ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before:	**Judge NIL Nonn, President** **Judge Silvia CARTWRIGHT** **Judge YA Sokhan** **Judge Jean-Marc LAVERGNE** **Judge THOU Mony**
Greffiers:	**LIM Suy-Hong, Matteo CRIPPA, SE Kolvuthy, Natacha WEXELS-RISER, DUCH Phary**
Duration of hearing:	**30 March 2009 until 27 November 2009**
Date:	**26 July 2010**
Classification:	**PUBLIC**

JUDGEMENT

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1 INTRODUCTION

1. The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("Chamber" and "ECCC", respectively) seised of Case File 001/18-07-2007/ECCC/TC,[1] renders its Judgement against Kaing Guek Eav *alias* Duch ("Accused"), a former mathematics teacher born on 17 November 1942 in the village of Poev Veuy, Peam Bang Sub-District, Stoeung District, in the province of Kompong Thom.

1.1 Establishment of the ECCC

2. Following an official request for assistance by Cambodia of 21 June 1997,[2] the United Nations and the Royal Government of Cambodia signed an Agreement on 6 June 2003 which envisaged the trial of senior leaders of Democratic Kampuchea ("DK") and those most responsible for the national and international crimes committed in DK between 17 April 1975 and 6 January 1979 ("ECCC Agreement").[3]

3. The ECCC was established under Cambodian law following the promulgation of the "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea" ("ECCC Law").[4]

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1 Decision on Appeal Against Closing Order Indicting Kaing Guek Eav *alias* 'Duch', D99/3/42, 5 December 2008 ("Decision on Appeal against the Closing Order").
2 UN Doc. A/51/930-S/1997/488 (24 June 1997); UN Doc. A/RES/52/135 (27 February 1998), para. 16.
3 "Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea", signed 6 June 2003 and entered into force on 29 April 2005; *see also* UN Doc. A/RES/57/228B (13 May 2003) (approving draft ECCC Agreement); UN Doc. A/60/565 (25 November 2005), para. 4.
4 "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea", 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

1.2 Brief Procedural Overview of the Case

4. On 18 July 2007, the ECCC Co-Prosecutors filed an Introductory Submission with the Co-Investigating Judges pursuant to Internal Rule 53, opening a judicial investigation against five individuals, including the Accused.[5]

5. On 19 September 2007, the Co-Investigating Judges ordered the separation of the Case File of the Accused in relation to facts concerning S-21, which were investigated under Case File number 001/18-07-2007 and which comprise the present case.[6]

6. On 8 August 2008, the Co-Investigating Judges issued a Closing Order indicting the Accused for crimes against humanity and grave breaches of the Geneva Conventions of 1949 ("Closing Order").[7]

7. The Co-Prosecutors appealed the Closing Order on 5 September 2008.[8] The Pre-Trial Chamber issued an oral decision on this appeal on 5 December 2008.[9] The Pre-Trial Chamber partially granted the Co-Prosecutors' first ground of appeal, finding that the domestic crimes of torture and premeditated murder as defined by the 1956 Penal Code of Cambodia ("1956 Penal Code") should be added to the Closing Order. The Pre-Trial Chamber dismissed the Co-Prosecutors' second ground of appeal, which had alleged that the Co-Investigating Judges erred in failing to include joint criminal enterprise as a form of responsibility in the Closing Order.

8. The Pre-Trial Chamber remitted the Accused for trial on the basis of the Closing Order as amended by its Decision on Appeal against the Closing Order ("Amended

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5 "Co-Prosecutors Introductory Submission", D3, 18 July 2007.
6 "Separation Order", D18, 19 September 2007. All other facts related to the Accused or the other individuals mentioned in the Introductory Submission were investigated under Case File number 002/19-09-2007.
7 "Closing Order indicting Kaing Guek Eav *alias* Duch", D99, 8 August 2008.
8 "Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav 'Duch' dated 8 August 2008", D99/3/3, 5 September 2008.
9 Decision on Appeal against the Closing Order.

Closing Order").[10] The Amended Closing Order established the factual allegations for the Chamber to determine at trial.

9. The initial hearing before the Chamber took place on 17 and 18 February 2009.[11] The substantive hearing commenced on 30 March 2009 and the hearing of the evidence concluded on 17 September 2009 after 72 trial days. 90 victims were joined as Civil Parties and were represented by lawyers, forming four Civil Party groups ("Civil Parties").[12]

10. Closing statements were made by the Co-Prosecutors, the Civil Parties, the Accused's Co-Lawyers, and the Accused from 23 to 27 November 2009.[13]

1.3 The Charges against the Accused

11. The Amended Closing Order alleges that the Accused, as Deputy Secretary or Secretary of S-21, planned, instigated, ordered, committed, or aided and abetted crimes against humanity,[14] grave breaches of the Geneva Conventions of 1949,[15] as well as the national crimes of premeditated murder and torture. In the alternative, he is responsible by virtue of superior responsibility. The offences for which he is charged are defined in Articles 5, 6 and 3 (new) of the ECCC Law, respectively. All charges pertain to acts and

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10 Decision on Appeal against the Closing Order, p. 41 (point 5).

11 "Order Setting the Date of the Initial Hearing", E8, 19 January 2009.

12 The Office of the Co-Investigating Judges received 28 Civil Party applications during the investigation phase. A further 66 Civil Party applications were received by the Chamber prior to the initial hearing, four of which were either withdrawn or rejected; *see* Direction on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, E2/94/2, 4 March 2009; Decision on Request to Reconsider Decision on Proof of Identity for Civil Party Application (E2/36), E2/94/4, 10 August 2009 (in relation to Civil Party application E2/36); "CPG3: Lettre d'abandon de droit de la constitution de la partie civile au près des chambres extraordinaires au sein des tribunaux cambodgiens", E2/65/5, 15 September 2009. Annex III to the Judgement indicates the full name, place of residence, birth date, birthplace and occupation of the Civil Parties as per Internal Rule 101(6)(f).

13 "Scheduling Order for Closing Statements", E170, 30 September 2009.

14 The Amended Closing Order charges the Accused with the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, rape, persecution on political grounds and other inhumane acts; *see also* Section 2.5.

15 The Amended Closing Order charges the Accused with the following offences as grave breaches of the Geneva Conventions of 1949: wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian; *see also* Section 2.6.

omissions committed in Phnom Penh and within the territory of Cambodia between 17 April 1975 and 6 January 1979.

12. Pursuant to Internal Rule 98(2), the Judgement is limited to the facts set out in the Amended Closing Order. However, the Chamber may change the legal characterisation of the crimes contained in the Amended Closing Order provided that no new constitutive elements are introduced.[16]

1.4 Jurisdiction of the Chamber over the Accused

13. Article 1 of the ECCC Law empowers the ECCC to "bring to trial senior leaders of [DK] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."[17]

14. No preliminary objection to the jurisdiction of the ECCC as such was raised at the initial hearing pursuant to Internal Rule 89.[18] In its closing statement, the Defence made extensive submissions alleging the lack of jurisdiction of the Chamber on the ground that the Accused was not a senior leader or one of those most responsible for the crimes committed during the DK regime.[19]

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[16] The French version of Internal Rule 98(2) is clearer in this regard: « La Chambre ne peut statuer que sur les faits mentionnés dans la décision de renvoi. Toutefois, la Chambre peut modifier les qualifications juridiques adoptées dans la décision de renvoi, sous réserve de n'introduire aucun élément constitutif nouveau. […]. »

[17] *See also* Article 2(1) of the ECCC Agreement, which defines the personal and subject-matter jurisdiction of the ECCC in accordance with the ECCC Law.

[18] Rule 89(1) then provided that "[a] preliminary objection concerning: a) the jurisdiction of the Chamber, […] shall be raised at the initial hearing, failing which it shall be inadmissible"; *see* T., 1 April 2009 (Defence), pp. 18-19 ("I am not intending to challenge [jurisdiction] because I am quite aware already and I could have raised it in the initial hearing already if I wished to do so"); *see also* T., 6 April 2009, p. 1 ("the Chamber wishes to reiterate its understanding that during his response to the opening statement by the Co-Prosecutors, the Defence lawyer did not make any formal submission on the legality of the proceedings of this Court". The Defence did not object to this understanding.")

[19] T., 25 November 2009 (Defence Closing Statement), pp. 84-109; T., 26 November 2009 (Defence Closing Statement), pp. 39-41 (alleging that senior leaders of DK comprised only the members of the Standing Committee, that the Accused merely executed orders, and that more people were killed in other prisons than in S-21. Equality before the law would require that if the Accused is to be tried, all other prison chiefs should also be tried by the ECCC.); *see also* T., 31 March 2009 (Response of the Defence to

15. The Chamber does not consider these belated submissions to constitute a preliminary objection. In addition, the Defence argued that Annex 5 of the 1991 Paris Peace Agreement and the 1994 Law on the Outlawing of the "Democratic Kampuchea" Group exempted the Accused from future prosecution.[20] The Chamber notes that these arguments were also belated and consequently rejects them.

1.4.1 Subject-Matter,Temporal and Territorial Jurisdiction

16. The Chamber has evaluated, on its own motion,[21] the question of whether there was any lack of jurisdiction over the Accused in the instant case. The subject-matter jurisdiction of the ECCC is limited to the offences listed in Articles 3 (new) to 8 of the ECCC Law insofar as they constituted crimes at the time of their alleged commission (Section 1.5). The crimes charged in the Amended Closing Order are within the scope of the subject-matter, temporal and territorial jurisdiction of the ECCC.

1.4.2 Personal Jurisdiction

17. Personal jurisdiction is confined either to "senior leaders of DK" or "those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia."[22]

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the Co-Prosecutors' Opening Statement), pp. 76-77, 82-83. The Co-Prosecutors contend that the Accused satisfies both criteria of senior leadership and being most responsible in view of his position and role at S-21, the uniqueness and importance of S-21 for the CPK, as well as the seriousness of his crimes ("Co-Prosecutors' Final Trial Submission With Annexes 1-5", E159/9, 11 November 2009, paras 239-245; T., 24 November 2009 (Co-Prosecutors' Closing Statement), pp. 8-12; T., 27 November 2009 (Co-Prosecutors' Rebuttal Statement), pp. 14-17; *see also* "Introductory Submission", D3, 18 July 2007, para. 115.) The Civil Parties who expressed themselves on this issue supported the position of the Co-Prosecutors (T., 26 November 2009 (Rebuttal Statements of Civil Party Groups 2 and 4), pp. 95-99, 108).

[20] *See* T., 25 November 2009 (Defence Closing Statement), pp. 115-116 (referring to the "Agreement on a comprehensive political settlement of the Cambodia conflict (with annexes)," concluded at Paris on 23 October 1991, 1663 UNTS No. 28613 ("1991 Paris Peace Agreement")) and the 1994 Law on the Outlawing of the "Democratic Kampuchea" Group (15 July 1994 (Reachkram no. 01.NS.94); *see also* Written Record of Interview of Charged Person, E3/11 (ERN 00159553-00159557).

[21] *See* Internal Rule 98(3).

[22] ECCC Agreement, Article 1.

18. The Co-Investigating Judges did not allege that the Accused was a senior leader of DK but instead charged him as being one of those most responsible for the offences committed during the temporal jurisdiction of the Chamber:

> 129. The judicial investigation demonstrated that, while DUCH was not a senior leader of Democratic Kampuchea, he may be considered in the category of most responsible for crimes and serious violations committed between 17 April 1975 and 6 January 1979, due both to his formal and effective hierarchical authority and his personal participation as Deputy Secretary then Secretary of S21, a security centre which was directly controlled by the Central Committee.[23]

19. Neither the ECCC Agreement nor the ECCC Law expressly defines "senior leaders of DK" or "those who were most responsible". The Group of Experts for Cambodia established in 1998 pursuant to General Assembly resolution 52/135, tasked with assessing the feasibility of bringing Khmer Rouge leaders to justice, concluded in its report that:

> the Group does not believe that the term "leaders" should be equated with all persons at the senior levels of Government of DK or even of the CPK. The list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng.[24]

20. The Group of Experts accordingly recommended that "any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of DK. This would include senior leaders with responsibility over the abuses *as well as* those at lower levels who are directly implicated in the most serious atrocities."[25]

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[23] Amended Closing Order, para. 129.
[24] UN Doc. A/53/850-S/1999/231, Annex ("Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135" dated 18 February 1999), para. 109.
[25] UN Doc. A/53/850-S/1999/231, Annex ("Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135" dated 18 February 1999), para. 110 (emphasis added).

21. Similar terminology was used by the Secretary General when transmitting the Group of Experts' report to the Security Council and the General Assembly,[26] and by the Commission of Human Rights, which examined the situation in Cambodia in 1999.[27]

22. The jurisprudence of other international tribunals which have also examined the notion of "most senior leaders suspected of being most responsible", have considered both the gravity of the crimes charged and the level of responsibility of the accused.[28] When assessing the gravity of the crimes charged, the Referral Bench of the International Criminal Tribunal for Yugoslavia ("ICTY") has relied on factors such as the number of victims, the geographic and temporal scope and manner in which they were allegedly committed, as well as the number of separate incidents, whereas the level of responsibility of the accused has been evaluated on the basis of considerations such as the level of participation in the crimes, the hierarchical rank or position of the accused, including the number of subordinates and hierarchical echelons above him or her, and the permanence of his position.[29] The Pre-Trial Chamber of the International Criminal Court ("ICC"), in determining the admissibility of a case, has evaluated similar factors.[30]

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[26] UN Doc. A/53/850-S/1999/231.

[27] Commission on Human Rights resolution 1999/76, 28 April 1999, para. 14.

[28] UN Doc. S2002/678, Enclosure ("Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts (June 2002)), para. 42; UN Doc. S/RES/1503 (2003); UN Doc. S/RES/1534 (2004), para. 5. This expression was first used in UN Doc. S/RES/1503 (2003), preamble (7th paragraph), by the Security Council; *see also* ICTY Rules of Procedure and Evidence ("RPE"), Rules 11bis (C) and 28(A) (*cf.* Article 1 of the ECCC Law, which instead refers to two distinct categories of suspects, "senior leaders" and "most responsible"); *Prosecutor v. Lukić et al.,* Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, ICTY Referral Bench (IT-98-32/1-PT), 5 April 2007, para. 26.

[29] *Prosecutor v. Lukić et al.,* Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, ICTY Referral Bench (IT-98-32/1-PT), 5 April 2007, paras 27, 28; *Prosecutor v. Kovačević*, Decision on Referral of Case Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-01-42/2-1), 17 November 2006, para. 20; *Prosecutor v. D. Milošević*, Decision on Referral of Case Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-98-29/1-PT), 8 July 2005, paras 23-24; *Prosecutor v. Janković*, Decision on Referral of Case Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-96-23/2-PT), 22 July 2005, para. 19; *Prosecutor v. Ademi et al.*, Decision on Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-04-78-PT), 14 September 2005, paras 28-29; *Prosecutor v. Ljubičić,* Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11*bis*; ICTY Referral Bench (IT-00-41-PT), 12 April 2006, paras 18-19*; see also Prosecutor v. Lukić et al.,* Decision on Milan Lukić's Appeal Regarding Referral, ICTY Appeals Chamber (IT-98-32/1-AR11*bis*.1), 11 July 2007, para. 22 (limiting the importance of geographic scope).

