmer and French transcripts suggest that a phrase is missing from the English, which refers to Angkar having "proposed to them to make a family".
[1994] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn) p. 16 line 10 before [09.37.05].

the will of *Angkar*, and confirmed the fearful circumstances including that people were monitored and taken away to be killed if they disobeyed.

810. In another misrepresentation (this time in **ground 166**),[1995] the Defence claims that Civil Party PREAP Sokhoeurn did not perceive the "recommendations" given at her wedding to represent CPK policy.[1996] In fact, regarding what was said at her wedding she testified that "we were required to… produce children for the Party."[1997] She gave no evidence that she did not perceive this as CPK policy. The citation given by the Defence relates to an answer she gave when asked why newlyweds were kept apart: "I do not know the policy of the Party."[1998]

811. Each of these attempts to suggest that Civil Party PREAP Sokhoeurn did not speak about coercion from the *Angkar* to consummate, or even that she refuted the idea, are unconvincing. No error by the Trial Chamber has been demonstrated.

10.10.3 Wrongful contention that Civil Party PREAP Sokhoeurn did not suffer

812. The Defence argues (in **ground 173**)[1999] that the Trial Chamber overlooked aspects of Civil Party PREAP Sokhoeurn's account, "casting doubt" on her levels of suffering.[2000] It claims that a "sentimental relationship" developed between Civil Party PREAP Sokhoeurn and her husband,[2001] but the transcript references given provide no support for this assertion.[2002]

813. In fact, Civil Party PREAP Sokhoeurn testified extensively about her pain and suffering. She wept and screamed after being raped by her husband.[2003] She was forcibly married to a person she did not like and did not want to have sexual intercourse with, and this hurt her "physically and mentally".[2004] She said,

> I hurt physically and morally. <First,> it was the pain that he inflicted upon me physically, and <second,> morally I was hurt <I did not intend to have a husband

[1995] **F54** Appeal Brief, paras 1211-1242.
[1996] **F54** Appeal Brief, para. 1229.
[1997] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 104 lines 22-23 after [15.32.17]. See also p. 105 lines 14-16 after [15.34.06].
[1998] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 116 lines 8-14 before [16.01.16].
[1999] **F54** Appeal Brief, paras 1301-1340.
[2000] **F54** Appeal Brief, paras 1315, 1328.
[2001] **F54** Appeal Brief, para. 1315.
[2002] See **F54** Appeal Brief, fn. 2492.
[2003] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 96 lines 14-22 after [15.12.50], p. 103 line 23 – p. 104 line 11 after [15.30.23].
[2004] **E1/488.1** T., 24 October 2016 (Civil Party PREAP Sokhoeurn), p. 80 lines 20-23 after [14.02.43].

> and wife relationship at all> and there was nothing I <could> do besides weeping and I regretted for what happened and that I betrayed my father's words. So all these things added together caused me a worried and I could not sleep and I could not eat and I became pale.[2005]

10.11 Civil Party SAY Naroeun

814. Civil Party SAY Naroeun testified during the impact hearings on the Regulation of Marriage,[2006] speaking about her experience of being forced to marry and have sexual intercourse with her husband. The Trial Chamber relied on Civil Party' SAY Naroeun's evidence on a number of issues.[2007] The Defence makes several challenges in this regard.

10.11.1 Civil Party SAY Naroeun's suffering

815. The Defence challenges Civil Party SAY Naroeun's evidence on suffering, arguing that the Trial Chamber wrongly failed to take into account that she did not emphasise suffering experienced as a result of the forced marriage or forced sexual intercourse in her final impact statement (**ground 163** and **ground 173**).[2008] As the Lead Co-Lawyers have pointed out elsewhere in this Brief, there is no basis for the suggestion that evidence should be weighted differently depending on which part of the Civil Party's testimony it is given in.[2009] However, the argument is particularly out of place in respect of Civil Party SAY Naroeun, given that she testified at an impact hearing. Therefore, in a sense, her entire testimony was an "impact statement". Moreover, when given the opportunity at the end of her hearing to put questions to the Accused, she asked a question specifically in relation to forced marriage.[2010] Oddly, in another part of its Appeal Brief, the Defence explicitly recognised that Civil Party SAY Naroeun had put this question, and noted that her testimony recalled her suffering.[2011]

816. In fact, Civil Party SAY Naroeun testified clearly about having suffered.[2012] She said that she did not love her husband and when forced to have sexual intercourse with him, she:

[2005] **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 96 line 24 – p. 97 line 5 after [15.12.50]. Earlier in her testimony she explained that: "I was committed not to allow any <man> to touch my body <as my father used to tell me that as a woman, I should not allow any man to touch my arms or legs." **E1/487.1** T., 20 October 2016 (Civil Party PREAP Sokhoeurn), p. 86 lines 17-19 before [14.35.06].
[2006] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun).
[2007] See for example **E465** Trial Judgment, paras 3556, 3615, 3633, 3635, 3639, 3641, 3646, 3663, 3679, 3684.
[2008] **F54** Appeal Brief, paras 1178, 1326.
[2009] See above at para. 199.
[2010] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 60 lines 6-8 before [11.36.22].
[2011] **F54** Appeal Brief, para. 1167 and fn. 2170.
[2012] See also above at paras 679, 697.

> …felt difficult in to breath in my heart because in my whole life, I never encountered such an incident. And as a Khmer woman, nothing is more important than our body. Although I was fearful and trembling, I thought to myself that I had to give my body to my husband in order to fulfil the requirement of Angkar. <It was so painful for me.>[2013]

She was forced to have sexual intercourse with her husband as she was afraid of the militiamen patrolling outside. She understood that she would be killed if she refused to consummate the marriage.[2014] Civil Party SAY Naroeun also suffered deeply because she was married without her parents knowing and having the opportunity to attend.[2015]

10.11.2 Misinterpretation of Civil Party SAY Naroeun's evidence regarding Khmer traditions

817. The Defence misuses Civil Party SAY Naroeun's evidence concerning why she did not divorce her husband in an attempt to suggest an error in the Trial Chamber's finding that relationships were controlled by the CPK and it was not possible to divorce (in **ground 166**).[2016] Civil Party SAY Naroeun explained that she remained in her forced marriage for the sake of her child, and that as a "Cambodian woman" she did not want a second husband.[2017] Using this statement, the Defence argues that divorce was frowned upon in Khmer culture before the DK.[2018] It is unclear to the Lead Co-Lawyers how this is relevant or shows any error by the Trial Chamber. The Trial Chamber made clear that the unavailability of divorce that it referred to was not a matter of social pressure or cultural beliefs; it was linked to a fear of direct punishment from the state, even the threat of death.[2019] The Trial Chamber was not unreasonable in treating this as distinct from questions of pre-existing Khmer values.

818. The Defence attempts a similar argument (in **ground 173**)[2020] concerning the consummation of traditional marriages. It claims that women's experiences of forced sexual intercourse within forced marriages under the DK were no different than in traditional Khmer

[2013] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 40 lines 7-12 after [10.48.09].
[2014] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 39 line 3 – p. 40 line 3 after [10.44.30], p. 49 lines 3-8 after [11.08.48].
[2015] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 37 line 12 – p. 38 line 1 after [10.41.03].
[2016] **F54** Appeal Brief, para. 1220 fn 2297; referring to **E465** Trial Judgment, para. 3669.
[2017] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 51 line 25 – p. 52 line 3 after [11.15.50].
[2018] **F54** Appeal Brief, para. 1220.
[2019] **E465** Trial Judgment, para. 3668.
[2020] **F54** Appeal Brief, paras 1301-1340.

marriages.[2021] The Lead Co-Lawyers have explained above in detail why this argument must be rejected.[2022] Here it notes only the misuse of Civil Party SAY Naroeun's evidence to this end. The Defence cites her as giving evidence in support of its comparison between marital rape under the DK and traditional practices.[2023] Her evidence did not support that view, and certainly not at the transcript references given. To the contrary, at one of the cited answers she stated that she had to submit to her husband "in order to fulfil the requirement of *Angkar*" and that "as a Khmer woman" it was very painful for her to have her body treated in that way.[2024]

10.11.3 Unfounded claim of exculpation

819. The Defence also attempts to make a strange use of Civil Party SAY Naroeun's testimony that *Angkar* instructed couples being forcibly married to love each other.[2025] The Defence argues that this is exculpatory material that the Trial Chamber should have considered (**ground 166**).[2026] The Lead Co-Lawyers see no basis on which this is exculpatory. Civil Party SAY Naroeun clearly understood this as a dehumanising affront: as she said in her question to the Accused, "why there was such law to force people to marry others whom they never knew, why was there such law because love came out of the feeling and not from such law."[2027]

10.12 Civil Party SOU Sotheavy

820. Civil Party SOU Sotheavy is a transgender woman.[2028] She testified over the course of two days during the Regulation of Marriage trial segment on many issues, including how she was forcibly married to a woman.[2029] The Trial Chamber relied on her evidence including on the impact of forced marriage on victims,[2030] and on the forced consummation of marriages.[2031]

[2021] **F54** Appeal Brief, para. 1321.
[2022] See at paras 654-663, 673. See also paras 556-560.
[2023] **F54** Appeal Brief, fn. 2503.
[2024] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 40 lines 7-12 after [10.48.09].
[2025] **F54** Appeal Brief, para. 1229 and fn. 2317.
[2026] **F54** Appeal Brief, paras 1211-1242, esp. 1229.
[2027] **E1/489.1** T., 25 October 2016 (Civil Party SAY Naroeun), p. 60 lines 6-8 before [11.36.22].
[2028] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 72 line 12 – p. 73 line 2 after [14.27.36].
[2029] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy); **E1/463.1** T., 24 August 2016 (Civil Party SOU Sotheavy).
[2030] **E465** Trial Judgment, paras 3679, 3682.
[2031] **E465** Trial Judgment, paras 3657, 3661.

821. The Defence challenges those findings in a number of respects. The Lead Co-Lawyers respond here to several problematic Defence's arguments concerning Civil Party SOU Sotheavy.[2032]

10.12.1 Representativeness of Civil Party SOU Sotheavy's evidence

822. The Defence argues that the Trial Chamber erred in relying on Civil Party SOU Sotheavy's testimony to support general findings about the impact of forced marriages (**ground 163** and **ground 174**).[2033] This is based on the circumstances in which her marriage was consummated,[2034] and the argument that as a transgender woman Civil Party SOU Sotheavy suffered differently.[2035]

823. Civil Party SOU Sotheavy explained that the village chief, who liked her and considered her as his relative, gave wine to her and that she and her wife decided to consummate the marriage so that they would not be killed.[2036] While this may have been unusual, it does not make her evidence unrepresentative on any material issue. Indeed, the account corroborates others regarding the fear of extreme punishment which forced newlyweds to have sexual intercourse despite their reluctance to do so.

824. It is correct that Civil Party SOU Sotheavy suffered differently in some ways, because of being transgender. She explained this herself: "Everybody knows what happened during the regime, but for me I suffered the most. I was looked down upon. I was forced to get married. I was sexually abused due to my transgender nature."[2037] She also spoke of the suffering of other transgender people, including that she heard of someone who drank poison rather than get married.[2038] The Defence has identified no authority to suggest that this heightened suffering of transgender people is irrelevant in assessing the crime of other inhumane acts. It is unclear why it would be: the particular nature of the suffering imposed by a mass crime

[2032] Other submissions concerning Civil Party SOU Sotheavy are found in Section 10.12 at paras 820-831.
[2033] **F54** Appeal Brief, paras 1156-1188, esp. 1170, 1341-1398, esp. 1390.
[2034] **F54** Appeal Brief, para. 1390.
[2035] **F54** Appeal Brief, paras 1390, 1170.
[2036] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 87 lines 7-12 before [15.26.42].
[2037] **E1/463.1** T., 24 August 2016 (Civil Party SOU Sotheavy), p. 70 lines 1-3 after [14.01.54].
[2038] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 96 lines 17-22 after [15.49.56]; **E1/463.1** T., 24 August 2016 (Civil Party SOU Sotheavy), p. 32 line 22 – p. 23 line 2 after [10.34.47].

will always vary somewhat as between its victims. The suffering of transgender people is no less valid and relevant than that of others.

825. In any event, it is also the case that Civil Party SOU Sotheavy suffered in ways that were common to non-transgender people. Like others, she had her dignity, privacy, and sexual autonomy violated; and she lived in the same climate of fear, threats, and violence. She testified that, after being forcibly married she was also forced to have sexual intercourse because she feared that she would be killed if she refused.[2039] She stated, "[s]o we were questioned on both sides and they warned if I did not consummate and if they find out, then we would be smashed."[2040] After being forcibly married, people crawled under her house to monitor her and her wife, making sure that they consummated the marriage.[2041] On the night she and her wife consummated the marriage after drinking wine, Civil Party SOU Sotheavy had told her wife "[i]f we do not consummate the marriage today then one day if they would find out and we would be killed and that we run out of lies."[2042] She said that her wife had replied, "we should do anything in order to survive."[2043]

826. The Trial Chamber was correct in relying on Civil Party SOU Sotheavy's evidence to make general findings about the impact of forced marriage, that forced marriage experiences have a long-lasting impact on the victims and that many of them are still haunted by the experience to this day.[2044] When asked whether it was possible to refuse the forced marriage, Civil Party SOU Sotheavy explained, "[w]e even did not dare to cough, we did not dare to talk because if we talked, we would be disappeared, so we had to accept but with expression of weeping, tears coming down."[2045] She testified that she will always remember the day she learned that she would be forcibly married even until the day she dies because it caused her the most pain.[2046]

[2039] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 87 lines 3-12 before [15.26.42].
[2040] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 87 lines 3-6 before [15.26.42].
[2041] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 86 lines 2-12 before [15.24.14].
[2042] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 87 lines 9-11 before [15.26.42].
[2043] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 87 lines 11-12 before [15.26.42].
[2044] **E465** Trial Judgment, paras 3679, 3682.
[2045] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 93 lines 13-15 before [15.42.57].
[2046] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 79 lines 13-19 after [15.05.50].

10.12.2 Arguments concerning forced sexual intercourse

827. In **ground 174**,[2047] the Defence attempts to argue an error in the Trial Chamber's findings that sexual intercourse was forced, based on a claim that this finding was only derived from the forced nature of the marriage itself.[2048] Civil Party SOU Sotheavy's evidence, amongst others, demonstrates how this is incorrect and misrepresents the Trial Chamber's conclusions.

828. The Trial Chamber described consent as impossible "in an environment where couples had not consented to enter into same marriage in the first place, *knew that consummation was required, compliance was monitored, and in case of noncompliance, forced*."[2049] [*emphasis added*]

829. Civil Party SOU Sotheavy avoided consummation for several weeks after the marriage.[2050] She was coerced by the knowledge that if she refused, she would be smashed.[2051] As the Trial Chamber found, she and her wife were called separately by the village chief and told that if they did not consummate the marriage, they would be smashed.[2052]

830. It is clear that, as the Trial Chamber found, factors outside the marriage itself compelled newlyweds to have sex. Civil Party SOU Sotheavy was compelled by the threat of extreme violence to consummate her forced marriage.

10.12.3 The experience of Civil Party SOU Sotheavy's wife

831. **Ground 173** contains a claim that the Trial Chamber erred by making findings regarding the suffering of Civil Party SOU Sotheavy's wife.[2053] The Lead Co-Lawyers have been unable to identify any finding to that effect from the Trial Chamber.[2054] It is equally unclear to the

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[2047] **F54** Appeal Brief, paras 1341-1398.
[2048] **F54** Appeal Brief, para. 1381. A similar argument, dismissing Civil Party SOU Sotheavy's experience of forced sexual intercourse is found in the Defence Response Brief in the OCP appeal (**F50/1** KHIEU Samphân Defence Response to the Prosecution's Appeal in Case 002/02, 23 September 2019, para. 46), which is relied on at **F54** Appeal Brief, fn. 2485.
[2049] **E465** Trial Judgment, para. 3661.
[2050] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 86 lines 17-18 after [15.24.14].
[2051] **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 83 line 25 – p. 84 line 4 after [15.17.35].
[2052] **E465** Trial Judgment, para. 3657 (referring to **E1/462.1** [Corrected 2] T., 23 August 2016 (Civil Party SOU Sotheavy), p. 87 lines 3-6 before [15.26.42]).
[2053] **F54** Appeal Brief, para. 1310.
[2054] The two paragraphs of the **E465** Trial Judgment (paras 3657 and 3659) which are referred to in **F54** Appeal Brief, at para. 1310 clearly refer to Civil Party SOU Sotheavy herself rather than of her wife, despite some possible confusion

Lead Co-Lawyers how, if the matter had arisen, it would be relevant for the Defence to highlight Civil Party's SOU Sotheavy's transgender identity in this context. This paragraph of the Defence Brief is inappropriate and unsubstantiated and should be dismissed.