[30] *Situation in the DRC*, *Prosecutor v. Ntaganda,* Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC Pre-Trial Chamber I (ICC-01/04-02/06-20-Anx2), 10 February 2006 (unsealed on 21 July 2008 pursuant to Decision ICC-01/04-520), paras 51-64, 68-71, 74, 78-89 (quashed on appeal,

23. The Amended Closing Order alleged, amongst other things, that as Deputy of S-21, the Accused led the Interrogation Unit and participated in the planning of S-21 operations and training of staff on interrogation techniques. As Chairman of S-21, his role consisted of oversight of the entire S-21 operation including the annotation of confessions and the ordering of executions. S-21 was a very important security centre of DK, considered as an organ of the Communist Party of Kampuchea ("CPK"), reporting to the very highest levels of the CPK leadership, carrying out nation-wide operations and receiving high-level cadres and prominent detainees. More than 12,000 individuals[31] were detained at S-21, a number which is incomplete and must be read in light of the practice of not registering all detainees. Victims from every part of Cambodia were sent to S-21, with the result that the scope of its activities reached across the entire country. S-21 was operational from October 1975 to early January 1979, thus covering a significant portion of the DK regime's existence.[32]

24. Due to the scale of crimes committed during the DK period, the ECCC Agreement and ECCC Law impose no obligation to try all potential perpetrators of crimes falling within its jurisdiction.[33] Although hierarchical position is a relevant criterion, international tribunals have generally not undertaken rigid comparisons of the seniority of persons previously tried before them when making referral decisions.[34] The fact that other individuals within DK during the indictment period may have shared these attributes does therefore not preclude the Accused from also being considered as one of those most responsible.

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on different grounds, in *Situation in the DRC,* Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC Appeals Chamber (ICC-01/04-169), 13 July 2006 (unsealed on 23 September 2008 pursuant to Decision ICC-01/04-538), paras 73-79).

[31] The Amended Closing Order alleges that no fewer than 12,380 persons were detained at S-21. During the examination of the merits of the case, the Chamber concluded that the S-21 detainees numbered at a minimum 12,273; *see* Section 2.3.3.4.2.

[32] Amended Closing Order paras 20-21, 32-33, 37-38, 42-43, 47, 97-98, 107-109.

[33] *See* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, para. 5 (acknowledging that in deciding which individuals merit prosecution in the international forum, the Prosecutor may require a higher threshold to be met than mere existence of credible evidence to suggest the commission of crimes within the jurisdiction of the tribunal).

[34] *See e.g., Prosecutor v. Ademi et al.*, Decision on Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-04-78-PT), 14 September 2005, paras 30-31 (finding that the Accused's seniority did not *ipso facto* preclude referral to a national jurisdiction for trial).

25. The Chamber agrees with the assessment of the Co-Investigating Judges and accordingly finds that the Accused falls within the personal jurisdiction of the ECCC as one of those most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979. There is consequently no need to examine the issue of whether the Accused was a senior leader of the DK.

1.5 The Principle of Legality

26. Notwithstanding the Chamber's subject-matter jurisdiction over them, each of the charged crimes and forms of responsibility must also conform to the principle of legality.[35]

27. Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR") states that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[36] This principle is qualified in Article 15(2) of the ICCPR, which adds: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[37]

28. The international jurisprudence has clarified that compliance with the principle of legality requires that the offence with which an accused is charged was sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the

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[35] Article 33 (new) of the ECCC Law indicates that the Chamber must exercise its jurisdiction in conformity with Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 ("ICCPR"); *see also* 1993 Constitution of The Kingdom of Cambodia, Article 31(1) (the Kingdom of Cambodia "shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights.")

[36] Article 15(1) of the ICCPR further states, "[n]or shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

[37] The principle of legality is recognised by numerous other international instruments, including Article 11(2) of the Universal Declaration of Human Rights (UNGA Res 217A, 10 December 1948) and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5/213 UNTS 222, 4 November 1950) ("ECHR").

accused at the relevant time.[38] A State practice of tolerating or encouraging certain acts will not operate as a bar to their perpetrators being brought to justice and punished where those acts are crimes under national or international law.[39] The principle of legality applies both to the offences as well as to the forms of responsibility.[40] Accordingly, the Chamber must determine whether the offences and modes of participation charged in the Amended Closing Order were recognised under Cambodian or international law between 17 April 1975 and 6 January 1979.

29. The 1956 Penal Code was the applicable national law governing during the 1975 to 1979 period, as it remained in force following the promulgation of both the Constitution of the Khmer Republic on 10 May 1972 and the DK Constitution on 5 January 1976.

30. As regards relevant sources of international law applicable at the time, the Chamber may rely on both customary and conventional international law,[41] including the general principles of law recognised by the community of nations.[42]

31. An assessment of the foreseeability and accessibility requirements integral to the principle of legality should take into account the particular nature of international law, including its reliance on unwritten custom.[43] The ICTY Appeals Chamber has noted that,

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[38] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 38; *see also S.W. v. United Kingdom*, Judgment, ECtHR (no. 20166/92), 22 November 1995, paras 35-36 (indicating that the term "law" in Article 7 of the ECHR "comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.")

[39] *Kononov v. Latvia*, Judgment, ECtHR (no. 36376/04), 24 July 2008, para. 114(e).

[40] *See e.g., Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, paras 34-44 (as applied to joint criminal enterprise); *Prosecutor v. Aleksovski*, Judgement, ICTY Appeals Chamber (IT-95-14/1-A), 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 126 (as applied to grave breaches of the Geneva Conventions of 1949).

[41] *See e.g.*, *Aleksovski* Appeal Judgement, para. 126 (relying on customary and conventional law sources); *Prosecutor v. Kordić et al.*, Judgement, ICTY Appeals Chamber (IT-95-14/2-A), 17 December 2004 ("*Kordić* Appeal Judgement"), paras 41-42.

[42] *See* Article 15(2) of the ICCPR; *see also* Article 38(1) of the Statute of the International Court of Justice.

[43] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, paras 38-42; *see also Groppera Radio AG and Others v. Switzerland*, Judgement, ECtHR (No. 10890/84), 28 March 1990, para. 68 (stating that the scope of the notion of foreseeability depends to a considerable degree on the content of

> [a]s to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom.[44]

32. Further, "[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts."[45]

33. The Chamber may also rely on conventional international law where a treaty is (i) unquestionably binding on the parties at the time of the alleged offence and (ii) not in conflict with or derogating from peremptory norms of international law.[46] As stated by the ICTY Appeals Chamber, the principle of legality "is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary international law."[47] International tribunals have in practice nevertheless ascertained whether a treaty provision is also declaratory of custom.[48]

34. The legality principle does not prevent the Chamber from determining an issue through a process of interpretation and clarification of the elements of a particular offence. Nor does it prevent the Chamber from relying on appropriate decisions which interpret particular ingredients of an offence.[49] Specifically, the Chamber's reliance on

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the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed); *Kononov v. Latvia*, Judgment, ECtHR Grand Chamber (no. 36376/04), 17 May 2010, para. 235.

[44] *Prosecutor v. Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber (IT-01-47-AR72), 16 July 2003, para. 34.

[45] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 42.

[46] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 143 (as regards Article 3 of the ICTY Statute).

[47] *Kordić* Appeal Judgement, para. 44.

[48] *Prosecutor v. Galić*, Judgement, ICTY Appeals Chamber (IT-98-29-A), 30 November 2006, para. 85.

[49] *Aleksovski* Appeal Judgement, para. 126; *see also S.W. v. United Kingdom*, Judgement, ECtHR (no. 20166/92), 22 November 1995, paras 35-36.

decisions of international tribunals that post-date January 1979 does not contravene the principle of legality. Rather, these decisions provide interpretative guidance as regards the evolving status of certain offences and forms of responsibility under international law. In addition, the fact that the ECCC was established and conferred with jurisdiction over offences after they were allegedly committed does not violate the principle of legality.[50]

1.6 The Internal Rules and Applicable Evidentiary Principles

1.6.1 Governing Procedural Law

35. Pursuant to the ECCC Agreement and the ECCC Law, the Chambers of the ECCC operate in accordance with Cambodian procedural law.[51] Following its establishment, the ECCC adopted its Internal Rules.[52] The purpose of the Internal Rules is to consolidate applicable Cambodian procedure in relation to proceedings before the ECCC. The ECCC Agreement and the ECCC Law envisage that additional rules may be adopted where existing procedures do not deal with a particular matter, in case of uncertainty regarding their interpretation or application, or where questions arise regarding their consistency with international standards.[53] Thus, while Cambodian law governs the procedure before the Chamber, guidance is also sought from procedural rules established at the international level, where appropriate.

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[50] *Prosecutor v. Kallon et al.,* Decision on Constitutionality and Lack of Jurisdiction, Special Court for Sierra Leone ("SCSL") Appeals Chamber (SCSL-04-14-AR72 & SCSL-04-15-AR72 & SCSL-04-16-AR72), 13 March 2004, para. 82 ("[t]he fact that no court exists with jurisdiction to adjudicate crimes proscribed by international law at the time the offences were committed is not a bar to prosecution and not a violation of the principle *nullum crimen sine lege*."); *see also Prosecutor v. Delalić et al.,* Judgement, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001 ("*Čelebići* Appeal Judgement"), paras 179-180; *cf. Streletz, Kessler and Krenz v. Germany*, Judgment, ECtHR (no. 34044/96 & 35532/97 & 44801/98), 22 March 2001, paras 79-81.

[51] ECCC Agreement, Article 12; ECCC Law, Article 33 (new)*; see also* ECCC Law, Article 20 (new) (as concerns the Co-Prosecutors) and Article 23 (new) (as concerns the Co-Investigating Judges).

[52] The first version of the ECCC Internal Rules were adopted on 12 June 2007, with an initial revision adopted on 1 February 2008 (which came into force on 10 February 2008), a second revision on 5 September 2008 (in force on 15 September 2008), a third revision on 6 March 2009 (in force on 16 March 2009), a fourth revision on 11 September 2009 (in force on 21 September 2009) and a fifth revision on 9 February 2010 (in force on 19 February 2010). All references in this Judgement to an "Internal Rule" are, unless otherwise noted, to a Rule in the ECCC Internal Rules currently in force.

[53] Fifth preambular paragraph of the Internal Rules, citing ECCC Agreement, Article 12(1) and ECCC Law, Articles 20 (new), 23 (new) and 33 (new).

1.6.2 The Case File

36. The Case File is the result of the material collated during the judicial investigation phase in the present case. Material was added to it successively, at each stage of the ECCC proceedings.

37. The Chamber was formally seised of the Case File following the Pre-Trial Chamber's Decision on Appeal against the Closing Order.[54] The Chamber was granted access to the Case File for the purpose of advance preparation for trial by decision of the Pre-Trial Chamber of 11 September 2008: a practice which has since found expression in the Internal Rules.[55]

38. Material on the Case File is considered evidence and relied upon by the Chamber in decision-making only where it is put before the Chamber, subjected to examination, and where it is not excluded on the basis of the criteria contained in Internal Rule 87(3).

1.6.3 Admissibility of Evidence

39. Internal Rule 87(1) states that "[u]nless provided otherwise in these [Internal Rules], all evidence is admissible."[56] The scope of this general principle is qualified by Internal Rule 87(2), which 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."

40. Although the wording of Internal Rule 87(3) refers to "evidence from the case file", it is apparent from the entirety of that sub-rule that material on the Case File is not "evidence" as such until it is put before (*i.e.*, summarised, read out, or appropriately

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[54] Decision on Appeal against the Closing Order.

[55] Decision on Trial Chamber Request to Access the Case File, D99/3/5, 11 September 2008. Internal Rule 69(3), which came into force on 21 September 2009, provides that "[t]he filing of an appeal against a Closing Order does not prevent access by the Trial Chamber to the case file for the purposes of advance preparation for trial."

[56] Internal Rule 21(3) specifically provides that statements recorded under the use of inducement, physical coercion or threats thereof shall not be admissible as evidence before the Chamber.

identified) in court.[57] The Chamber may also admit new material not originally on the Case File, either on its own motion or at the request of a party.[58]

41. Further, to be used as evidence, material on the Case File must satisfy certain conditions of relevance and probative value. The Chamber may reject any material put before it based on the criteria listed in Internal Rule 87(3) (namely irrelevance, inability to prove the facts alleged, impossibility of obtaining evidence within a reasonable time, or due to the existence of breaches of fundamental legal standards concerning the rules of evidence).

42. The probative value of this evidence, and thus the weight to be accorded to it, is ultimately assessed by the Chamber.

43. In its practice, the Chamber ultimately had recourse to the fundamental fair trial principles enshrined in Internal Rule 21 and Article 33 (new) of the ECCC Law, as well as to the jurisprudence of international criminal tribunals. In light of this jurisprudence, the Chamber has considered hearsay and circumstantial evidence to be admissible where sufficiently relevant and probative.[59] With regard to hearsay statements, the Chamber gave particular consideration to whether the Accused was able to confront the source of such statements.[60] In keeping with international jurisprudence, the Chamber has also found that the testimony of a single witness can establish a fact at issue where such evidence is sufficiently relevant and probative.[61]

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[57] *See* Decision on Admissibility of Material on the Case File as Evidence, E43/4, 26 May 2009, paras 5-7.

[58] *See* Decision on Admissibility of New Materials and Direction to the Parties, E5/10/2, 10 March 2009 (a party making such a request must do so by reasoned submission and establish that the requested testimony or evidence had been unavailable before the opening of the trial); *see also* Internal Rule 87(4) (permitting the Chamber to summon or hear any witness, or admit new evidence during the trial, where conducive to ascertaining the truth).

[59] *See e.g., Prosecutor v. Nahimana et al.,* Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 509; *Čelebići* Appeal Judgement, para. 458.

[60] Decision on Admissibility of Material on the Case File as Evidence, E43/4, 26 May 2009, paras 14-16 (statements excluded where confrontation of their author by the Accused had not occurred and was no longer possible).

[61] *See e.g., Aleksovski* Appeal Judgement, 24 March 2000, para. 62; *see also, Prosecutor v. Brima et al.,* Judgement, SCSL Trial Chamber (SCSL-04-16-T), 20 June 2007 ("*Brima* Trial Judgement"), para. 109; *Akayesu* Trial Judgement, para. 135.