10.13 Civil Party EM Oeun

832. Civil Party EM Oeun worked as a medic during the DK period. He testified over four days during Case 002/01.[2055] Of particular relevance to the present case was his testimony concerning statements made by KHIEU Samphân at a political training session he attended, and concerning his forced marriage.

10.13.1 Arguments about inconsistencies in Civil Party EM Oeun's evidence

833. In Case 002/01, in response to arguments from the Defence that Civil Party EM Oeun's evidence should not have been accepted by the Trial Chamber,[2056] this Chamber recognised that the testimony did contain some inconsistencies, and that "EM Oeun admitted to having trouble recalling the events in chronological order because of their traumatic nature and the 40-year passage of time, which he said affected and left gaps in his memory."[2057] However, it concluded that these had not been shown to have had any impact on the verdict.[2058]

834. The Defence now raises again the same generic points about inconsistencies in Civil Party EM Oeun's testimony, essentially claiming that his poor recall on non-material matters such as dates should have led the Trial Chamber to reject his evidence.[2059] The OCP has responded thoroughly on these general credibility complaints[2060] and the Lead Co-Lawyers agree with their submissions. The following submissions are therefore limited to addressing more

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caused by the use of male pronouns in paragraph 3657 and the phrase "these women" in paragraph 3659. Civil Party SOU Southeavy's wife is not discussed in her own right in this section. Elsewhere in **F54** Appeal Brief (para. 1381), the Defence appears to have understood **E465** Trial Judgment, para. 3659 as referring to Civil Party SOU Sotheavy, rather than to her wife.

[2055] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun); **E1/115.1** T., 27 August 2012 (Civil Party EM Oeun); **E1/116.1** T., 28 August 2012 (Civil Party EM Oeun); **E1/117.1 [**Corrected 4] T., 29 August 2012 (Civil Party EM Oeun).

[2056] **F17** Case 002/01 Mr KHIEU Samphân's Defence Appeal Brief against the Judgement in Case 002/01, 29 December 2014, paras 43 and 532.

[2057] **F36** Case 002/01 Appeal Judgment, para. 347.

[2058] **F36** Case 002/01 Appeal Judgment, para. 347.

[2059] **F54** Appeal Brief, paras 1757-1758. Those paragraphs are also cross-referenced to in paras 319, 1424, 1864, 2027 and para. 243 fn. 347.

[2060] **F54/1** OCP Response Brief, paras 141-142.

specific Defence attacks made on Civil Party EM Oeun's evidence in relation to forced marriage which are made in **ground 163**.

10.13.2 Challenges to Civil Party EM Oeun's evidence of forced marriage and suffering

835. In **ground 163**, the Defence brings its intemperate language to bear on Civil Party EM Oeun's evidence concerning his forced marriage.[2061] It relies on an unclear response that EM Oeun gave when asked about the date of his wedding and in which he refers to having chosen to marry on a particular day,[2062] claiming that it shows he was not forced to marry, and does not support the Trial Chamber's finding that great suffering resulted.[2063] Later it repeats its assertion that suffering detailed during the main portion of a Civil Party's testimony, no matter how unequivocally or forcefully, are to be disregarded if they are not repeated in the statement of harm at the end of the court appearance.[2064]

836. As set out elsewhere in this Brief, the latter claim has no basis in law or logic.[2065] It is particularly problematic in respect of Civil Party EM Oeun, given that his statement of harm was interrupted before he explained his sufferings, and he did not complete it.[2066]

837. However, the testimony which Civil Party EM Oeun gave on the first day of his evidence answers the Defence arguments. He detailed the process by which he was coerced into marriage, making it entirely clear that this was not voluntary, regardless of his comment about 'choosing':

> As a youth, I believe that we want our freedom to choose our own wife, and if you were forced to get married to someone whom you do not love, that was very painful. And at that time the situation was that pressing because they actually suppressed us to get married and they actually arranged that marriage for me, and I had to get married to someone whom I did not love at all. And at that hospital, at the base, I was given the responsibility to oversee the situation in the hospital and I was asked to get married to someone whom I did not love. And I protested, but then they punished me; they transfer me to work in the worksite instead of working in the hospital.[2067]

[2061] **F54** Appeal Brief, para. 1172.
[2062] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 107 lines 16-20 before [16.04.47].
[2063] **F54** Appeal Brief, para. 1172.
[2064] **F54** Appeal Brief, para. 1185.
[2065] See above at para. 199.
[2066] **E1/117.1 [**Corrected 4] T., 29 August 2012 (Civil Party EM Oeun), p. 30 lines 9-18 before [10.23.32].
[2067] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 104 lines 4-14 before [15.55.36].

When he was called back again he decided that he "had to get married. Otherwise, my life would be in serious risk."[2068]

838. From his testimony it was equally clear that the forced marriage had caused Civil Party EM Oeun immense suffering. He explained that "it was very difficult at the time. My wife did not love me either, so, whenever we stayed together at night, we cry to each other."[2069] At this point he began to cry. On resuming he explained:

> I could not hold my tears because, 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.[2070] 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.[2071]

839. He described the forced marriage as a "very heinous act" and said that "to date I cannot forget it".[2072] The Defence's claims that Civil Party EM Oeun did not suffer greatly can be given no credence in light of this evidence.

840. Finally, the Lead Co-Lawyers recognise that Civil Party EM Oeun's evidence was given in the context of proceedings in Case 002/01. As noted elsewhere in this Brief, there were certainly instances, even before the severance, in which counsel (particularly the OCP and Lead Co-Lawyers) were prevented from questioning on matters which subsequently came to fall within Case 002/02.[2073] In some such instances it will have been appropriate for the Trial Chamber to take into account that the Defence did not have an opportunity to question on the issue. That is not the case here. It is true that the President asked the Lead Co-Lawyer to

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[2068] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 104 lines 22-23 after [15.55.36].
[2069] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 105 lines 1-3 before [15.57.58].
[2070] The Lead Co-Lawyers note that in **ground 173** the Defence argues that Civil Party EM Oeun's evidence does not support a finding by the Trial Chamber that his wife suffered as a result of forced sexual intercourse (**F54** Appeal Brief, para. 1335). The Lead Co-Lawyers have been unable to identify any reliance by the Trial Chamber on Civil Party EM Oeun's evidence for that purpose, so it is unclear how this argument from the Defence could be relevant to the verdict. In any event, the Lead Co-Lawyers note that it clearly would have been open to the Trial Chamber to use this testimony from Civil Party EM Oeun concerning his understanding of his wife's suffering.
[2071] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 105 line 21 – p. 106 line 5 before [15.59.41].
[2072] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 106 lines 7-10 after [15.59.41].
[2073] See above, Section 8.3.3 at paras 242-248, esp. at para. 243.

move on to another subject.[2074] However, the Trial Chamber had allowed more than ten minutes of questioning on the subject by the Lead Co-Lawyer; and before the Defence intervention, not only had counsel for NUON Chea been able to question and challenge the Civil Party on aspects of that evidence, but the President had expressly directed Civil Party EM Oeun to answer the questions put to him.[2075] Moreover, counsel for KHIEU Samphân in fact did put questions concerning the marriage – at least as regards its date.[2076]

841. The Defence has therefore failed to demonstrate that the Trial Chamber erred in relying on Civil Party EM Oeun's evidence and those findings should not be disturbed.[2077]

11 ARGUMENTS RELATING TO SENTENCING

842. The Lead Co-Lawyers seek to respond to two Defence grounds concerning sentencing. These responses do not address the quantum of the sentence imposed by the Trial Chamber, but are limited to two narrow points raised by the Appeal Brief which explicitly relate to Civil Parties and directly affect their rights and interests.[2078]

843. First (in **ground 252**),[2079] the Defence contends that the Trial Chamber applied the wrong legal principles concerning the objective of sentencing. The Defence argues that the Trial Chamber overemphasized deterrence and the reassurance of victims and others concerning the upholding of the law,[2080] thereby making itself "a standard bearer for the civil parties."[2081]

844. Secondly (among the points raised within **ground 255**),[2082] the Defence argues that the Trial Chamber erred in assessing KHIEU Samphân's cooperation with the ECCC and acknowledgment of the suffering caused, *inter alia*, because it contradicted itself and therefore failed to correctly consider his attitude towards the Civil Parties and victims.[2083]

[2074] **E1/113.1** [Corrected 1] T., 23 August 2012 (Civil Party EM Oeun), p. 108 lines 3-8 before [16.06.27]. See reference to this in **F54** Appeal Brief, para. 1928 fn. 3751.
[2075] **E1/116.1** T., 28 August 2012 (Civil Party EM Oeun), p. 73 line 13 – p. 76 line 15 after [14.47.42].
[2076] **E1/116.1** T., 28 August 2012 (Civil Party EM Oeun), p. 84 line 1 – p. 86 line 12 after [15.32.37].
[2077] **E465** Trial Judgment, fns 12092, 12274.
[2078] The Appeal Brief raises five "grounds" of appeal in relation to sentencing, ultimately requesting that, in the event the Chamber does not overturn the guilty verdict, a new and lesser sentence be determined.
[2079] **F54** Appeal Brief, paras 2145-2148.
[2080] **F54** Appeal Brief, para. 2145.
[2081] **F54** Appeal Brief, para. 2146.
[2082] **F54** Appeal Brief, paras 2168-2177.
[2083] **F54** Appeal Brief, para. 2168-2170.

11.1 The standing of civil parties to respond on submissions concerning sentencing

845. This Chamber has twice ruled that civil parties may respond to a defence appeal brief so long as the response is limited to "grounds directly affecting Civil Parties' rights and interests" and does not duplicate submissions made by the OCP.[2084] Neither decision limited the scope of the civil parties' permitted response to a conviction, as opposed to a sentence. The Lead Co-Lawyers therefore consider that they are permitted to respond to submissions made on sentencing, so long as those submissions directly affect the Civil Parties' rights or interests, and are not redundant in light of the OCP Response Brief.[2085]

846. While Internal Rule 105(1)(c) precludes civil parties from appealing a sentence imposed by the Trial Chamber,[2086] the Internal Rules do not prohibit a response on issues related to sentencing. In this process, defence rights are protected by the Supreme Court Chamber's two limitations on the scope of civil parties' responses on appeal – *i.e.* that submissions made in such a response may only relate to matters directly affecting the rights and interests of civil parties; and that submissions must not be redundant in light of the Prosecution response. A preclusion of the right of civil parties to respond to sentencing issues directly affecting them would disrupt the balance of rights of the parties which is mandated by Internal Rule 21(1),[2087] as it would enable the Defence to directly challenge civil parties (in general, or even on an individual, personal level) without allowing them to be heard so as to defend their interests.

847. The Lead Co-Lawyers note that in 2009 the Trial Chamber, by majority, refused permission to Civil Party Lawyers in Case 001 to make closing arguments in relation to sentencing ("Case 001 Standing Decision").[2088] Since that time, lawyers representing civil parties have not sought to make submissions concerning sentencing. However, the Lead Co-Lawyers

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[2084] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, para. 17; **F52/1** Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal, 6 December 2019, para. 11. See above in Section 2.3 at para. 40.

[2085] See **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, paras 12-15.

[2086] Internal Rule 105(1)(c).

[2087] Internal Rule 21.

[2088] The Trial Chamber's decision was first issued orally, on 27 August 2009. See **Case 001 - E1/70.1** T., 27 August 2009, p. 42. Written reasons were issued on 9 October 2009. See **Case 001 - E72/3** Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009 ("Case 001 Standing Decision")

submit that there are good reasons to depart from that practice in the present appeal and to accept the minority view of Judge Lavergne in the Case 001 Standing Decision which gave a detailed explanation of why civil parties should be permitted to make submissions on sentencing.[2089] In any event, if the Chamber considers that the Trial Chamber majority's approach in the Case 001 Standing Decision was – and remains – correct, the Lead Co-Lawyers submit below that the circumstances of the current response are distinguishable from those which arose in respect of the Case 001 closing arguments.

11.1.1 The Case 001 Trial Chamber majority decision should not be upheld

848. By its Case 001 Standing Decision, the Trial Chamber majority held that Civil Party Lawyers could neither present closing arguments on sentencing, nor question testifying persons on the related issue of the accused's character.[2090] The majority considered that such matters do not fall within the role or function of civil parties before the ECCC.[2091] The Case 002/01 Trial Judgment repeated that position, although no submissions had been made on the subject in that case.[2092]

849. This issue has not been considered by the Supreme Court Chamber. An attempted immediate appeal from the Case 001 Standing Decision was ruled inadmissible by the Chamber,[2093] which noted that the decision could be appealed at the same time as an appeal against the judgment on the merits.[2094] However, no arguments in respect of this decision were made in appeal proceedings against the Case 001 Trial Judgment. Neither were they made in Case 002/01 appeal proceedings. As a result, this Chamber has never pronounced itself on the merits of the Trial Chamber majority's position or on the permissibility of civil party submissions on sentencing.

850. The position is also complicated by the fact that the ECCC's framework regulating civil party participation has developed significantly since the Case 001 Standing Decision in 2009. Most

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[2089] **Case 001 - E72/3** Case 001 Standing Decision, Dissenting Opinion of Judge Lavergne Judge of the Trial Chamber, 9 October 2009 ("Dissenting Opinion of Judge Lavergne in the Case 001 Standing Decision"), pp. 13-26.
[2090] **Case 001 - E72/3** Case 001 Standing Decision, paras 40, 48.
[2091] **Case 001 - E72/3** Case 001 Standing Decision, paras 40, 48.
[2092] **E313** Case 002/01 Trial Judgment, para. 1064.
[2093] **Case 001 - E169/1/2** Decision on the Appeals Filed by Lawyers for Civil Parties (Groups 2 and 3) against the Trial Chamber's Oral Decisions of 27 August 2009, 24 December 2009.
[2094] **Case 001 - E169/1/2** Decision on the Appeals Filed by Lawyers for Civil Parties (Groups 2 and 3) against the Trial Chamber's Oral Decisions of 27 August 2009, 24 December 2009, para. 12.

obviously, separate representation in trial proceedings by multiple Civil Party Lawyers is no longer permitted, with proceedings now streamlined through the use of Lead Co-Lawyers representing a consolidated group of all civil parties.[2095] Additionally, reparations may now be ordered based on external funding, rather than at the cost of a convicted person.[2096] The Trial Chamber may direct that details of civil party requests for such awards be made early in trial proceedings.[2097] Following these changes, the Trial Chamber directed that reparations projects funded from external sources could be implemented before a verdict.[2098] In the present case, a number of reparations projects began in 2015 or 2016[2099] – well before the end of the trial proceedings – with a number having even concluded before the end of trial hearings.[2100]

851. These developments are of some significance because the Trial Chamber majority's reasoning in its Case 001 Standing Decision was underpinned by its view on the relationship between reparations and civil party participation at trial.