1.6.4 Burden and Standard of Proof

44. Internal Rule 21(d) enshrines the right of an accused to be presumed innocent as long as his or her guilt has not been established.[62] This presumption places the burden of establishing the guilt of an accused before the ECCC on the Co-Prosecutors.[63] Internal Rule 87(1) further provides that "[i]n order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt."

45. The basis of this finding is expressed differently in common law and civil law systems, and within the different language versions of Internal Rule 87(1). Cambodian law derives from civil law and, in particular, from the notion of the judge's *intime conviction.*[64] This notion is retained in the French version of Internal Rule 87(1), whereas both the Khmer and English versions of this Internal Rule state that a finding of guilt against the accused requires that the Chamber be convinced beyond a reasonable doubt.[65] Despite these conceptual differences, the Chamber has adopted a common approach that has evaluated, in all circumstances, the sufficiency of the evidence. Upon a reasoned assessment of evidence, any doubt as to guilt was accordingly interpreted in the Accused's favour.

1.6.5 Sources of Evidence Put Before the Chamber

1.6.5.1 Agreed facts and admissions by the Accused

46. The Chamber directed the Co-Prosecutors and the Defence to submit filings indicating their joint agreement, if any, with facts in the Amended Closing Order.[66] These

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[62] *See also* ECCC Agreement, Article 13; ECCC Law, Article 35 (new). The presumption of innocence is enshrined in a number of human rights instruments, including Article 14(2) of the ICCPR and Article 6(2) of the ECHR.

[63] Internal Rule 87(1).

[64] *See also* Article 321 of the 2007 Code of Criminal Procedure: "the Court has to consider the value of the evidence submitted for its examination, following the judge's *intime conviction.*"

[65] The French version of Internal Rule 87(1) reads: "[p]our condamner l'accusé, la Chambre doit avoir *l'intime conviction* de sa culpabilité" (emphasis added). By contrast, the ICTY, the ICTR and ICC have all equated the term "beyond reasonable doubt" to "au-delà de tout doute raisonnable."

[66] Direction Requesting Additional Information from the Parties and Co-Investigating Judges in Preparation of the Initial Hearing, E5/11, 5 February 2009, para. 5.

submissions were filed on 11 February 2009 and 1 April 2009, respectively.[67] During the hearing of 1 April 2009, the Chamber instructed the Co-Prosecutors and the Defence to publicly read out facts that were jointly agreed to or that were not disputed.[68]

47. Broadly speaking, the Accused agreed with or did not dispute a significant number of facts contained in the Amended Closing Order.[69]

48. Unlike the legal framework of other international tribunals, the governing law of the ECCC provides no procedure for the acceptance and recording of a plea of guilty by an accused.[70] Before these other tribunals, a guilty plea typically permits a Trial Chamber, following a significantly shortened evidentiary phase, to proceed directly to a consideration of factors relevant to sentence.[71] Absent such a mechanism, the Chamber was compelled to hear and evaluate all evidence put before it, including in relation to matters not in dispute. The agreement on facts nevertheless significantly assisted the Chamber in identifying the most contentious issues at trial and in streamlining the proceedings.

49. Pursuant to the Internal Rules, the agreement on facts neither binds the Chamber nor relieves the Co-Prosecutors of their burden of proof. Where material from the agreement on facts was put before the Chamber and subjected to examination, the Chamber

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[67] "Response of the Co-Prosecutors Regarding Agreement on Facts", E5/11/2; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, which is attached as Annex 1 to the "Defence's explanation concerning the document entitled 'Defence's Position on the facts contained in the Closing Order'", E5/11/6; *see also* "Annex 2: Part III Character Information", E5/11/6.2 , 30 April 2009.

[68] T., 1 April 2009, pp. 17, 51-100. Several opportunities were provided to the Accused during hearings to further clarify his position with regard to particular facts in the Amended Closing Order (*see e.g.,* T., 30 April 2009, pp. 57-78; 18 May 2009, pp. 5-59; 16 June 2009, pp. 78-81, 86-87; 17 June 2009, pp. 37-39).

[69] *See e.g.,* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 3, 7, 35, 39, 58-60, 169, 203, 213.

[70] *See e.g.,* Rules 62 and 62*bis* of the ICTR RPE; Rules 62 and 62*bis* of the ICTY RPE, and Rules 61 and 62 of the RPE of the SCSL.

[71] *See e.g.*, *Prosecutor v. Serugendo,* Judgement and Sentence, ICTR Trial Chamber (ICTR-2005-84-I), 12 June 2006, paras 4-11 (noting that a plea agreement was filed by the parties on 16 February 2006 and conviction entered by the Trial Chamber following a plea hearing on 15 March 2006); *Prosecutor v. Bralo*, Sentencing Judgement, ICTY Trial Chamber (IT-95-17-S), 7 December 2005, para. 3 (noting that a plea agreement was filed by the parties on 19 July 2005 and conviction entered by the Trial Chamber following a hearing on the same day).

remained free to assess what weight, if any, to give it.[72] The Internal Rules do, however, permit the Chamber to accept such facts as proven.[73]

1.6.5.2 Questioning of the Accused and the privilege against self-incrimination

50. Accused persons enjoy a fundamental right not to be compelled to testify against themselves or to confess guilt.[74] The Accused was informed of this right and nevertheless chose to respond to questions at trial and to confirm many of the facts contained in the Amended Closing Order.[75] The Accused's responses constituted evidence, the probative value of which has been evaluated by the Chamber.[76]

51. Internal Rule 90(1) obliges the Chamber to pose all pertinent questions to the Accused, irrespective of whether these would tend to prove or disprove his guilt. Over the course of the trial, the Chamber (followed by the Parties) questioned the Accused in relation to seven thematic areas of relevance to the proceedings.[77]

1.6.5.3 Witnesses, Civil Parties and Experts

52. The Internal Rules exempt certain individuals from the requirement of testifying under oath or affirmation.[78] These individuals may nevertheless testify and have their

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[72] T., 17 February 2009, pp. 15-16 (noting the role of the agreement on facts in the proceedings).

[73] New sub-Rule 87(6) of the Internal Rules, which came into force on 21 September 2009, clarifies that "[w]here the Co-Prosecutors and the Accused agree that alleged facts contained in the Indictment are not contested, the Chamber may consider such facts as proven."

[74] *See* ECCC Law, Article 35 (new)(g); Internal Rule 21(1)(d); *see also* Article 14(3)(g) of the ICCPR.

[75] T., 30 March 2009, p. 5.

[76] *See also* Internal Rule 87(5) ("The Chamber shall give the same consideration to confessions as to other forms of evidence.")

[77] Direction on the Scheduling of the Trial, E26, 20 March 2009, para. 9 (these seven thematic areas were: issues relating to M-13; establishment of S-21 and the Takmao prison; implementation of CPK policy at S-21; armed conflict; functioning of S-21, including Choeung Ek; establishment and functioning of S-24; and issues relating to the character of the Accused). Civil Parties were not, however, permitted to pose questions to the Accused or to witnesses on issues relating to the character of the Accused; *see* Oral Decision of the Chamber at T., 27 August 2009, p. 74 (Judge LAVERGNE dissenting); Decision on Civil Party Co-Lawyer's 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, E72/3, 09 October 2009; Decision on the Appeals Filed the Lawyers for Civil Parties (Groups 2 and 3) Against the Trial Chamber's Oral Decisions of 27 August 2009, E169/1/2, 24 December 2009.

[78] Included in this category are the Accused, the Civil Parties and witnesses exempt from doing so pursuant to Internal Rule 24(2).

statements put before the Chamber and assessed as evidence where relevant and probative.

53. In particular, a number of the individuals who testified before the Chamber were survivors of S-21 and S-24. The ECCC legal framework distinguishes between the survivors who testified as witnesses and the survivors who were joined as Civil Parties and also provided evidence before the Chamber. Pursuant to Internal Rule 23(6), upon joining as a Civil Party, a victim becomes a party to the proceedings. These survivors were accordingly no longer questioned as witnesses and were exempted by the Internal Rules from the requirement to testify under an oath or affirmation.

54. A total of 24 witnesses testified under oath before the Chamber during the proceedings.[79] Protective measures were afforded in a limited number of cases.[80] 22 Civil Parties provided evidence before the Chamber.

55. Pursuant to Internal Rule 31, the Chamber sought expert opinion on a variety of subjects relevant to the proceedings.[81] Expert testimony is designed to provide specialised knowledge, be it a skill, or knowledge acquired through training or research, which assists the Chamber in understanding the evidence presented. The Chamber retains its exclusive responsibility to decide any issue within its competence. A total of nine experts appeared before, or made submissions to, the Chamber over the course of the trial.

1.6.5.4 Documents

56. Over the course of the trial, approximately 1,000 documents were put before the Chamber and subjected to examination.

57. As a general rule, documents were required to be available in all three working languages of the ECCC (Khmer, French and English) in order to be put before the

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[79] Internal Rule 24(2) excludes a number of witnesses, including the father, mother and ascendants of the Accused or the Civil Parties, from taking an oath prior to their statements before the Trial Chamber.

[80] *See* Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, E135, 7 August 2009.

[81] *See* Decision on Protective Measures for Witnesses and Experts and on Parties' Request to Hear Witnesses and Experts – Reasons, E40/1, 10 April 2009, paras 26-28; Decision Concerning the Assignment of Experts, E51, 23 April 2009.

Chamber.[82] In light of the requirements of Internal Rule 87, only those parts of documents which were read out in full or summarised and subjected to examination were considered put before the Chamber. Practices developed before the Chamber to expedite proceedings in relation to uncontested documents have since been reflected in amendments to the Internal Rules.[83]

1.6.6 Spelling of Names and Locations

58. The spelling of certain names in transcripts and documents sometimes differed based on a number of circumstances, such as the person's area of provenance, the pronunciation of the name or its subsequent interpretation. Similarly, the spelling of certain locations sometimes differed across various references. The Chamber has accepted that names and locations with similar but not identical spelling may nonetheless refer to the same individuals or locations. Given the Cambodian practice of adopting different names, as well as the prevalence of aliases and revolutionary names within the CPK at the time, the Chamber also notes that individuals were sometimes referred to by various appellations.

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82 *See also* Oral Decision of the Chamber at T., 19 May 2009, pp. 31-33.

83 On 21 September 2009, an amendment to Internal Rule 87(3) came into force which clarified that "[e]vidence 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" (emphasis added); *see also* Oral Decision of the Chamber at T., 20 May 2009, pp. 4-6 (noting that where the discussion of a document extended beyond its initial summary, the entire discussion is available for the Chamber's decision. Further, a party need not have specifically commented on a document for it to be considered subjected to examination).

2 FACTUAL AND LEGAL FINDINGS

2.1 Historical Context and Armed Conflict

59. A brief overview of the historical context in which the DK regime took power in Cambodia indicates that during most of the period of the DK regime, Cambodian and Vietnamese armed forces engaged in increasingly violent hostilities. This culminated in the Vietnamese military offensive, the fall of Phnom Penh on 7 January 1979 and the DK leadership fleeing the capital.[84]

60. The Cambodian-Vietnamese conflict stemmed from various factors, some of which dated back centuries. The Vietnamese Southern expansion started in the 15th century, resulting in hereditary enmity between Cambodia and Vietnam. In addition to this historical animosity, disputes over border demarcations drawn by the French, often favouring the Vietnamese side, and in particular over the Brevié line (drawn in 1939 as a maritime boundary for administrative and policing purposes) further increased tension.[85]

61. The Cambodian communists in particular harboured resentment towards Vietnam after the 1954 Geneva Conference, where they perceived betrayal by their Vietnamese counterparts.[86] This sentiment was further aggravated in the early 1970s. While the

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[84] T., 25 May 2009 (Nayan CHANDA), pp. 52, 71.

[85] T., 25 May 2009 (Nayan CHANDA), pp. 31-32, 35, 56, 57, 64, 81-83; T., 26 May 2009 (Nayan CHANDA), p. 25. Expert Nayan CHANDA described the conflict as arising in part from "anti-Vietnamese racism" (T., 25 May 2009, p. 35); *see also* "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 5, 32-33, 49, 54-56, ERN (English) 00192190, 00192217-00192218, 00192234, 00192239-00192241 and more generally pp. 49-57, ERN (English) 00192234-00192242; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, pp. 2-3, 37, ERN (English) 00187381-00187382, 00187396; "US Department of State 'International Boundary Study No.155'", including Appendix 12: Translation of letter dated 31 January 1939 by Mr. Brevié establishing the Brevié Line, E3/520, in particular ERN (English) 00157794. *See further* "1:959,000 scale colour nautical map of Gulf of Siam showing off-shore islands in relation to Vietnam, Cambodia and Thailand", E3/534, for a map showing the Brevié Line and "Black Paper" (book), published September 1978, E3/199, Chapter 1: "The Annexationist Nature of Vietnam", pp. 3-13, ERN (English) 00082514-00082519 (for an illustration of anti-Vietnamese rhetoric).

[86] T., 25 May 2009 (Nayan CHANDA), pp. 32-33, 87; T., 26 May 2009 (Nayan CHANDA), p. 13. Unlike their Vietnamese and Laotian counterparts, the Cambodian communists ("Khmer Issarak") were excluded from participation in the negotiations. In addition, the Vietnamese communists gave up their colleagues' claims for communist-controlled areas to the Royal Government of Cambodia. Finally, the

Vietnamese had assisted the Khmer Rouge in their resistance struggle against the Cambodian pro-American LON Nol regime, which had overthrown Prince Sihanouk in March 1970, tension again arose following the Paris peace talks in 1972-1973 between the Vietnamese and the United States of America. The United States demanded that the Khmer Rouge enter into negotiations with the LON Nol government, which they refused, believing that they were close to victory. The Vietnamese and the United States signed a peace treaty in 1973, and the United States commenced a bombing campaign on Cambodia. The Khmer Rouge viewed the peace treaty as a betrayal by the Vietnamese, which freed up American bombers to inflict massive bombings on Cambodia. The peace agreement was followed by Khmer Rouge attacks on Vietnamese arms depots, hospitals and base camps, and executions of Vietnamese cadres inside Cambodia.[87]

62. Tensions were further exacerbated by the Khmer Rouge and then DK leaders' belief that Vietnam intended to impose and control an Indochinese Federation, which would result in Cambodia being "swallowed" by its eastern neighbour.[88] The Vietnamese, on the other hand, feared domination by the Khmer Rouge's ally, China. It was within this climate of distrust and hostility that the first border clashes between Cambodia and Vietnam occurred soon after the fall of Phnom Penh to the Kampuchea People's National Liberation Armed Forces ("KPNLAF") on 17 April 1975 and that of Saigon to the North Vietnamese army two weeks later, on 30 April 1975.[89]

63. The Amended Closing Order summarises the conflict between Cambodia and Vietnam as follows:

Cambodian communists were ordered to disband and disarm ("Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 58-59, ERN (English) 00192243-00192244).

[87] T., 25 May 2009 (Nayan CHANDA), pp. 53-55, 88; T., 26 May 2009 (Nayan CHANDA), p. 13; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 48, 64, 68, 72, ERN (English) 00192233, 00192249, 00192253, 00192257.

[88] T., 25 May 2009 (Nayan CHANDA), pp. 27-28, 32, 83-85; "Letter to the UN Secretary General from the Representative of the DK Government dated 2 January 1979, E3/528, ERN (English) 00078239; *see also* an illustration of this belief and related propaganda in "Black Paper" (book), published September 1978, E3/199, pp. 14-15, 19-21, ERN (English) 00082520, 00082522-00082523; "DK Embassy in Beijing Public Statement entitled 'News of Democratic Kampuchea, No. 005'", E3/758; "Press Communiqué of the Spokesman of the Ministry of Propaganda and Training (and Information) of the Democratic Kampuchea", E3/761; "International Media Report 'Phnom Penh Rally Marks 17th April Anniversary'", E3/783, ERN (English) S00010558..

[89] T., 25 May 2009 (Nayan CHANDA), pp. 32-34, 88; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 5-6, ERN (English) 00192190-00192191.

> 16. Almost immediately following the KPNLAF's entry into Phnom Penh on 17 April 1975, international armed conflict broke out between Vietnam and Cambodia. Protracted hostilities continued until at least 6 January 1979.
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> 17. Although Democratic Kampuchea and the Socialist Republic of Vietnam only officially recognised the existence of international armed conflict on 31 December 1977, there is evidence that, from mid-April 1975, with the exception of several respites during peace negotiations or diplomatic and cultural visits, there was escalating and increasingly frequent armed violence between the two States. In particular, the former KPNLAF, renamed the Revolutionary Army of Kampuchea [("RAK")], fought the Vietnam People's Army at various times in the Cambodian territories of: Ratanakiri; Mondulkiri; Kratie; Kompong Cham; Prey Veng; Svay Rieng; Kandal; Takeo; Kampot; and the islands of Wai, Koh Ach, Koh Tral, Koh Ses, Koh Thmei, Koh Sampoch, Koh Rong, and Koh Muk Ream.
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> 18. At the end of 1977, the conflict escalated into a full-scale war which reached deep into Democratic Kampuchea, and led the DK to seize the United Nations Security Council of the matter on 31 December 1978. By 7 January 1979, the RAK had been forced to flee Phnom Penh and, from that point forward, the regime rapidly lost effective control of the greater part of Cambodian territory.[90]

64. The Accused did not dispute that there was an armed conflict with Vietnam as of 31 December 1977. Initially, he took no position in relation to the preceding period. During his testimony on 9 and 10 June 2009, however, he acknowledged the existence of a continuous armed conflict between DK and Vietnam from 17 April 1975 to 6 January 1979, although claiming to have had limited knowledge of it at the time. In its final submission and closing statement, the Defence reiterated its acknowledgment that DK and Vietnam were in armed conflict from 31 December 1977, but alleged that the existence of an armed conflict before late 1977 remained uncertain.[91] The Co-Prosecutors submitted that an international armed conflict existed between 17 April 1975 and 6 January 1979.[92]

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[90] Amended Closing Order, paras 16-18 (footnotes omitted).

[91] T., 9 June 2009 (Accused), pp. 75-79, pp. 84-89; T., 10 June 2009 (Accused), pp. 69, 75-76. For more details on the knowledge of the Accused at the time, *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 28, 28a-d. "Final Defence Written Submissions", E159/8, paras. 25-34; T., 25 November 2009 (Defence Closing Statement), pp. 80-82.

[92] "Co-Prosecutors' Final Trial Submission with Annexes 1-5", E159/9, paras. 49-61, 295; T., 25 November 2009 (Co-Prosecutors' Closing Statement), pp. 48-50. The Civil Parties did not make any submissions with regards to the existence of an international armed conflict.

65. The relationship between Vietnam and Cambodia during the DK period can be divided into two main phases; the first from the KPNLAF's entry into Phnom Penh on 17 April 1975 until the DK's severance of diplomatic relations with Vietnam on 31 December 1977[93] and the second from 31 December 1977 until the fall of Phnom Penh on 7 January 1979, when the DK government fled the capital.

2.1.1 April 1975 to 31 December 1977

66. As early as April 1975, disputes over the control of a number of islands off the Cambodian and Vietnamese coasts resulted in armed confrontations between the armed forces of the two nations. In May 1975, the RAK forces seized the islands of Phu Quoc ("Koh Tral" in Khmer) and Tho Chu ("Koh Krachak" in Khmer), causing numerous casualties, before the islands were re-taken by the Vietnamese army two weeks later. Efforts to assert control over disputed islands, in particular the island of Puolo Wai, resulted in the seizure by the RAK of an American container ship, the *Mayaguez*, near this island. Puolo Wai was captured by the Vietnamese army in June 1975 but returned to DK two months later.[94]

67. The Vietnamese army also conducted raids into the Cambodian provinces of Ratanakiri and Mondulkiri. From August to December 1975, there were a number of RAK incursions into Vietnamese territory, including into the provinces of Ha Tien, Tay Ninh, Kontum and Darlac. DK leaders also believed they were the victims of a failed coup or assassination in this period, staged by Vietnam.[95]

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[93] "Radio announcement by Democratic Kampuchea Ministry of Foreign Affairs announcing the severing of relations with Vietnam", E3/171; "Statement of the Minister of Foreign Affairs of Democratic Kampuchea", 31 December 1977, E3/756.

[94] T., 25 May 2009 (Nayan CHANDA), pp. 8-9, 43-44, 58-59, 63, 65; T., 26 May 2009 (Nayan CHANDA), p. 17; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 5, 9-15, ERN (English) 00192190, 00192194-00192200; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 8, ERN (English) 00187387; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, pp. 10, 16, ERN (English) 00187275, 00187281 (for a Vietnamese perspective).

[95] T., 25 May 2009 (Nayan CHANDA), pp. 43-44; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service,

68. According to Expert Nayan CHANDA, more than 150,000 civilians of Vietnamese origin residing in Cambodia were expelled in the five months following the fall of Phnom Penh to the Khmer Rouge on 17 April 1975 and took refuge in the South of Vietnam.[96]

69. Numerous DK internal documents show that border clashes occurred throughout 1976 and that DK continued to regard Vietnam as its enemy at the time. In particular, various DK military reports and telegrams from early 1976 described incidents, armed attacks and killings on both sides of the border, mainly near the Pou Nhak Mountain (O Vay) and in the provinces of Svay Rieng (Chantrea district), Prey Veng (Preah Sdah district) and Mondulkiri (in Ou Reang and Dak Dam) by either Vietnamese or RAK forces, and requested military instructions. At least four meetings of the CPK Standing Committee, held between February and May 1976, addressed the border situation and clashes with Vietnam (in particular in the provinces of Ratanakiri, Svay Rieng, Kandal (Kaam Samna) and Mondulkiri (including in Dak Dam)) and decided on military measures to be taken in response. Military meeting minutes and a speech by DK Minister of Foreign Affairs IENG Sary in December 1976, in which he indicated that aggression against DK would be resisted, also attest to the continuation of the conflict between DK and Vietnam in the latter part of 1976. Several border discussions took place during 1976, but were generally inconclusive.[97]

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entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 8, ERN (English) 00187387; "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, p. 10, ERN (English) 00187275 (for a Vietnamese perspective); "Black Paper" (book), published September 1978, E3/199, p. 76, ERN (English) 00082551; "News of DK: News Summary from Phnom Penh", E3/755, ERN (English) 00305342.

[96] T., 25 May 2009 (Nayan CHANDA), pp. 10-11, 45; T., 26 May 2009 (Nayan CHANDA), p. 2.

[97] T., 26 May 2009, p. 7; s*ee, e.g.,* "Black Paper" (book), published September 1978, E3/199; "DK Telegram entitled 'Telegram via Kolaing to Uncle 89' dated 23 January 1976", E3/806; "DK Report entitled 'Report from Sector 23 to East Zone' dated 20 February 1976", E3/768; "CPK Standing Committee Meeting Minutes entitled 'Minutes, Meeting of Standing Committee' dated 22 February 1976", E3/750; "DK Telegram by Chhin entitled 'Telegram To Beloved Brother 89' dated 29 February 1976", E3/809; "DK Telegram by Ya entitled 'Telegram 25, Dear Respected Brother' dated 7 March 1976", E3/791; "DK Military Report entitled 'To beloved Brother 89' dated 9 March 1976", E3/753; "CPK Standing Committee Meeting Minutes entitled 'Record of Meeting of the Standing Committee' dated 11 March 1976", E3/89; "DK Telegram by Chhon entitled 'Telegram 21, Band 676, To Beloved and Missed Brother Pol' dated 21 March 1976", E3/114; "CPK Standing Committee Meeting Minutes entitled 'Record of Meeting of the Standing Committee' dated 26 March 1976", E3/751; "CPK Standing Committee Meeting Minutes entitled 'Examination of the Reaction of Vietnam During the Fifth Meeting' dated 14 May 1976", E3/752, ERN (English) 00182693; "DK Military Meeting Minutes by Division 920 entitled

70. Expert Nayan CHANDA spoke of a lull in the fighting between DK and Vietnam in 1976, but acknowledged that he had not had access to internal DK documents such as those cited above. The Chamber notes that until the severance of diplomatic relations in December 1977, and in some instances even beyond that date, a policy of secrecy concerning the conflict was implemented in both countries. There appears to have been a variety of reasons for the secrecy, the main one stemming from a political will to avoid interference from other countries.[98] The Chamber therefore considers that any appearance of a relative respite in 1976 is attributable not to any cessation of hostilities, but rather to the covert nature of the armed conflict between DK and Vietnam at the time.

71. The existence of conflict between DK and Vietnam in 1976 is also evident from the presence of Vietnamese prisoners in S-21 as early as that year. The Accused did not dispute that the first record of an S-21 prisoner described as "Vietnamese" dates back to 7 February 1976. He also acknowledged that Vietnamese prisoners were sent to S-21 as early as 1975 and that their number increased, particularly in 1978 as the conflict with Vietnam escalated, to a total of 345 by 6 January 1979. All Vietnamese prisoners at S-21 were divided into one of three categories (soldiers, spies and civilians), interrogated, sometimes tortured, and invariably killed.[99]

'Plenary Meeting of the 920th Division' dated 7 September 1976", E3/145; "DK Military Meeting Minutes by Division 801 entitled 'DK Military Meeting Minutes of Division 801' dated 16 December 1976", E3/162; "International Media Report dated 19 January 1978 on Speech of Pol Pot on 17 January 1978", E3/200, ERN (English) S00008671; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 8, ERN (English) 00187387; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, pp. 11, 20-21, ERN (English) 00187276; 00187285, 00187286 (for a Vietnamese perspective).

98 T., 25 May 2009 (Nayan CHANDA), pp. 21, 71, 73-74, 90-91, 105-107, 109-110; T., 26 May 2009 (Nayan CHANDA), pp. 6-7; T., 6 August 2009 (David CHANDLER) pp. 17-18, 99-100; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 83, 91, 196, 318, ERN (English) 00192268, 00192276, 00192381, 00192503.

99 T., 9 June 2009 (Accused); pp. 72, 96-97; T., 10 June 2009 (Accused), pp. 2, 3, 5-19; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras. 108 (a, b, c); T., 1 April 2009 (Agreed Facts), pp. 72-73; "Vietnamese Prisoners Entering S-21", E68.27; "S-21 Prisoners identified as Vietnamese", E68.30.

72. From January 1977, DK increasingly conducted raids into Vietnamese territory, none of which were publicised in either country, and prepared army units in the east of the country for an attack on Vietnam.[100]

73. On 30 April 1977, the RAK initiated a large-scale attack against the Vietnamese township of Tinh Bien and a string of villages in the An Giang Province in the Mekong Delta, killing many civilians. The aggression continued through the following months. After unpublicised bombing of Cambodia by Vietnam starting in May 1977 and unsuccessful peace attempts in June 1977, a second major DK attack followed on 24 September 1977 in the Tay Ninh Province, killing hundreds of civilians.[101]

74. The Vietnamese army retaliated in October and November 1977 with a major unpublicised military operation into the Cambodian province of Svay Rieng, resulting in few losses for the RAK forces. It launched a further extensive attack in December 1977 at various points along the border, in particular in the provinces of Kampong Cham, Svay Rieng and Takeo, this time inflicting major defeats on the DK side.[102]

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[100] T., 25 May 2009 (Nayan CHANDA), pp. 13, 91-94, 107-108; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, ERN (English) 00192272; T., 6 August 2009 (David CHANDLER) pp. 16-18, 99-100; "'Voices from S-21 – Terror and History in Pol Pot's Secret Prison'" (book) by David CHANDLER, E3/427, p. 61, ERN (English) 00192740; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, p. 22, ERN (English) 00187287 (for a Vietnamese perspective).

[101] T., 25 May 2009 (Nayan CHANDA), pp. 11-18, 41, 43-44, 46; T., 26 May 2009 (Nayan CHANDA), pp. 18-19; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 87, 91-92, 186, 193-194, 198, 220, ERN (English) 00192272, 00192276-00192277, 00192371, 00192378-00192379, 00192383, 0192405; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, pp. 8-9, ERN (English) 00187387-00187388; "DK Telegram by Chhean entitled 'Telegram 46 - Radio Band 600 - Respected and beloved brother' dated 15 June 1977", E3/818; "DK Telegram by Chhean entitled 'Telegram 62 - Radio Band 1474 - Respectfully Presented to Respected and Beloved Mo-81' dated 14 August 1977", E3/824; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, pp. 14, 22-23, ERN (English) 00187279, 00187287-00187288 (for a Vietnamese perspective).