852. The core of the majority's reasoning was related to the purpose of civil party participation set out in Internal Rule 23(1).[2101] The majority took the view that seeking reparations is the principal interest of civil parties.[2102] Civil parties' interest in a conviction, and the possibility for them to participate in securing such a conviction, was said to be secondary to, and indeed derived from, that principal interest in reparations:

> [T]he interests of Civil Parties are *principally* the pursuit of reparations. The Civil Parties *accordingly* have an interest in the Trial Chamber determining the elements of the crime *which, if proved, form the basis for their civil claims*. *For this reason* they are entitled to support the prosecution in establishing the

[2095] Especially Internal Rules 12*ter* and 23*ter*, adopted on 9 February 2010. See also Internal Rule 23(3), adopted on 9 February 2010 originally as Internal Rule 23(5) (in Internal Rules (Rev.5)) and amended to Internal Rule 23(3) on 17 September 2010.
[2096] Internal Rule 23*quinquies*(3), amended on 17 September 2010.
[2097] Internal Rule 80 *bis* (4), amended on 17 September 2010.
[2098] **E218/7** Trial Chamber Memorandum entitled "Indication of priority projects for implementation as reparation (Internal Rule 80*bis*(4)", 4 December 2012; **E465** Trial Judgment, para. 4418.
[2099] See for example **E465** Trial Judgment, paras 4422, 4424, 4425, 4426, 4427, 4428, 4430, 4431.
[2100] See for example **E465** Trial Judgment, paras 4426, 4427, 4428, 4431.
[2101] See Internal Rule 23(1).
[2102] **Case 001 - E72/3** Case 001 Standing Decision, para. 33.

> criminality of the actions of the accused which affect them and which *create the foundation for a claim for reparations*.[2103]

Essentially then, the civil party role was framed by the majority as limited to (1) seeking reparations, and (2) participating in support of the prosecution *on matters linked or leading to a reparations claim*.

853. The majority contrasted the roles of civil parties with the functions of the OCP to represent the community and the public interest, including by pursuing punishment and deterrence.[2104] Thus the majority sought to create a tidy bifurcation between the objectives of the OCP and civil parties: the former seeking a conviction only in order to impose sentence; the latter seeking a conviction only in order to gain reparations. Accordingly, civil parties were excluded from submissions on sentencing as a matter falling exclusively within the purview and role of the OCP, as guardians of the public interest.

854. There are a number of flaws in this reasoning, which, as Judge Lavergne's dissent makes clear, were already evident at the time of the majority's decision. As elaborated in the following paragraphs, the principles he articulated have only been strengthened over time, through the above-referenced development of the Internal Rules. For a number of reasons, therefore, the Lead Co-Lawyers ask the Chamber to depart from the Trial Chamber majority's position in the Case 001 Standing Decision.

855. First, no provision of the Internal Rules (or the Court's other texts) expressly precludes civil parties from making submissions on sentencing.[2105] As Judge Lavergne explained in his dissent, the civil parties are parties to the proceedings and "unless the Rules explicitly exclude Civil Parties from participating or explicitly restrict their rights, logically, it must be assumed

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[2103] **Case 001 - E72/3** Case 001 Standing Decision, para. 33. See also para. 11 ("*[i]n order to pursue reparation claims*, the Civil Parties have the right to participate in proceedings against those responsible for crimes within the jurisdiction of the ECCC, by supporting the Prosecution.") [*emphasis added*].

[2104] **Case 001 - E72/3** Case 001 Standing Decision, para. 22.

[2105] While Internal Rule 105(1) makes clear that civil parties are not permitted to initiate an appeal in respect of sentencing, this is also the case in respect of conviction. It has never been held (or suggested) that Internal Rule 105(1) prevents civil parties from making *submissions* on the guilt or innocence of the accused, or from responding to an appeal on this subject initiated by another party.

that Civil Parties have the same rights and obligations as all the other parties."[2106] The same principle has since been stated in another context by this Chamber.[2107]

856. Secondly, the Trial Chamber majority misinterpreted Internal Rule 23(1) when it read paragraph (a) ("participat[ion]… by supporting the prosecution") as *limited by* paragraph (b) ("seek[ing] collective and moral reparations…").[2108] This is contrary to the plain meaning of the provision, which links the two paragraphs only with an "and", indicating that the roles are cumulative. Decisions issued since make clear that the two purposes in Internal Rule 23(1) exist separately and additionally to each other. This Chamber has stated that the role of the civil parties "is to 'support the prosecution' *and* seek reparations" [*emphasis added*].[2109] The purpose is not, as the Trial Chamber majority framed it, to support the prosecution (only) *in order* to seek reparations. Even the Trial Chamber more recently (in 2015) ruled in respect of Internal Rule 23(1)'s two purposes that "the IRs do not establish a hierarchy between these purposes such that one purpose is primary and the other subsidiary."[2110]

857. The fact that the two purposes of civil party participation stand independently of each other is made clearer still by the approach to reparations introduced through Internal Rule 23*quinquies*(3).[2111] As noted above, in the present case, this enabled reparations projects to be implemented *before* verdict; indeed before the conclusion of trial proceedings. This highlights that civil party participation in not undertaken solely for the purpose of securing reparations. Much of the active Civil Party participation in the present case occurred after reparations projects were already being implemented, or in some cases after they had even been completed.

858. The reality is that civil party participation in support of the prosecution is not directed solely and simplistically at securing reparations. It is also an avenue for civil parties to have their

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[2106] **Case 001 - E72/3** Dissenting Opinion of Judge Lavergne in the Case 001 Standing Decision, para. 13.
[2107] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, para. 14.
[2108] **Case 001 - E72/3** Case 001 Standing Decision, paras 32-33.
[2109] **F36** Case 002/01 Appeal Judgment, para. 311. See also **Case 001 - F28** Appeal Judgment, para. 489, referring to the "role played by a civil party in support of both the civil claim and the prosecution", which also does not suggest an approach limiting the Civil Parties' role in the prosecution to that which facilitates a civil claim.
[2110] **E365/2** Decision on Civil Party Lead Co-Lawyers' Request for Clarification on the Scope of In-Court Examination of Civil Parties, 20 November 2015, para. 5.
[2111] Internal Rule 23*quinquies*(3).

voices heard in order to pursue their rights to truth and justice,[2112] and a means by which to achieve one of the ECCC's core goals, national reconciliation.[2113] As Judge Lavergne recognised, reconciliation is achieved in part through punishment and measures taken to prevent the recurrence of crimes.[2114] It is also affected by the "the notion of forgiveness"[2115] which will be influenced by punishment, as well as the other factors underpinning it such as the character of the accused, the motivations for his conduct, his attitudes towards the victims of the crimes and his levels of remorse.[2116] The role that civil parties play in contributing to national reconciliation through their participation in ECCC proceedings[2117] implies that they may be heard on these subjects which are inextricably linked to reconciliation, including sentencing.

859. In this respect it is also relevant to note that a number of Civil Parties who testified before the Trial Chamber expressly articulated outcomes they desired from the Court's work other than reparations in the narrow sense. These included a desire to have the truth about the DK period uncovered and made known;[2118] a hope that the process would contribute to deterrence

[2112] **C22/I/69** Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, 29 August 2008, para. 8.
[2113] **D404/2/4** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, para. 65.
[2114] **Case 001 - E72/3** Dissenting Opinion of Judge Lavergne in the Case 001 Standing Decision, paras 28, 31.
[2115] **Case 001 - E72/3** Dissenting Opinion of Judge Lavergne in the Case 001 Standing Decision, para. 31.
[2116] **Case 001 - E72/3** Dissenting Opinion of Judge Lavergne in the Case 001 Standing Decision, paras 29, 31.
[2117] **D404/2/4** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, para. 65.
[2118] See for example **E1/483.1** T., 13 October 2016 (Civil Party PEN Sochan), p. 68 line 3 after [11.58.22] ("I want the younger generation to know what was going on"); **E1/308.1** [Corrected 1] T., 2 June 2015 (Civil Party SEANG Sovida), p. 87 lines 14-21 after [14.30.10] ("And I would like to them to answer in details about the reasoning behind this so that the young Cambodians and the next generation will understand their motive and this will also enlighten the people as it brings out the truth. And it will also be the truth <and justice delivered to> the victims including my parents and siblings and relatives who died during the regime. <Otherwise, the trials against them would be useless.> I would like them to tell us the truth and not anymore lies."); see also **E3/5238** Written Record of Interview (Civil Party EAR Sophal), 13 January 2009, ERN (En) 00270670 ("It is an opportunity to record a bit of my own history and my family's history and to make sure that there is no forgetting of the past."). The Civil Parties' interest in having the truth uncovered and documented is demonstrated by the questions asked to the Accused during trial. For a compilation of these see **E457/6/2.2.7** Civil Party Lead Co-Lawyers' Amended Closing Brief in Case 002/02, Amended Annex E: Questions to the Accused, 2 October 2017.