[102] T., 25 May 2009 (Nayan CHANDA), pp. 19-21, 44, 106; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 196, 206-207, ERN (English) 00192381, 00192391-00192392; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 9, ERN (English) 00187388; "DK Telegram by Chhon entitled 'Telegram 56 - Radio Band 348 - Dear Respected and Beloved M 870' dated 26 October 1977", E3/834; "DK Telegram by

2.1.2 31 December 1977 to 7 January 1979

75. The existence of an international armed conflict between DK and Vietnam from the end of December 1977 to at least 6 January 1979 is uncontested by the parties.[103]

76. At the end of December 1977, the DK leaders decided to publicise the war. On 31 December 1977, following a speech by DK President KHIEU Samphan denouncing Vietnamese aggression, the DK Minister of Foreign Affairs IENG Sary issued a statement severing diplomatic relations with Vietnam, and Vietnamese troops withdrew from Cambodia.[104]

77. On 6 January 1978, POL Pot presented the Vietnamese withdrawal as a "grand victory" over the Vietnamese army, and confessions of Vietnamese prisoners at S-21 started being broadcast for propaganda purposes.[105]

78. There was a wave of purges in the Cambodian Eastern Zone starting in January 1978, and border clashes continued throughout that year. In particular, on 14 March 1978, RAK forces conducted a violent attack in the Chau Doc area, resulting in many civilian casualties. In April 1978, Radio Phnom Penh broadcast excerpts from a resolution adopted at a "Phnom Penh Rally", in which the participants, including the DK

Chhon entitled 'Telegram 54 - Radio Band 642 - Dear Respected, Beloved and Missed M 870' dated 26 October 1977", E3/835; "DK Telegram by Chhon entitled 'Report to Brother about Situation of Enemy along the Route 22-7' dated 22 December 1977", E3/858; "DK Telegram by Chhon entitled 'Telegram 90: to Beloved Office 870 about situation of enemies in battle field route No 22' dated 9 December 1977", E3/849.

[103] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para 28.

[104] T., 25 May 2009 (Nayan CHANDA), pp. 44, 47, 49-50, T., 6 August 2009 (David CHANDLER), p. 100; "Statement of the Minister of Foreign Affairs of Democratic Kampuchea", 31 December 1977, E3/756; "Radio announcement by Democratic Kampuchea Ministry of Foreign Affairs announcing the severing of relations with Vietnam", E3/171; ""Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 207-208, 213, 297, ERN (English) 00192392-00192393, 00192398, 00192482.

[105] T., 10 June 2009 (Accused), pp. 3, 7-8; "Speech by Pol Pot entitled 'The Valiant and Powerful Revolutionary Army of Kampuchea Under the Leadership of the Communist Party of Kampuchea' dated 17 January 1978", E3/757, ERN (English) S00005012; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, p. 213, ERN (English) 00192398. Various Vietnamese prisoners' confessions, broadcast between January and December 1978, are contained in documents ranging from E3/665 to E3/747. *See, e.g.,* "Radio broadcast of confession by SRV Lt. Tran Van Hay transcribed in the Foreign Broadcast Information Service (Cambodia), 23 January 1978", E3/665; "Radio broadcast of confession by SRV 'spy', former South-Vietnam Lt. Tran Ngoc Tuong reported among various other foreign newsreports in BBC SWB (Far Eastern Relations), 17 June 1978", E3/716; "Radio broadcast of confession by female SRV 'spy' Le Thi Vinh Sang reported among various other foreign newsreports in BBC SWB (Far Eastern Relations), 22 December 1978", E3/746.

leaders, "solemnly pledged", *inter alia,* to "exterminate resolutely all agents of the expansionist, annexationist Vietnamese aggressors from our units and from Cambodian territory forever". This policy was reiterated in May 1978, when a broadcast aired by Radio Phnom Penh appealed to DK soldiers to kill the whole of the Vietnamese population.[106]

79. In June 1978, Vietnam started bombing Cambodia and in October 1978 it commenced preparations for a major offensive by placing troops and artillery along the border. The Kampuchean National United Front for National Salvation ("KNUFNS"), dedicated to overthrowing the DK regime, was founded.[107]

80. The Vietnamese Army launched a large-scale attack against DK in late December 1978. Despite fierce resistance by the RAK, the KNUFNS and Vietnamese troops entered DK and within a few days had captured Phnom Penh on 7 January 1979.[108]

81. DK was also involved in armed border clashes with Thailand around the same time, though these skirmishes were of much lesser significance than those with Vietnam.[109]

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[106] T., 25 May 2009 (Nayan CHANDA), pp. 16-18, 22, 26-27, 66; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 213-214, 221-224, 251, ERN (English) 00192398-00192399, 000192406-00192409, 00192436; "Broadcast entitled 'Phnom Penh Rally Marks the 17th April Anniversary' dated 16 April 1978", E3/783, ERN (English) S00010563; "Report about Cambodia's Strategy of Defence against Vietnam dated 15 May 1978", including a Broadcast of 10 May 1978, E3/198, ERN (English) 00003960; *see also* Expert Nayan CHANDA's account of Ros Saroeun's discovery of "Directive 870" dated 1 April 1977 to at least one DK district chief, requesting him to hand over to the state security service all ethnic Vietnamese in the district, and all Khmers who had any Vietnamese connection and his conclusion that this was the beginning of a campaign to kill all ethnic Vietnamese (T., 25 May 2009 (Nayan CHANDA), pp. 66-67; 107-108; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, p. 86, 186, ERN (English) 00192271, 00192371.)

[107] T., 25 May 2009 (Nayan CHANDA), pp. 28, 48-49; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 318, 333-334, 339, ERN (English) 00192503, 00192518-00192519, 00192524; "'The Vietnam – Kampuchea Conflict (A Historical Record)' dated 1979" (book), E3/522, pp. 45-46, ERN (English) 00187363-00187364.

[108] T., 25 May 2009 (Nayan CHANDA), pp. 48, 52; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 337, 341, 343, 345-346, ERN (English) 00192522, 00192526, 00192528 ("Soon nine of Vietnam's twelve divisions, accompanied by three regiments of front soldiers, would close in on Phnom Penh from the southeast to the north"), 00192530-00192531; *see also* "Telegram dated 31 December 1978 from the Deputy Prime Minister in Charge of Foreign Affairs of Democratic Kampuchea addressed to the President of the Security Council (UN S/13001)", E3/785; "Telegram dated 3 January 1979 from the Deputy Prime Minister in Charge of Foreign Affairs of Democratic Kampuchea addressed to the President of the Security Council", E3/209.

[109] T., 25 May 2009 (Nayan CHANDA), pp. 26-27, 73; T., 26 May 2009 (Nayan CHANDA), p. 24.

2.2 Overview of DK Period

82. The Accused has indicated either that he agrees with, or does not dispute,[110] paragraphs 10-15 of the Amended Closing Order, which provide the following overview of the DK period:

> 10. On 17 April 1975, the army of the Communist Party of Kampuchea (CPK), the Kampuchea People's National Liberation Armed Forces (KPNLAF), entered Phnom Penh and seized national power. With the end of the civil war against LON Nol's Khmer Republic, the CPK's stated policy was to pass to "… *the next phase of making socialist revolution*". During the three years, eight months, and twenty days, that followed, the CPK exercised effective authority over Democratic Kampuchea, and pursued a policy of "*completely disintegrat[ing]*" the economic and political structures of the Khmer Republic and creating a "*new, revolutionary State power*".
>
> 11. Historians and observers agree that this programme was implemented through a number of means including the forced transfer of residents of Phnom Penh and other former Khmer Republic strongholds to the countryside; the creation of Party-controlled agricultural production cooperatives where people were made to work under extremely difficult conditions to increase food production; and the elimination of officials and supporters of the previous regime.
>
> Many of these CPK policies required the transformation of "*new people*" into peasants. These individuals were broadly made up of evacuated city dwellers and peasants living under LON Nol control until April 1975, as distinct from "*old*" or "*base*" people who were essentially peasants from areas already under the authority of the CPK during the Khmer Republic period.
>
> 12. Politically motivated extra-judicial executions were committed from the outset by military units. They continued thereafter in security centres throughout the country. The CPK foreshadowed these events by [organising], in February 1975, a "Popular National Congress of the National United Front of Kampuchea", at which it publicly announced that seven so-called Khmer Republic "*super-traitors*" were to be summarily killed for treason, post-liberation.
>
> The Congress also declared that lower-level Khmer Republic personnel would be welcomed by the revolutionary forces *"provided they immediately cease their service to the seven traitors and stop cooperating with them*". This implied that any such personnel who did not immediately defect to the Communist side were vulnerable to summary execution.

[110] T., 1 April 2009 (Agreed Facts), pp. 54-55; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 10-27.

In fact, it appears that from the early 1970s, CPK security organs such as M13, chaired by DUCH, had been tasked with executions, indicating that a policy of physically eliminating persons deemed "enemies" of the revolution was already institutionalised prior to 17 April 1975.

13. The CPK destroyed the legal and judicial structures of the Khmer Republic. While it is true that Democratic Kampuchea adopted a Constitution in January 1976, its Chapter 7, concerning "*Justice*," showed the CPK's priority was to protect the State from subversion. Article 10 provided for an unspecified "*highest level of punitive sanction*" for "*opposition and wrecking activities of a systematic character that endanger the State*",[111] while declaring that other "*crimes*" must be dealt with through "*re-education and refashioning within the context of State or popular organs*".

Although Article 9 promised that "*courts constituted as People's Courts belonging to the people*" would "*embody the people's justice and defend the people's rights and democratic freedoms,*" there is no evidence that they were ever created. Moreover, while the first, and apparently only meeting of what was said to be a popularly elected People's Representative Assembly mandated the formation of a Judicial Committee in April 1976, no evidence exists of any implementation of Article 9. This left the punishments set forth in Article 10 to be applied arbitrarily. Furthermore, there is no evidence that the CPK established appropriate facilities for captured enemy combatants or civilians, or mechanisms to challenge the legality of their arrest, detention or punishment.

14. The old legal structures were replaced by re-education, interrogation and security centres where former Khmer Republic officials and supporters, as well as others accused of offences against the CPK, were detained and executed.

This network[112] of security centres was supplemented by a programme of surveillance at all levels of the regime which aimed to identify, report, and eliminate potential enemies of those in control of the Party.

15. Thus, numerous persons, rightly or wrongly linked to the Khmer Republic or its purported social class foundations, were punished or summarily executed by the CPK in the days and weeks immediately following the "liberation" of Phnom Penh, through to the end of the regime.[113]

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[111] The Chamber notes that this language does not correspond to the English translation of "Constitution of Democratic Kampuchea", E3/27, at ERN 00184836, which states: "Dangerous activities in opposition to the people's State must be condemned to the highest degree."

[112] The Accused did not agree that there was a direct link between the security centres and therefore did not accept the use of the word "network". In all other respects however, he agreed with this statement; *see* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 25-26; T., 1 April 2009 (Agreed Facts), p. 55.

[113] Amended Closing Order, paras 10-15 (footnotes omitted).

83. It is within this historical and political context that the structure and policy of the CPK, particularly as it applied to the operation of S-21 and the charges against the Accused, are examined.

2.2.1 CPK structure

84. Following the liberation of Phnom Penh, the CPK met at a Party Congress in January 1976 to formalise by statute ("CPK Statute"),[114] a complex, centrally-organised structure by which it intended to govern. The CPK Statute provided that the entire government apparatus and the armed forces would be under the complete control of the CPK.[115] Its provisions reflected earlier policy and structures devised at the First Congress of the CPK in 1960, including the establishment of a Central Committee and a Standing Committee.[116]

85. In practice, the Central Committee met rarely. Its powers were delegated to, and exercised by its executive, the Standing Committee, the membership of which comprised the Secretary and Prime Minister POL Pot, his Deputy Secretary NUON Chea and seven other high-level members of the CPK, either as full or alternate members.[117] The Standing Committee met frequently and its daily work was conducted from Office 870 based in Phnom Penh.[118] Office 870 and the Standing Committee were known also as the "Centre", the "Organization,"[119] or "Angkar"[120] and were responsible for monitoring and

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[114] "Communist Party of Kampuchea: Statute", E3/28, pp. 1-55; "CPK Magazine entitled 'Revolutionary Flag', dated June 1976", E3/36.
[115] "Communist Party of Kampuchea: Statute", E3/28, Art. 27; "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182814.
[116] T., 18 May 2009 (Craig ETCHESON), p. 77. An earlier meeting of the Standing Committee also signalled the manner in which work would be delegated, the operational process, preparations for living in common and specific work arrangements for commerce and the military; *see* "Meeting of the Standing Committee of 9 October 1975", E3/14.
[117] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 12; "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182814.
[118] T., 21 May 2009 (Craig ETCHESON), p. 22; "Meeting of the Standing Committee of 9 October 1975", E3/14.
[119] Also known as the "Party Centre"; *see* "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, fn. 18; T., 18 May 2009 (Craig ETCHESON), pp. 70, 81.
[120] T., 18 May, 2009 (Accused), p. 17; T., 18 May 2009 (Craig ETCHESON), pp. 69-70.

implementation of CPK policy nationwide.[121] Office 870 discharged these responsibilities through a network of subsidiary offices.[122]

86. The CPK Statute was a primary source of CPK policy, albeit applying directly only to those who were members of the Party.[123] Nonetheless its provisions had implications for the whole of the country.[124] From the outset, the entire civilian population was governed by a network of bodies tightly controlled by the Central Committee through the Standing Committee. The country was divided into Zones, and then subdivided into Sectors, Districts, and Communes.[125] With the advent of the DK regime, Communes which traditionally had been divided into villages were "combined into larger entities known as Cooperatives, within which communal eating and work were organized".[126] Other Commune or Cooperative units comprised mobile brigades, groups of 100 workers and local militia.[127] The Commune or Cooperative branches of the CPK were under the leadership of branch secretaries.[128]

87. Zones were governed by three-person Zone Committees comprising a Secretary, Deputy-Secretary responsible for security and a Member responsible for economics appointed by the Standing Committee. In addition to the six original Zones there were a number of autonomous sectors, and special municipal regions under military authority, including DK's capital city, Phnom Penh.[129] At each level, the leadership structure

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[121] T., 18 May 2009 (Craig ETCHESON), p. 81; "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182809.
[122] T., 21 May 2009 (Craig ETCHESON), p. 28; *see also* "Meeting of the Standing Committee of 9 October 1975", E3/14.
[123] T., 21 May 2009 (Craig ETCHESON), p. 20.
[124] T., 21 May 2009 (Craig ETCHESON), p. 20 ("[…] because the Statute of the Communist Party of Kampuchea was the guiding document of the organization which exercised dictatorial state power in Cambodia, in fact many of the provisions embodied within the Statute of the Communist Party were imposed on the entire people of the nation.")
[125] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras. 7-10; T., 18 May 2009 (Craig ETCHESON), p. 76; "Communist Party of Kampuchea: Statute", E3/28, Article 7.
[126] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 10; *see also* "CPK Magazine entitled 'Revolutionary Flag', Special Issue, October - November 1977", E3/29, ERN (English) 00182581.
[127] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 10; "Communist Party of Kampuchea: Statute", E3/28, Article 9.
[128] "Communist Party of Kampuchea: Statute", E3/28, Article 9.
[129] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 7; T., 18 May 2009 (Craig ETCHESON), pp. 74-76 (later various changes were made to the number and composition of the Zones and autonomous regions).

mirrored the Zone governing body; those governing were appointed by the body immediately superior to it, and the appointments were finally approved by the Standing Committee itself. Each body or organ reported to the body above it, and ultimately to the Standing Committee.[130]