and the non-repetition of the crimes;[2119] a wish to see the responsible persons punished;[2120] and a broadly expressed interest in seeing "justice" done by the Court.[2121]

860. Thirdly, it does not follow from the OCP's function in respect of sentencing that civil parties are excluded from making submissions on this issue. While it is certainly true that the OCP and civil parties have different interests and roles in the proceedings,[2122] this does not imply that there are no areas of overlap – areas where both civil parties and the wider public (represented by the OCP) *share* an interest and a role in the proceedings. Even the Trial Chamber majority in the Case 001 Standing Decision implicitly accepted that both may make submissions on matters relevant to the guilt of the accused.[2123] Indeed, Internal Rule 23(1)(a) recognises as a Civil Party role supporting the prosecution, and does so without limiting this support to only some parts of the prosecution's functions. Considering that the civil parties are part of the community whose interests the OCP advances, it is unsurprising that they may play a supporting role in all of the prosecution's functions. It is therefore unclear why the OCP's role in sentencing would preclude a role for civil parties on this issue. This Chamber's approach has been to recognise that equality of arms is not threatened where the civil parties address areas also dealt with by the OCP, so long as civil party submissions "avoid repetitiveness and overlap" with submissions made by the OCP.[2124]

[2119] See for example **E1/262.1** [Corrected1] T., 12 February 2015 (Civil Party RY Pov), p. 74 line 25 – p. 75 line 1 after [14.24.34] ("So I <> ask the United Nations and the Khmer Rouge tribunal to help prevent the recurrence of the atrocity."); **E1/488.1** T., 24 October 2016 (Civil Party KUL Nem), p. 116 lines 19-25 before [15.43.12] ("And I would like to request the Court to make sure that the later generation will not face the same kind of fate like mine…. My life was miserable since I was born until now and that's why I would like to request the Court to make sure that our later generation will not face the kind of misery").

[2120] See for example **E1/340.1** [Corrected 2] T., 2 September 2015 (Civil Party MEAN Loeuy), p. 73 line 24 – p. 74 line 1 after [14.30.03] ("I have a request and a proposal through Mr. President. I ask the Chamber to sentence the Accused to life <imprisonment>, and place them in the dark prison."); **E1/288.1** [Corrected 1] T., 3 April 2015 (Civil Party IM Vannak), p. 66 lines 11-13 after [14.07.24] ("I would like justice to be <delivered> and I would like the perpetrators of these crimes to be sentenced - - to be sentenced for life.").

[2121] See for example **E1/287.1** [Corrected 1] T., 2 April 2015 (Civil Party THANN Thim), p. 37 lines 2-5 before [11.10.36] ("My request is for the Judges and the officials of the Court to find me justice. …the important thing is for the Bench to find me justice"); **E1/252.1** [Corrected 2] T., 22 January 2015 (Civil Party OUM Sophany), p. 37 lines 17-19 before [10.35.10] ("In the end, Your Honour, I believe this Court will try its best to find justice for the victims, and to find who are the offenders and the accomplices to those acts.").

[2122] See **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, para. 11.

[2123] **Case 001 - E72/3** Case 001 Standing Decision, paras 33 and 34.

[2124] **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, para. 17.

861. Fourthly, as Judge Lavergne identified, distinguishing between matters relating to criminal responsibility and matters relating to sentencing is an impossible exercise and civil parties have routinely been permitted to provide evidence and undertake questioning on matters which are relevant to sentencing.[2125] This includes not only the character of the accused, but the impact of the crimes on victims, including civil parties. In some instances, the level of suffering inflicted on victims is an element of the crime in question.[2126] But in others (for example in respect of grave breaches, genocide and the crimes of murder, extermination, deportation, enslavement and imprisonment) it is not. There, testimony given or elicited by civil parties regarding victim impact is *only* relevant to sentencing. Having been permitted to put such material before the Court, civil parties should also be able to make submissions on it.

862. Finally, if there is any uncertainty on this issue (which the Lead Co-Lawyers consider there is not), guidance from Cambodian law and international practice strongly supports the view that civil parties should be permitted to make submissions on sentencing. The Cambodian Code of Criminal Procedure does not exclude sentencing from the broad standing of civil parties to make oral and written submissions.[2127] Participating victims are permitted to make submissions on sentencing at the ICC,[2128] the STL,[2129] the KSC,[2130] and the EAC.[2131] While this Chamber has previously highlighted the differences between the victim participation systems at the ICC and ECCC, it did so by noting that at the ECCC, civil parties are granted *more* participatory rights, as full parties to the proceedings, than are granted to participating victims at the ICC.[2132] It would therefore be surprising if the ECCC were the only

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[2125] **Case 001 - E72/3** Dissenting Opinion of Judge Lavergne in the Case 001 Standing Decision, paras 27, 35.
[2126] This is the case, for example, in respect of the crimes against humanity of persecution and other inhumane acts.
[2127] Code of Criminal Procedure of Cambodia, Articles 334 and 335. See also **Case 001 - E72/3** Dissenting Opinion of Judge Lavergne in the Case 001 Standing Decision, para. 32.
[2128] See most recently in *Prosecutor v Bosco Ntaganda*. At first instance, ICC *Prosecutor v Bosco Ntaganda*, Order on the sentencing procedure, ICC-01/04-02/06-2360, 8 July 2019, paras 2, 3; and on appeal, ICC *Prosecutor v Bosco Ntaganda*, Decision on Victim Participation, ICC-01/04-02/06-2471, 13 February 2020, para. 5.
[2129] STL Rules of Procedure and Evidence, (Rev.10), 10 April 2019, Rule 87(C); STL *Prosecutor v Ayyash et al.*, STL-11-01/S/TC, Decision allowing the participating victims to participate in the sentencing proceedings and extending the time for the Ayyash Defence to file submissions, 7 September 2020, paras 6-7; see also STL *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, Judgment, 18 August 2020, para. 907.
[2130] KSC Rules of Procedure and Evidence before the Kosovo Specialist Chambers, (Rev.2), 5 May 2020, Rule 162(2).
[2131] EAC *Le Procureur Général c. Hissein Habré*, Arrêt, 27 April 2017, para. 552-553.
[2132] **Case 001** – **F28** Appeal Judgment, paras 478-479; **F10/2** Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01, 26 December 2014, para. 16.

internationalised court or tribunal with victim participation to deny them the possibility to be heard on sentencing.

863. For all of these reasons the Lead Co-Lawyers respectfully submit that the majority of the Trial Chamber in the Case 001 Standing Decision erred in precluding the civil parties from being heard on sentencing. That ruling should not prevent the Lead Co-Lawyers from responding to the Defence appeal grounds concerning sentencing.

11.1.2 The circumstances differ from those before the Trial Chamber in Case 001

864. In any event, even if the Chamber considers that the Trial Chamber majority in the Case 001 Standing Decision was correct, the current circumstances differ because the Chamber has before it specific Defence submissions relating to sentencing which directly and unambiguously concern Civil Party interests.

865. The Lead Co-Lawyers do not seek to respond to all submissions on sentencing. Some are not of specific concern to Civil Parties and have been adequately answered by the OCP. However in **ground 252** and **ground 255** the Defence has made incorrect legal arguments and/or mis-stated facts in a way which adversely affects Civil Party interests,[2133] meaning that the Civil Parties should be heard in response.[2134] This is different from a situation in which civil parties initiate submissions on sentencing on subjects of their own choosing. The Lead Co-Lawyers submit that it falls squarely within the scope of the Lead Co-Lawyers' permitted response pursuant to this Chamber's decision.[2135]

11.2 Submissions concerning sentencing

866. The standard of review on appeal regarding questions of sentencing is well established. In order to succeed on appeal an appellant must demonstrate that the Trial Chamber "committed a discernible error in exercising its discretion or has failed to follow the applicable law."[2136]

[2133] **F54** Appeal Brief, paras 2146, 2169-2170.
[2134] **F52/1** Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal, 6 December 2019, paras 11-12.
[2135] **F52/1** Decision on Requests Concerning the Civil Party Lead Co-Lawyers Response to KHIEU Samphân Appeal, 6 December 2019.
[2136] ICTY *Prosecutor v Milošević,* IT-98-29/1, Judgement, 12 November 2009, para. 297; cited with approval in **Case 001** – **F28** Appeal Judgment, para. 354, and **F36** Case 002/01 Appeal Judgment, para. 1107 ("It is for the appellant to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or

The arguments made by the Defence in **ground 252** and **ground 255**[2137] do not meet that standard.

11.2.1 Principles relating to the purpose of sentencing

867. In paragraph 4348 of its Judgment, the Trial Chamber set out the purposes of sentencing:

> In reducing crimes of considerable enormity and scope to an individualised sentence, the Chamber seeks to reassure the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced, and applies to all regardless of status or rank. Sentencing further serves the purposes of deterrence, both to the accused and more generally, and punishment, though not revenge. The sentence must be proportionate and individualised in order to reflect the culpability of the accused based on an objective, reasoned and measured analysis of the accused's conduct and its consequential harm. These principles are also recognised and applicable in Cambodian law.[2138]

This summary is a verbatim adoption of the position taken in the Case 002/01 Trial Judgment,[2139] that position itself being a close reflection of words used by the Trial Chamber in the Case 001 Judgment.[2140]

868. In **ground 252** the Defence addresses paragraph 4348, arguing that the Trial Chamber erred because it gave undue weight to "reassure[ing] the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced."[2141] This argument repeats a complaint made in the Defence's Case 002/01 Appeal Brief.[2142] As was also the case in the Case 002/01 appeal, the argument is confusing and poorly substantiated.

869. The Lead Co-Lawyers agree with the OCP that the Defence has failed to demonstrate any error.[2143] However, the Lead Co-Lawyers respond with limited submissions addressing the Civil Parties' specific interests on this issue.

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that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.").

[2137] **F54** Appeal Brief, paras 2145-2148, 2168-2183.

[2138] **E465** Trial Judgment, para. 4348.

[2139] **E313** Case 002/01 Trial Judgment, para. 1067.

[2140] **Case 001** – **E188** Trial Judgment, paras 579-580.

[2141] **F54** Appeal Brief, para. 2146; **E465** Trial Judgment, para. 4348.

[2142] **F17** Mr KHIEU Samphân's Defence Appeal Brief against the Judgement in Case 002/01, 29 December 2014, paras 647-648.

[2143] **F54/1** OCP Response Brief, paras 1285-1287.

870. The Lead Co-Lawyers understand the Defence to be saying that the Chamber erred because it gave undue weight to "reassure[ing] the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced."[2144] According to the Defence, the Trial Chamber thereby neglected the Accused, "the central figure of the trial", and "set itself up as a standard bearer for the civil parties."[2145] As it did elsewhere in the Appeal Brief, the Defence claims that this demonstrates bias on the part of the Trial Chamber.[2146]

871. It is important that this suggestion be refuted in strong terms. The Trial Chamber's statement of the purpose of sentencing not only assiduously follows the established law of this Court and the caselaw of the ICTY Appeals Chamber,[2147] it also reflects the objectives and procedural law of the ECCC.

872. Reassuring victims, including the Civil Parties, and the public that justice has been served through the fair imposition of a sentence following a conviction is essential to achieving the ECCC's fundamental objectives. The Court was established in recognition that accountability for international crimes "is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State."[2148] In reference to these principles, the Agreement establishing the ECCC refers to the "pursuit of justice and national reconciliation, stability, peace and security."[2149] However, reconciliation will be elusive if justice has not been seen to be done, including through appropriate sentencing.[2150] As Justice Winter explained in the context of Sierra Leone:

> The necessity of credible justice for reconciliation and peace has been the *raison d'etre* of this Special Court [for Sierra Leone] since its conception. The belief of the victims that justice in whatever form (*e.g.*, retributive, restorative, etc.) has been done or will be done is of paramount importance to the credibility of justice.

[2144] **E465** Trial Judgment, para. 4348, see para. 867 above.
[2145] **F54** Appeal Brief, para. 2146.
[2146] **F54** Appeal Brief, para. 2146. Regarding the Defence arguments about bias see Section 5 at paras 80-87.
[2147] See **E465** Trial Judgment, para. 4348 and the cases cited therein.
[2148] General Assembly Resolution. A/RES/57/228, Khmer Rouge trials, 27 February 2003 (77th plenary meeting of 18 December 2002), preamble, para. 3.
[2149] ECCC Agreement, second preambular paragraph.
[2150] On reconciliation as an objective of sentencing, see ICC *Prosecutor v Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para. 11; ICC *Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 67.

> This forms the foundation for the social trust upon which reconciliation can be built.[2151]

873. It is also artificial to suggest that retribution and deterrence can be separated from any public reassurance about those concepts to victims and the community. Retribution can only be effective if it is made known to those affected. As judges of the ICC have explained, retribution or punishment is "the *expression* of society's condemnation of the criminal act and of the person who committed it, which is also a way of *acknowledging* the harm and suffering caused to the victims" [*emphasis added*].[2152] These objectives are of particular importance to the victims of the crimes in question, as made clear by the statements of suffering given by Civil Parties.[2153]

874. Finally, it is emphatically neither a legal error, nor an indicator of bias, for the Trial Chamber to have considered the Civil Parties' interests as well as the position of the Accused. To the contrary, this is demanded by Internal Rule 21 which requires the Court to safeguard the interests of all parties, including civil parties, and preserve a balance between their respective rights.[2154]

875. Far from having erred by considering the objective of reassuring victims and the community about the fair and equal application of the law, the Trial Chamber was required to do so.

11.2.2 KHIEU Samphân's conduct and attitude towards the Civil Parties

876. In **ground 255** the Defence argues, amongst other things, that KHIEU Samphân's sentence should have been mitigated because of "cooperation with the ECCC."[2155] This argument covers two separate (although somewhat related) grounds of mitigation which have been recognised in international practice and by this Chamber. Mitigation for *cooperation* arises where a convicted person has provided "substantial cooperation with the Prosecution", through conduct such as "clarifying areas of investigative doubt, including crimes previously

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[2151] SCSL *Prosecutor v Fofana et al.*,SCSL-040140A0829, Judgment, Partially Dissenting Opinion of Justice Renate Winter, 28 May 2008, para. 94.
[2152] ICC *Prosecutor v Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, para. 38. See also ICC *Prosecutor v Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para. 11; ICC *Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 67; ICC *Prosecutor v Ntaganda*, Sentencing Judgment, ICC-01/04-02/06-2442, 7 November 2019, para. 10.
[2153] See examples given above in fns 2119 and 2120.
[2154] Internal Rule 21.
[2155] **F54** Appeal Brief, paras 2168-2183.

unknown to the prosecutor; admitting facts; helping organise operations which led to the arrest of other suspects; and agreeing to testify as a witness in other proceedings."[2156] A separate ground of mitigation exists in relation to *remorse or sympathy*.

877. The Lead Co-Lawyers agree with the OCP's response,[2157] and provide the following submissions specifically concerning remorse and KHIEU Samphân's conduct towards the victims and Civil Parties. On this issue, the Defence appears to argue that KHIEU Samphân's sentence should be mitigated because he answered Civil Party questions in his final statement, which included references to the suffering experienced by Civil Parties.[2158]

878. Caselaw of the ICTY, which appears to have been endorsed by the Trial Chamber in Case 002/01,[2159] distinguishes between mitigation for *remorse* and mitigation for expressions of *sympathy*. It is not unknown for an accused person to express regret without admitting participation in a crime. "In such circumstances, remorse nonetheless requires acceptance of some measures of moral blameworthiness for personal wrongdoing, falling short of the admission of criminal responsibility or guilt."[2160] It is recognised, however, that a separate basis for mitigation might arise where an accused makes sincere expressions of "sympathy, compassion or sorrow."[2161]

879. In the present case, KHIEU Samphân has shown neither remorse nor sympathy. The Defence points only to KHIEU Samphân's statement at the end of the trial as purportedly reflecting both his attitude to Civil Party suffering, and his response to Civil Party questions posed during trial.