88. The CPK Statute established criteria for membership and required Party members to be "self-aware" and to "build a clear, clean and pure personal history […] constantly."[131] It also demanded regular self-assessment sessions at all levels of the Party and among the cadres, exhorting members of the CPK to "take criticism and self-criticism as [the] daily routine" and to "cling closely to the principles and stances of independence, mastery, self-reliance, and self-determination of fate."[132]

89. The CPK directed the Central Committee to implement the Party's "lines" (or policies) throughout the country, instruct the Zone, Sector, and Military Organizations and the Party organs responsible for various nation-wide departments. It was further directed to administer and deploy "cadre and party members within the Party as a whole […] while maintaining a clear and constant grasp on their biographies and political, ideological and organizational stances and constantly educating and indoctrinating them in terms of politics, ideology and organization."[133]

90. All bodies, including the military, were required to report to the Central Committee through the Standing Committee, and were prohibited from communicating with each other. As the Accused described the reporting obligations, they were vertical, never horizontal.[134] According to his testimony, the Accused received instructions from his superior, SON Sen and later NUON Chea, but did not communicate with any other organ of the CPK directly.[135] The rule against direct communication between organs of the CPK applied to the military as well as to the Zones and their subsidiary organs, and was

[130] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 8.
[131] "Communist Party of Kampuchea: Statute", E3/28, preambular para. 6.
[132] "Communist Party of Kampuchea: Statute", E3/28, preambular paras 7 and 8.
[133] T., 18 May 2009 (Craig ETCHESON), p. 68; *see also* "Communist Party of Kampuchea: Statute", E3/28, Art. 23.
[134] T., 9 June 2009 (Accused), pp. 51-52 (adopting Etcheson's analysis in "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 56).
[135] T., 29 April 2009 (Accused), p. [82]; T., 9 June 2009 (Accused), p. 39.

intended to ensure that the Central Committee of the CPK held and controlled all information and directed the actions of the whole population, from the most senior member of the Party to the humblest citizen.[136]

91. There was no traditional bureaucratic structure operating in the various Ministries, which were simply areas of responsibility assigned to a Party member.[137] The Standing Committee managed the appointment of senior officials to the Party, government and military. It also appointed leading officials to government posts, and appointed and removed senior military members of the General Staff.[138] Every aspect of life in DK was managed through these structures, from security (both internal and external), foreign affairs, energy and commerce to production, farming, political instruction, health care, education and communications.[139]

2.2.2 The Constitution of Democratic Kampuchea

92. Contemporaneously with the enactment of the CPK Statute, the CPK promulgated the "Constitution of Democratic Kampuchea" ("DK Constitution").[140] The DK Constitution provided for a "Kampuchean People's Representative Assembly" ("KPRA") to be elected by secret ballot in direct general elections, an executive body elected by and responsible to the KPRA, a judicial system staffed by judges selected and appointed by the KPRA, and a State Praesidium to be selected and appointed every five years by the KPRA.

93. The members of the KPRA, however, were never elected; the Central Committee appointed the chairman and other high officials both to it and to the State Praesidium.[141]

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[136] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 36.
[137] T., 27 May 2009 (Craig ETCHESON), pp. 65-66; *see also* "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 001828313-001828314; "Meeting of the Standing Committee of 9 October 1975", E3/14, ERN (English) 00183393-00183408.
[138] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 18; *see also* "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13.
[139] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 35; *see also* "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182809; "Meeting of the Standing Committee of 9 October 1975", E3/14.
[140] "Constitution of Democratic Kampuchea", E3/27.
[141] "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182813.

Plans for elections of members were discussed, but the 250 members of the KPRA were in fact appointed by the upper echelon.[142] There is evidence to suggest that the Central Committee did not intend to establish either of these organs as provided for in the DK Constitution,[143]and that the DK Constitution was, as the Accused has said, a "façade".[144]

2.2.3 The Judiciary

94. In his book, Expert David CHANDLER also states that after the Khmer Rouge victory of 17 April 1975, the judicial system of Cambodia disappeared.[145] There were no courts, judges, laws or trials in DK. The "people's courts" stipulated in Article 9 of the DK Constitution were never established.[146] The KPRA met once in April 1976, but its legislative and policy responsibilities were undertaken by the Standing Committee and no laws or enforcement mechanisms, including courts which might conduct trials, were ever established.[147] The Chamber accordingly finds that during the DK regime, there was no functioning judicial system to provide procedural safeguards for detainees.

2.2.4 The Military

95. The Central Committee also exercised rigid control of the military. The RAK as required by the CPK Statute became a "mainforce Army belonging to the Centre."[148] For

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[142] T., 21 May 2009 (Craig ETCHESON), p. 17.

[143] "Minutes of Meeting on Base Work 8 March 1976", E3/44, ERN (English) 001826308 ("If anyone asks […] do not speak playfully about the Assembly in front of the people to let them see that we are deceptive, and our Assembly is worthless.")

[144] T., 9 June 2009 (Accused), p. 25 ("And the DK constitution, as I told Your Honours, it is a façade […] a decoration of their activities"); T., 21 May 2009 (Craig ETCHESON), p. 17 ("The KPRA […] did not meet regularly, did not pass any laws, and in fact did not appear to have any duties at all other than to serve as a propaganda façade […] to burnish the reputation of DK among other nations of the world.")

[145] "Voices from S-21: Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 120, ERN (English) 00192813.

[146] T., 6 August 2009 (David CHANDLER), p. 34 (in Expert CHANDLER's opinion, the only trace of a judicial system was the interrogation, normally a precursor to a judicial prosecution, but there was no constitutionally-based body to deal with the information gathered); T., 19 May 2009 (Craig ETCHESON), p. 48.

[147] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras 149-151. A judicial committee was approved by the KPRA in April 1976: "Document on Conference I of Legislature I of the People's Representative Assembly of Kampuchea, 11-13 April 1976", E3/43; T., 19 May 2009 (Craig ETCHESON), pp. 47-48.

[148] "Communist Party of Kampuchea: Statute", E3/28; "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 12.

organizational purposes, the Standing Committee, delegated by the Central Committee, controlled the three branches of the Military directly.[149] A Military Committee was established by the Central Committee and chaired by POL Pot. SON Sen to whom the Accused reported initially, and NUON Chea who succeeded him as the Accused's superior, were both members of the Military Committee.[150]

96. Zones and Sectors also commanded armed units under a General Staff, and Districts controlled less formal militia. All had internal security responsibilities which included the power to arrest and execute personnel within their own area of authority, and all reported through the level above to the Standing Committee. According to Expert Craig ETCHESON, the Districts, which maintained "Security offices" and decided which "enemies" would be "disposed of" locally and which sent to higher authorities, played a key role in the DK regime.[151]

2.2.5 Relevant CPK policy

2.2.5.1 Secrecy

97. The CPK maintained almost total secrecy concerning its leadership and the implementation of its policy. Party members were enjoined to "[a]lways and absolutely strive to maintain Party secrecy with a high stance of revolutionary vigilance."[152] Breaches of secrecy could invoke Party discipline.[153]

98. The policy of secrecy contributed to the regime's ability to hide its illegal activities within Cambodia and from international scrutiny.

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[149] "Communist Party of Kampuchea: Statute", E3/28, Art. 27: The three categories were: regular army, sector army and militia.
[150] T., 18 May 2009 (Craig ETCHESON), pp. 81-82; T., 28 May 2009 (Craig ETCHESON), p. 61.
[151] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras 9, 89.
[152] "Communist Party of Kampuchea: Statute", E3/28, Art. 2: Internal Duties, para. E; *see also* T., 6 August 2009 (David CHANDLER), pp. 75-76, 97-99; T., 15 June 2009 (Accused), p. 79.
[153] "Communist Party of Kampuchea: Statute", E3/28, Art. 4(2).

2.2.5.2 "Smashing" enemies

99. The most critical aspect of CPK policy as it relates to this trial was that of "smashing" enemies, a policy introduced at M-13[154] and continued after 17 April 1975. This policy was sanctioned by Chapter 7, Article 10 of the DK Constitution, under the heading "Justice", which stated that violations of the laws of the people's State including dangerous activities in opposition to the people's State must be condemned to the highest degree. According to Expert Craig ETCHESON, POL Pot himself spoke at a conference in 1976 concerning the need to deal with enemies in the cooperatives through "continuous absolute measures to smash them."[155]

100. Described by the Accused as global, the policy stood "for S-21, for the entire party, the military, the State authority in the bases, and the Police Offices throughout the country."[156] Those deemed to be enemies and therefore to be executed, "evolved and broadened over the period as a result of domestic developments and the international armed conflict between Cambodia and Vietnam."[157] To "smash" meant more than to kill. As the Accused described it: "[…] to smash […] means to arrest secretly […, to interrogate] with torture employed, and then [to execute] secretly without the knowledge of [the detainees'] family members. [It also meant that] the person was not to be released […] So if he was smashed […] this did not go through the judicial process because there was no law, no court, the Standing Committee governed all the three main powers."[158] Moreover, to smash was frequently translated as "smash to bits" as in to smash into little pieces [... it] involved not merely a physical smashing but also a psychological smashing, and the regime of prisoner treatment inside S-21 was ideally suited to this sort of dehumanization and debasement of the individual psyche […] [S]mash means something more than merely kill."[159]

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154 T., 18 May 2009 (Accused), p. 15.
155 "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 26, fn. 51.
156 Amended Closing Order, para. 33 (footnotes omitted).
157 Amended Closing Order, para. 34
158 T., 18 May 2009 (Accused), p. 14.
159 T., 28 May 2009 (Craig ETCHESON), pp. 2-3.

101. The DK Constitution in its chapter entitled "Justice" also provided that "Other cases [than 'Dangerous activities'] are subject to constructive re-education in the framework of the State's or people's organizations."[160]

2.2.6 30 March 1976 Directive

102. One of the most critical and influential directives to full-rights members of the Party from the Central Committee was the "Decision of the Central Committee Regarding a Number of Matters" dated 30 March 1976, a document that the Accused himself had not seen until the investigation preceding this trial.[161] In it, those CPK entities entitled to "smash" or kill enemies were listed as follows:

> 1. The right to smash inside and outside the ranks [...]
> - If in the base framework, to be decided by the Zone Standing Committee.
> - Surrounding the Center Office, to be decided by the Central Office Committee.
> - Independent Sectors, to be decided by the Standing Committee
> - The Center Military, to be decided by the General Staff.

103. According to Expert Craig ETCHESON, this document, although apparently emanating from the Central Committee, was likely to have been drafted by the Standing Committee. Its importance lies in the delegation to the four organs mentioned of independent authority to kill.[162] Expert David CHANDLER described the 30 March 1976 Decision as "[…] the closest thing we've got to […] a smoking gun authorizing the smashing of enemies of Democratic Kampuchea. Of course, this document was extremely closely held. There were only six or seven copies made, and only one of these copies survived."[163]

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[160] "Constitution of Democratic Kampuchea", E3/27, Art. 10.
[161] "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13.
[162] T., 27 May 2009 (Craig ETCHESON), p. 64.
[163] T., 6 August 2009 (David CHANDLER), pp. 25-26; "Voices from S-21: Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 51, ERN (English) 00192730.

2.2.7 Dissemination of CPK policy

104. Policy was disseminated by various means including through Directives[164] to all organizational units, by stadium rallies, through a Party Training school where cadres of the CPK were instructed in the policy of the Party and the government of Democratic Kampuchea, and by strictly-controlled broadcasts on State radio. There were telegraphed instructions as well as face-to-face meetings at which policy could be communicated. In addition, the CPK required regular meetings among the Party members and cadres at all levels.[165]

105. The DK periodical "Revolutionary Flag" was an important form of communication and was widely circulated among full-rights members of the Party who were obliged to study it. According to Expert Raoul JENNAR, it was believed that all its articles were written by POL Pot.[166] It could contain general instructions concerning agricultural production as well as directives which resulted in intensified purges of "burrowing enemies" with emphasis on "new" people from the cities who were deemed to be inferior to the peasant farmers.[167] The communications were based at least to some degree on reports from Zones to Office 870, which usually emphasized their activities in searching for enemies often to the detriment of reports on economic and production issues.[168] In a Special Issue of the Revolutionary Flag magazine published in 1977, every level of the Party was exhorted to "adopt the role of leading the army and the people to attack all such enemies, sweep them cleanly away, sweep, sweep and sweep again and again ceaselessly, so that our Party forces are pure, our leading forces at every level and in every sphere are clean at all times."[169] Surviving documents also demonstrate routine reporting of executions ordered by Sector leaders.[170]

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164 T., 21 May 2009 (Craig ETCHESON), p. 35.
165 "Communist Party of Kampuchea: Statute", E3/28, Art. 18, 20; "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 57.
166 "Report by Consultant Raoul M. Jennar", E3/511, p. 4, ERN (English) 00283026.
167 T., 21 May 2009 (Craig ETCHESON), p. 42.
168 T., 21 May 2009 (Craig ETCHESON), p. 46.
169 "'Revolutionary Flag', Special Number, May-June 1978", E3/35, ERN (English) 00185343.
170 "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras 64-68.