880. It is true that in his statement, KHIEU Samphân made two or three brief references to the fact that he knew that people had suffered.[2162] However, he gave no acknowledgment of the extreme scale or intensity of the suffering endured. To the contrary, KHIEU Samphân would only go so far as to acknowledge that "life was hard in the cooperatives",[2163] a telling

[2156] **Case 001** –**F28** Appeal Judgment, para. 366.
[2157] **F54/1** OCP Response Brief, para. 1300.
[2158] **F54** Appeal Brief, paras 2169-2170.
[2159] **E313** Case 002/01 Trial Judgment, para. 1093.
[2160] ICTY *Prosecutor v Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 365.
[2161] ICTY *Prosecutor v Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 366.
[2162] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 34 line 1 after [10.34.54], p. 34 line 6 before [10.37.19], p. 37 line 7 before [10.54.38].
[2163] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 34 line 17 before [10.40.44].

understatement. Perhaps even more significantly, not one of these brief comments was accompanied by any statement of "sympathy, compassion or sorrow" concerning that suffering.[2164] KHIEU Samphân gave no apology. Rather, he stated that it would be a "shameful and tragic irony"[2165] if Cambodians leaders were asked to apologise for the genocide of Vietnamese, which in his view is a figment of Vietnamese propaganda.[2166]

881. The overwhelming majority of KHIEU Samphân's approximately 30 minutes of speaking time was used to justify his own righteousness or allocate blame elsewhere. He variously: denied events or his responsibility for them,[2167] sought to justify CPK policies,[2168] blamed events on others (the USA, Vietnam, the Vietnamese communists),[2169] made accusations

[2164] ICTY *Prosecutor v Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 366.
[2165] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 38 lines 6-7 before [11.00.29].
[2166] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 37 line 12 – p. 38 line 11 after [10.54.38].
[2167] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 34 line 8 after [10.37.19] ("But the term 'murderer', I categorically reject it"), p. 37 lines 13-14 after [10.54.38] ("The communist people of Kampuchea leaders did not exterminate our people").
[2168] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 34 lines 18-19 before [10.40.44] ("however, those who consider themselves in senior positions believed that they had the right to accuse and have the right to punish other people"), p. 34, lines 22-24, after [10.40.44] ("[w]e should <consider> where the country was when the resistant Khmers took power and the urgency of the situation of rebuilding the economy."), p. 35 lines 8-10 before [10.44.44] ("unlike other countries, Cambodia was not an industrialized country and some people forget it today. At the time, there was no gear or factory for equipment production."), p. 35 lines 12-17 after [10.44.44] ("we had to rebuild economy urgently and the famine was very serious in 1975, and the danger became more acute in <1978> when drought threatened to destroy our main crops and, at the same time, the conflict with Vietnam intensified. And in order to rebuild and defend our country, the only force we had was the strength of people."), p. 35 line 22 – p. 36 line 3 before [10.48.43] ("The Communist Party of Kampuchea leadership hoped to gradually improve the living and working conditions of the people. The leaders of the Communist Party of Kampuchea hoped to transform our country into a modern, agricultural country that would gradually develop industries and that is for the people, that is people would have abundance of food to eat and to live better and better."), p. 36 lines 11-14 after [10.48.43] ("cooperatives were instituted in order to fight together for the production of paddy no matter what and to ration production so that everyone could survive and our soldiers at the front battlefields could be fed."), p. 36 lines 15-21 before [10.52.56] ("the problem of the hunger became even more acutely. Cooperatives had therefore been expanded throughout the country in order to work together by collecting and organizing forces to build the irrigation system to the paddy fields in order to achieve the best output and be able to feed everyone. Is this something criminal? Of course, not.").
[2169] **E1/528.1** T., 23 June 2017 ((KHIEU Samphân), p. 34 line 25 – p. 35 line 4 after [10.40.44] ("All areas in our countryside had been pounded by American bombs. In addition, we had been abandoned by those who claimed to be our friends -- that is, the Vietnamese communists who, in reality, simply wanted to subjugate us in an Indochinese communist federation."), p. 35 lines 5-7 before [10.44.44] ("never forget the suffering of the Cambodian people at the very moment when the resistant Khmers took power"), p. 36 lines 8-10 after [10.48.43] ("how could one envisage ploughing, transplanting and working the paddy fields individually under the strains of the Lon Nol aircraft and under the B-52 bombs?").

against political opponents and other governments,[2170] and reproached the ECCC for harming his reputation.[2171] None of these sentiments or comments indicates remorse or sympathy.

882. KHIEU Samphân's statement also did not constitute a genuine response to Civil Party questions posed during the Case 002/02 trial. Some 47 Civil Parties posed questions to the two accused during the trial.[2172] The questions covered a range of issues including why inhumane living and working conditions had been imposed; why people were forced to marry strangers; why religion was repressed and religious groups persecuted; why children were deprived of education; why civilians, including babies and children, were killed; why Old People and New People were treated differently; and what the defendants knew about security centres.[2173] None of these questions is answered by KHIEU Samphân's final statement.

883. It is noteworthy that KHIEU Samphân's statement focused on the worksites and cooperatives. To the extent that he was willing to acknowledge the suffering endured by Civil Parties, he explained it as a necessary means to the end of a visionary economic and agricultural revolution which he clearly still believes in. On marriages, rapes, and the persecution of minorities he claimed ignorance.[2174] On security centres and purges he said nothing at all, neither claiming ignorance nor recognising any suffering they had caused. Therefore, even his extremely limited recognitions of suffering, lacking actual sympathy, were only directed at a small portion of the Civil Parties and only related to a small part of the harms they endured.

[2170] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 37 lines 15-18 before [10.57.31] ("The manipulation of Vietnam saying that it was self-genocide is, in fact, a Vietnamese propaganda. You can see moreover how Vietnam has profited by this manipulation. It will perhaps soon reap the fruits of its expansionist ambition."), p. 38 lines 1-5 after [10.57.31] ("At present, Vietnam is already exploiting the land, sea, and rivers of Cambodia and that is with the blessing of the current Cambodian leaders…Vietnam invaded our country...and Vietnam never have cooperation with this tribunal and, finally, it has invented the unacceptable idea of the Cambodian genocide").

[2171] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), 34 lines 1-5 before [10.37.19] ("I also heard when [the civil parties] spoke to me, sometimes referring to me as a murderer. How could it be otherwise, since this Court's inception, it has done everything in order to let you, the civil parties, to refer to me as someone who has the responsibility for all the sufferings?").

[2172] **E457/6/2/3.4** Civil Party Lead Co-Lawyers' Amended Closing Brief in Case 002/02, Amended Annex E: Questions to the Accused, 2 October 2017.

[2173] *Ibid.*

[2174] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 36 line 22 – p. 37 line 11 before [10.54.38].

884. Against this context, KHIEU Samphân's statement that he wanted to "bow to the memory of all the innocent victims" is not an indication of sincere remorse or sympathy. His remarks made it unclear whom he considered to be an "innocent victim".[2175]

885. For the avoidance of doubt, the Lead Co-Lawyers do not suggest that KHIEU Samphân has been actively uncooperative or that his conduct at trial should be considered as any form of aggravation. That is clearly not the case. However neither do his conduct or statements meet the accepted bases for mitigation at this Court.

12 REQUEST

886. The Civil Party Lead Co-Lawyers respectfully request that the Supreme Court Chamber:

DISMISS the KHIEU Samphân Appeal in its entirety; and therefore

AFFIRM all of KHIEU Samphân's convictions;

AFFIRM KHIEU Samphân's sentence of life imprisonment.

Respectfully submitted,

Date	Name	Place	Signature
4 January 2021	PICH ANG National Lead Co-Lawyer	Phnom Penh	
	Megan HIRST International Lead Co-Lawyer	Phnom Penh	

[2175] **E1/528.1** T., 23 June 2017 (KHIEU Samphân), p. 40 lines 13-18 after [11.00.29].