106. Reflecting the control of the military as provided in the CPK Statute, there were also communications concerning the search for internal enemies from military units to the Party Centre. Expert Craig ETCHESON, referring to the letters sent by Division 502 Commander SOU Met to the Accused explaining the reason members of his division were sent to S-21, concluded that they were a good illustration of taking "an absolute stance towards sweeping clean enemies burrowing from within", as urged in Revolutionary Flag publications.[171]

107. "Revolutionary Youth" magazine was another important publication, directed at younger cadres. It was published monthly by the Propaganda and Education Organisation of the "Youth League" and contained articles urging youth to "have the view of constantly preparing for war."[172] The thrust of the publication was to encourage young cadres to be self-reliant, to work hard, and to support the revolution. Special emphasis was placed on engaging in physical labour and food production, to achieve three tons of paddies per hectare.[173] Cadres were told to "strengthen the stance of attacking the enemy absolutely, no matter what kind of enemy they are", to "attack and eliminate all private property" and to "regularly study the political, ideological, and organizational lines of the Party […] in order to increase political capability." At the same time, they were encouraged to "consciously and unconditionally respect the organizational discipline of the Party at all times."[174]

108. By 1978, the periodical was expounding the treachery of the Vietnamese and Americans and urging youth to "concentrate and monitor and continue to actively purge [sweep clean] enemy elements boring holes within in order to screen the units, ministries, offices, cooperatives, and our entire national society to be clean, good, fresh and

[171] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 123; T., 19 May 2009 (Craig ETCHESON), p. 7; T., 27 May 2009 (Craig ETCHESON), p. 56.
[172] "CPK magazine 'Revolutionary Youth,' issue dated February 1978," E3/532, p. 10, ERN (English) 00278717.
[173] "Revolutionary Youth', Issue number 5, May 1976", E3/136, p. 3, ERN (English) 00357870.
[174] "CPK magazine 'Revolutionary Youth,' issue dated February 1978," E3/532, p. 10, ERN (English) 00278717.

beautiful" in an echo of the language used in the Special Issue of the Revolutionary Flag magazine published in 1977.[175]

2.2.8 CPK security structure

109. A critical element of the DK structure was the Security apparatus. Internal security was entrusted to SON Sen, who was originally an alternate member of the Standing Committee. He was promoted to full membership of the Standing Committee during 1978, and became Deputy Prime Minister responsible for National Defence.[176] In addition, he was Chief of Staff of the General Staff of the RAK, thereby holding important civilian and military posts in DK.[177] Described by Expert Raoul JENNAR as "the mentor of the Accused,"[178] and the person who trained and protected him before 1975 and after 1979, SON Sen studied in France, was a member of the French Communist party and participated in the activities of the Marxist circle of Khmer students. Expert Raoul JENNAR's opinion was that SON Sen subscribed to the ideology that he learned during this period which advocated iron discipline and degradation of those accused by the regime. He further stated that this policy was imposed by him at S-21, and continued when NUON Chea assumed responsibility as the Accused's superior in 1977.[179]

110. The Santebal security system was established well before the CPK came to power.[180] As parts of Cambodia were captured during the LON Nol regime, beginning in 1971, security centres were opened in the "liberated zones". M-13 (Section 2.3.2), situated in Kampong Speu province, was one of these early Santebals. Later they were established in all parts of the country and to date, 196 centres have been identified by the

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[175] "CPK magazine 'Revolutionary Youth,' issue dated February 1978," E3/532, p. 11, ERN (English) 00278718.
[176] T., 18 May 2009 (Craig ETCHESON), p. 71.
[177] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, ERN (English) 00146854.
[178] T., 14 September 2009 (Raoul JENNAR), p. 57.
[179] T., 14 September 2009 (Raoul JENNAR), p. 59.
[180] "Report by Consultant Raoul M. Jennar", E3/511, p. 10, ERN (English) 00283032; *see also* T., 14 September 2009 (Raoul JENNAR), p. 57. According to Expert David CHANDLER, "Santebal" is a Khmer compound term that combined the words "santisuk" (security) and "nokorbal" (police); *see* "Voices from S-21: Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 3, ERN (English) 00192682; *see also* T., 22 April 2009 (Accused), p. 78 ("The word Santebal means those who looked after the peace, who preserve the peace in the country.")

Documentation Centre of Cambodia ("DC-Cam"). Their primary purpose was to "identify and kill internal enemies", to encourage informing on others and to obtain confessions.[181] Expert Raoul JENNAR contended that these methods were based on Stalinist policies and that those identified as "enemies" were to be executed or "smashed", a word used in Lenin's writings.[182]

2.3 S-21 and the Role of the Accused

111. The Amended Closing Order states, and the Accused has acknowledged, that he served as Deputy and then Chairman of S-21, a security centre tasked with interrogating and executing perceived opponents of the CPK from 1975 to 1979.[183] Section 2.3 provides a summary of the Accused's background prior to assuming these positions and describes the organisational structure of S-21, including Choeung Ek and S-24, as well as the role of the Accused at these locations. Section 2.4 describes the offences committed within S-21. The Chamber's legal findings regarding these offences and the Accused's criminal responsibility for their perpetration follow in Sections 2.5-2.7.

2.3.1 Relevant background information

112. The Accused was born on 17 November 1942 in Kompong Thom Province, into a family of poor peasants of Chinese origin. He was the eldest of five children and the only son. A good pupil, he completed his schooling at the Kompong Thom junior high school, followed by high school in Siem Reap at the Lycée Sisowath in Phnom Penh, where he passed his baccalaureate.[184] He joined the Khmer Rouge in October 1964. Upon completion of his education, he was appointed as a mathematics teacher at the junior high school in Skoun, Kompong Cham in 1965.[185] He began increasingly dedicating himself to

[181] "Report by Consultant Raoul M. Jennar", E3/511, p. 11, ERN (English) 00283033; T., 14 September 2009 (Raoul JENNAR), p. 79.
[182] "Report by Consultant Raoul M. Jennar", E3/511, p. 11, ERN (English) 00283033; T., 14 September 2009 (Raoul JENNAR), p. 87.
[183] *See generally* T., 1 April 2009 (Agreed Facts); "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1.
[184] "Part III: Character Information", E5/11/6.2, paras. 330, 331, 335, 337.
[185] "Part III: Character Information", E5/11/6.2, para. 338; T., 1 September 2009 (TEP Sem), p. 52; "The Lost Executioner" (book) by Nic DUNLOP, E160.1, pp. 59-60, ERN (English) 00370004-00370005.

revolutionary activities and left his teaching position to join the underground resistance on 29 October 1967.[186]

113. The Accused was arrested on 5 January 1968 and later sentenced to 20 years imprisonment for breach of State security.[187] Following his detention in Tuol Kork and Phnom Penh, he was transferred to the army prison at Prey Sar in May 1968, where he witnessed, but was not subjected to, illegal executions and torture.[188] The Accused subsequently was inducted as a full rights member of the CPK,[189] and chose "Duch" as his revolutionary name.[190]

114. Following the 18 March 1970 *coup d'état* led by General LON Nol against Prince NORODOM Sihanouk, the Accused was released from prison on 3 April 1970, whereupon he recommenced his activities on behalf of the Khmer Rouge.[191]

2.3.2 M-13

115. In July 1971, the Accused was tasked with directing M-13,[192] a security centre for interrogating individuals suspected of being spies or enemies of the CPK.[193] As Chairman of M-13, the Accused first operated under the supervision of VORN Vet from 20 July 1971 until the middle of 1973 and subsequently of SON Sen until January 1975.[194]

116. M-13 was divided by the Accused into two distinct facilities: M-13A, which was directly supervised by the Accused, and M-13B, which was managed by his deputy.

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186 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 4.
187 T., 1 April 2009 (Agreed Facts), p. 53.
188 T., 6 April 2009 (Accused), pp. 36-43.
189 The Chamber notes that there are some discrepancies regarding the exact date on which he was inducted; *cf.* T., 6 April 2009 (Accused), pp. 35-36 and T., 28 April 2009 (Accused), p. 56.
190 T., 6 April 2009 (Accused), pp. 47-49.
191 T., 1 April 2009 (Agreed Facts), p. 53; T., 6 April 2009 (Accused), pp. 18, 36-37.
192 Events relating to M-13 fall outside the temporal jurisdiction of the ECCC. *See* Article 2 (new) of the ECCC Law (limiting the jurisdiction of the ECCC to crimes committed "during the period from 17 April 1975 to 6 January 1979"). Given that M-13 was in many ways a precursor to S-21, the Chamber nonetheless heard testimony regarding the functioning of M-13 and the Accused's role therein.
193 T., 6 April 2009 (Accused), pp. 20, 65-68; T., 20 April 2009 (CHAN Khan), p. 90.
194 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 6.

Individuals sent to M-13A were interrogated, tortured and executed, while those sent to M-13B could be re-educated and released.[195]

117. As Chairman of M-13, the Accused was responsible for ensuring that the policy of interrogating and "smashing" detainees at M-13A was implemented. He recruited staff, including youths, amongst the local peasants and provided them with training in interrogation techniques.[196] He supervised the interrogation of M-13A detainees, which were frequently carried out by his staff through violence,[197] principally via beatings with bamboo branches.[198] The confessions of the detainees were then passed on by the Accused to his superiors, though he suspected that much of the information in them was fabricated. Once he considered the interrogation of a detainee to be complete, he ordered their execution.[199] Detainees at M-13A also died as a result of the detention conditions, which included a lack of adequate food and medical care.[200]

118. The Accused's experience operating M-13 prepared him for his work as Deputy and then Chairman of S-21.[201] In particular, he relied on many of the same techniques and policies in his operation of both M-13A and S-21, including the use of torture during interrogations,[202] the recruitment and indoctrination of youths as staff members,[203] and the systematic execution of detainees following the completion of their interrogation.[204] Further, many of the Accused's staff from M-13 accompanied him to S-21, where they continued to serve as his subordinates.[205]

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[195] T., 6 April 2009 (Accused), pp. 22, 70, 75-78; T., 7 April 2009 (Accused), pp. 2-3, 12-13, 23-24, 90, 99-100.
[196] T., 7 April 2009 (Accused), pp. 23-27, 49, 64-66, 91-92, 108; T., 8 April 2009 (Accused), pp. 3, 9.
[197] T., 6 April 2009 (Accused), p. 22; T., 7 April 2009 (Accused), pp. 18, 21-22; T., 8 April 2009 (François BIZOT), pp. 69-70; T., 20 April 2009 (CHAN Khan), p. 98; T., 21 April 2009 (CHAN Khan), p. 23.
[198] T., 7 April 2009 (Accused), p. 63; T., 9 April 2009 (UCH Sorn), p. 67.
[199] T., 7 April 2009 (Accused), pp. 21-24, 80-82; T., 8 April 2009 (Accused), pp. 104-106.
[200] T., 6 April 2009 (Accused), pp. 22, 78, 89-91.
[201] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 35, 202; T., 6 April 2009 (Accused), p. 51; T., 28 April 2009 (Accused), pp. 57-59.
[202] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 35, 202; T., 7 April 2009 (Accused), pp. 65-66; T., 27 April 2009 (Accused), p. 90.
[203] T., 27 April 2009 (Accused), pp. 88-90.
[204] T., 29 April 2009 (Accused), pp. 76-77.
[205] T., 1 April 2009 (Agreed Facts), pp. 58, 63.

2.3.3 S-21

2.3.3.1 Establishment of S-21

119. The Amended Closing Order states:

> 20. On 15 August 1975, SON Sen, called DUCH to a meeting at the Phnom Penh train station together with IN Lorn *alias* Nat from Division 703 of the RAK. The purpose of the meeting was to plan the establishment of S21, which for the purpose of this Closing Order includes the detention centre and surrounding area (Tuol Sleng), as well as its execution and re-education camp branches on the outskirts of Phnom Penh, named Choeng Ek and Prey Sâr (S24), respectively. S21 was unique in the network of security centres given its direct link to the Central Committee and its role in the detention and execution of CPK cadre.
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> 21. SON Sen appointed Nat as Chairman of S21 and Committee Secretary, with DUCH as his deputy in charge of the interrogation unit. Following the meeting, DUCH brought a number of his former M13 staff to Phnom Penh to join forces with the Division 703 personnel already conducting security operations against former LON Nol regime members in Phnom Penh. S21 became fully operational in October 1975.[206]

120. The Accused agreed with these statements, though he disputed that S-21 could be described as unique.[207]

121. The Accused remained in Phnom Penh following the 15 August 1975 meeting and collected documents from the institutions of the former LON Nol government. In October 1975, the Accused, as the Deputy of IN Lorn *alias* Nat, established and began supervising the S-21 interrogation unit.[208]

122. The Accused stated that he was reluctant to accept his initial appointment as Deputy of S-21 and tried instead to apply for work in the Ministry of Industry. When this request was denied, the Accused did not "dare" contest his appointment because, in his words,

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[206] Amended Closing Order, paras 20-21 (footnotes omitted).
[207] T., 1 April 2009 (Agreed Facts), pp. 57-58, 63; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 33.
[208] T., 22 April 2009 (Accused), pp. 74-76; T., 28 April 2009 (Accused), pp. 6-8; "Written Record of Interview of Duch by CIJ on 7 August 2007", E3/23, ERN (English) 00147518; "Written Record of Interview of Duch by CIJ on 22 November 2007", E3/15, ERN (English) 00153567.

"my duty is my duty."[209] He married on 20 December 1975, with his superiors' approval, and had four children, two of whom were born while he was in charge of S-21.[210]

2.3.3.2 Initial locations of S-21

123. The Amended Closing Order states:

> 26. The original S21 complex was located in Phnom Penh in Boeng Keng Kang 3 sub-district, Chamkar Mon district. The detention and interrogation facilities were originally located in a block of houses on the corner of streets 163 and 360. In late November 1975, S21 moved to the National Police Headquarters on Street 51 (Rue Pasteur) near Central Market (Phsar Thmei), yet in January 1976, it moved back to its original location.[211]

124. The Accused agreed with these statements.[212]

2.3.3.3 Appointment and role as Deputy of S-21

125. As Deputy of S-21, the Accused was in charge of an interrogation unit comprised of approximately 20 former subordinates from M-13 and RAK members from Division 703.[213] Detainees were brought to the S-21 interrogation unit from the Ta Khmao Psychiatry Hospital, which IN Lorn *alias* Nat, and his Division 703 staff had converted into a detention centre.[214]

126. The Accused had four main tasks as head of the interrogation unit: (i) collating documents collected from the institutions of the LON Nol government; (ii) preparing reports for his superiors based on these documents; (iii) teaching interrogation methods to

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[209] T., 28 April 2009 (Accused), pp. 41-42, 44; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 35.
[210] "Part III: Character Information", E5/11/6.2, paras. 341, 342. The Accused also explained that during the time of the DK period or in its immediate aftermath, two of his brothers in law were purged, one of whom was detained, tortured and executed at S-21. Two of his sisters and six of his nephews and nieces also died (T., 15 September 2009 (Accused), p. 42).
[211] Amended Closing Order, para. 26 (footnotes omitted).
[212] T., 1 April 2009 (Agreed Facts), pp. 59-60, 63; T., 22 April 2009 (Accused), pp. 76-77; T., 23 April 2009 (Accused), pp. 14, 21-22; T., 27 April 2009 (Accused), pp. 43-44; T., 28 April 2009 (Accused), pp. 8-9.
[213] T., 23 April 2009 (Accused), pp. 15-17; T., 17 June 2009 (Accused), pp. 67-68.
[214] T., 22 April 2009 (Accused), pp. 75-77, 83; T., 27 April 2009 (Accused), pp. 66-69; T., 28 April 2009 (Accused), pp. 11-12, 18-20.

the staff of the interrogation unit; and (iv) reporting detainees' confessions to his superiors.[215]

127. The Accused acknowledged that, as Deputy, he permitted S-21 interrogators to use torture.[216] The Accused was also aware that, following the completion of their interrogation, detainees were taken away and executed.[217]

2.3.3.4 Appointment and role as Chairman of S-21

128. Paragraph 22 of the Amended Closing Order states:

> 22. In March 1976, Nat was transferred to the General Staff, and DUCH replaced him as Chairman and Secretary of S21. DUCH confirmed KHIM Va[k] *alias* Hor, a former Division 703 cadre, as his deputy responsible for the day-to-day operation of the office. However, DUCH admitted he continued personally to oversee the interrogation of the most important prisoners, and to be ultimately responsible for S21. The third member of the S21 Committee, and head of S24 was NUN Huy *alias* Huy Sré. […].[218]

129. The Accused agreed with these statements.[219]

130. The Accused stated that he asked his superior, SON Sen, to select his former teacher CHHAY Kim Huor to replace IN Lorn *alias* Nat, as Chairman of S-21. When this request was denied, the Accused did not further contest his appointment and began serving as Chairman of S-21 in March 1976. According to the Accused, he was appointed to replace Nat, because he was "faithful or very honest to" his superiors, while Nat and his Division 703 staff were not considered as trustworthy. The Accused also considered himself to be a better interrogator than Nat by virtue of his experience running M-13.[220]

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[215] T., 29 April 2009 (Accused), pp. 40-41; *see also* T., 22 April 2009 (Accused), pp. 79-80; T., 16 June 2009 (Accused), p. 24; T., 17 June 2009 (Accused), pp. 66-67.
[216] T., 29 April 2009 (Accused), pp. 18-19; T., 16 June 2009 (Accused), pp. 44-45.
[217] T., 22 April 2009 (Accused), p. 85.
[218] Amended Closing Order, para. 22 (footnotes omitted).
[219] T., 1 April 2009 (Agreed Facts), pp. 58, 63; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 34-37.
[220] T., 27 April 2009 (Accused), pp. 91-94; T., 29 April 2009 (Accused), pp. 13, 62; T., 30 April 2009 (Accused), pp. 10-11; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 35.

131. The Accused indicated that as Chairman he reported to SON Sen from March 1976 until September 1977, when SON Sen was sent to take direct command of the RAK in its increasing hostilities with Vietnam, and then to NUON Chea, the CPK Deputy Secretary.[221]

132. In conjunction with his appointment as Chairman of S-21, the Accused was named Secretary of the S-21 Committee.[222] As Chairman and Secretary, the Accused had full authority over all S-21 staff, including the two other members of the S-21 Committee, KHIM Vak *alias* Hor, and NUN Huy *alias* HUY Sre.[223] The role of the Accused as the undisputed head of S-21 is confirmed by the Accused's own admissions, the testimony of witnesses and Civil Parties, as well as documents put before the Chamber during the proceedings.[224]

133. The Accused's Deputy, KHIM Vak *alias* Hor, was entrusted with managing the daily operations of S-21, and overseeing the work of the guards and the interrogators

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[221] T., 1 April 2009 (Agreed Facts), p. 63; "Written Record of Interview of Duch by CIJ on 7 August 2007", E3/23, ERN (English) 00147520; T., 23 June 2009 (Accused), pp. 48-49; T., 18 May 2009 (Craig ETCHESON), p. 88.

[222] T., 22 April 2009 (Accused), pp. 81-82.

[223] T., 15 June 2009 (Accused), p. 66; T., 16 June 2009 (Accused), pp. 42-43, 76; T., 17 June 2009 (Accused), pp. 21-22, 65; T., 23 June 2009 (Accused), pp. 16, 48; T., 20 July 2009 (Accused), p. 64.

[224] *See* T., 1 April 2009 (Agreed Facts), pp. 58-59, 63; T., 28 July 2009 (SUOS Thy), p. 36 ("[F]or the prisoners to be taken out or in there had to be an authorization from Duch who was the Chairman of S-21. Everything had to be done through him and with his authorization."); T., 16 July 2009 (HIM Huy), p. 44 ("At S-21 the most senior person was Duch. So it was only him who could order for such arrest."); T., 20 July 2009 (HIM Huy), p. 6 ("When detainees were being transported to Choeung Ek, Duch did not oversee these but, actually, he was the one who made the decision to have these people taken away to be executed."); T., 20 July 2009 (HIM Huy), p. 10 ("At S-21, nobody ordered [the Accused]. It was only him who ordered other people […] He could do all these things because at that location he was the top-most leader."); T., 20 July 2009 (HIM Huy), p. 57 ("At S-21 Duch was the Chairman; next Brother Hor, the one-eyed Hor, and then Huy he was a member and he in charge of the rice fields at Prey Sar."); T., 6 August 2009 (David CHANDLER), p. 11 ("As the man in charge of S-21, Duch worked hard to control every aspect of its operations."); T., 29 June 2009 (VANN Nath), p. 76 ("S-21 was [the Accused's] location and he was the boss"); T., 21 July 2009 (PRAK Khan), p. 32 ("As a rule had it, an interrogator was not allowed to torture anyone unless there was instruction otherwise by Duch to torture the detainees."); T., 3 August 2009 (SEK Dan), p. 15 ("I would say that would only be Duch who ordered the arrest of those adult medics."); T., 11 August 2009 (SAOM Met), p. 21 ("During the meetings, we were told that planning was coming from Brother Duch through Hor, Huy [Sre] and then to us."); T., 5 August 2009 (CHEAM Sour), p. 46 ("The law is in the hand of Duch and he issued orders to his subordinates. I did not know from whom he received his orders. He issued orders to his subordinates to torture or kill the prisoners but I myself never saw him torture or kill any prisoner. Whenever he issued his order, day or night, it had to be implemented."); "Written Record of interview of Duch by CIJ on 29 November 2009", E3/17, ERN (English) 00154198-00154199.

within S-21. The Accused used Hor, as well as his own assistants, to issue orders to the staff of S-21.[225] The Accused met frequently with Hor to stay informed of recent activities and confirmed "that [he (the Accused)] knew clearly on a day to day basis exactly what was happening at S-21".[226]

134. The Accused met less frequently with the third member of the S-21 Committee, NUN Huy *alias* HUY Sre, who managed the functioning of S-24.[227]

2.3.3.4.1 Relocation of S-21

135. The Accused agreed that in April 1976, upon his decision, S-21 detainees were moved to the premises of the Pohnea Yat Lycée, a high school located between streets 113, 131, 320, and 350, in Phnom Penh. S-21 operated at this location, which is now the site of the Tuol Sleng Genocide Museum, until 6 January 1979.[228] The decision to relocate, which was approved by the Accused's superior, SON Sen, was intended to facilitate the interrogation of detainees and to guard against their escape.[229]

136. Following its relocation, the secrecy of S-21's operations became of paramount importance.[230] S-21 staff were not allowed to move freely nor to communicate with others outside the compound without authorisation.[231]

137. The existing school buildings of the Pohnea Yat Lycée (referred to at trial as Buildings A through E) were converted to be used for S-21's purposes.[232] In particular, detainees were interrogated in Building A, and detained in Buildings B, C and D. Most

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[225] T., 23 April 2009 (Accused), pp. 30-32; T., 27 April 2009 (Accused), p. 19; T., 29 April 2009 (Accused), p. 71; T., 17 June 2009 (Accused), pp. 22-23; T., 16 July 2009 (HIM Huy), pp. 17, 28; T., 21 July 2009 (PRAK Khan), pp. 5-7, 14-15.
[226] T., 17 June 2009 (Accused), p. 23.
[227] T., 17 June 2009 (Accused), pp. 21-22; *see also* Section 2.3.3.7.
[228] T., 1 April 2009 (Agreed Facts), pp. 60, 63.
[229] T., 23 April 2009 (Accused), p. 22; T., 27 April 2009 (Accused), p. 44; T., 28 April 2009 (Accused), p. 9.
[230] T., 6 August 2009 (David CHANDLER), pp. 44-47.
[231] T., 3 August 2009 (LACH Mean), p. 101; *see also* T., 21 July 2009 (PRAK Khan), p. 11; T., 22 July 2009 (PRAK Khan), p. 78; T., 4 August 2009 (KHIEU Ches statement read), p. 71; T., 10 August 2009 (CHUUN Phal), p. 60 and T., 6 August 2009 (David CHANDLER), p. 9; *see also* "Submission of Kaing Guek Eav's Comments on the book entitled 'Voices from S-21 – Terror and History in Pol Pot's Secret Prison' by David Chandler", E108/1.1, ERN (English) 00270554.
[232] *See generally* T., 1 April 2009 (Agreed Facts), pp. 60-61, 63; *see further* Annex II.

detainees were kept in common detention cells, in addition to which the Accused ordered the construction of individual detention cells for more important detainees.[233] Building E was used to store documents, to photograph incoming detainees, and as an artist workshop for producing CPK propaganda.[234] The Accused stated that while he visited Building E a number of times, he did not visit Buildings B, C and D.[235]

138. In addition to the buildings located within the walls of the Pohnea Yat Lycée, S-21 used a number of other nearby buildings. These included interrogation houses, execution sites, mess halls for S-21 staff, a medical centre, staff residences, houses and offices of the Accused, and a reception hall for detainees. These buildings were located within a second outer perimeter also protected by armed guards.[236]

139. Special detainees, including foreigners and former S-21 staff, were also interrogated and detained in a Special Prison located outside the walls of the Pohnea Yat Lycée. These interrogations were later moved to Building A. The Accused acknowledged repeatedly visiting the Special Prison.[237]

2.3.3.4.2 Overview of S-21 detainees

140. The detainee population at S-21 was comprised of former LON Nol cadres and soldiers, military personnel of the RAK, numerous DK and CPK high and low-ranking cadres, their family members and affiliates, women, children, foreign nationals from

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[233] T., 23 April 2009 (Accused), pp. 25-26; T., 28 April 2009 (Accused), pp. 37-38; T., 29 April 2009 (Accused), p. 70; *see also* T., 29 June 2009 (VANN Nath), p. 73; T., 21 July 2009 (PRAK Khan), p. 43; T., 1 July 2009 (BOU Meng), pp. 20-21, 26; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 48

[234] T., 23 April 2009 (Accused), pp. 25-26; T., 22 June 2009 (Accused), p. 64; *see also* T., 29 June 2009 (VANN Nath), p. 74; T., 1 July 2009 (BOU Meng), p. 35.

[235] T., 15 June 2009 (Accused), pp. 64-65, 89; *see also* T., 29 June 2009 (VANN Nath), pp. 74-75, 84; T., 1 July 2009 (BOU Meng), pp. 36-37.

[236] T., 1 April 2009 (Agreed Facts), pp. 62-63; *see also* "Written Record of Interview of Duch by CIJ on 22 November 2007", E3/15, ERN (English) 00153567-00153569, 00153575; T., 21 July 2009 (PRAK Khan), pp. 5, 62.

[237] T., 29 April 2009 (Accused), pp. 85-86; T., 15 June 2009 (Accused), pp. 64-65, 89; *see also* T., 28 July 2009 (SUOS Thy), p. 33; T., 21 July 2009 (PRAK Khan), pp. 12-13; T., 22 July 2009 (PRAK Khan), p. 6; T., 10 August 2009 (SAOM Met), pp. 87-88.

various countries, particularly Vietnamese soldiers and civilians, as well as a number of S-21 staff members and their relatives.[238]

141. The Revised S-21 Prisoner List indicates that no fewer than 12,273 individuals were detained at S-21.[239] This list is a revision of an earlier list relied upon in the Amended Closing Order which indicated that no fewer than 12,380 individuals were detained at S-21.[240] The Revised S-21 Prisoner List contains 5,994 entries as men, 1,698 as women and 89 as children.[241] 5,609 entries are members of the RAK and 4,371 are DK cadres, while 1,751 are neither members of RAK nor DK cadres.[242] Furthermore, it describes 876 entries as relatives of somebody else;[243] 328 as soldiers in the Khmer Republic Army ("KRA");[244] 279 as either teachers, professors, students, doctors, lawyers or engineers;[245] 345 as Vietnamese, of whom 122 are described as Vietnamese soldiers, 144 as Vietnamese spies while for the remaining 79, who were presumably civilians, no description is provided.[246] Finally, it also contains 155 entries for former S-21 Staff and 590 for individuals arrested from S-24.[247] Certain of the entries on the Revised S-21 Prisoner List contain minimal information.[248]

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[238] T., 15 June 2009 (Accused), pp. 7-11, 32; T., 24 June 2009 (Accused), p. 70; T., 27 July 2009 (SUOS Thy), pp. 73-78; T., 21 July 2009 (PRAK Khan), pp. 46-47; T., 10 August 2009 (SAOM Met), p. 88.

[239] "Revised S-21 Prisoner List", E68.1.

[240] *See* Amended Closing Order, paras 107, 140; "S-21 Prisoner List (1975-1978)", E3/38 Annex A. This list was a collation by the Office of the Co-Prosecutors of previous lists compiled by DC-Cam based on the original prisoner lists and execution logs of S-21. The Combined S-21 Prisoner List contained 107 entries which appeared to be duplicate entries and were thus removed by the Office of the Co-Prosecutors from the Revised Prisoner List. *See* "Co-Prosecutors' Rule 92 Motion to disclose analysis of the revised S-21 Prisoner List", E68, 19 May 2009, paras 3-4.

[241] "S-21 Prisoners Identified as Men", E68.5; "S-21 Prisoners Identified as Women", E68.6; "S-21 Prisoners Identified as Children", E68.7.

[242] "S-21 Prisoners from the RAK", E68.9; "S-21 Prisoners From DK Government Offices", E68.10; "S-21 Prisoners Not Coming from the RAK or DK Government Offices", E68.11.

[243] "S-21 Prisoners Identified as the Relative of Someone Else", E68.22. The largest entries were for wives (583), daughters (112) and sons (107), as well as husbands, mothers and fathers.

[244] "S-21 Prisoners described as former Khmer Republic soldiers", E68.24.

[245] "S-21 Prisoners described as teachers, professors, students, doctors, lawyers or engineers", E68.26.

[246] "Vietnamese Prisoners Entering S-21", E68.27; "S-21 Prisoners identified as Vietnamese soldiers", E68.28; "S-21 Prisoners described as Vietnamese spies", E68.29; "S-21 Prisoners identified as Vietnamese", E68.30; *see also* Section 2.5.2.3.

[247] "S-21 Prisoners who were former S-21 staff", E68.39; "S-21 Prisoners arrested from S-24 (Prey Sar)", E68.41. The List contains 47 entries as former S-24 staff, 342 as detainees undergoing tempering at S-24 and 201 for which it is not possible to determine whether they were S-24 staff or detainees undergoing tempering at S-24; *see* "S-21 Prisoners identified as former S-24 staff", E68.42; "S-21 Prisoners who were

142. Notwithstanding the thoroughness of the administrative record keeping at S-21, the Revised S-21 Prisoner List is incomplete. This is attributable to certain S-21 policies, such as not registering children who were brought along with their parents, and to the fact that files may have been lost since the abrupt abandonment of S-21 by the Accused and his staff on 7 January 1979.[249] The Revised S-21 Prisoner List does not, for example, include the names of Civil Party BOU Meng, Witness VANN Nath, Witness NORNG Chanphal's mother, MUM Yauv, or of the Accused's own brother-in-law, all of whom were detained at S-21.[250]

143. The Chamber thus considers that while the Revised S-21 Prisoner List establishes the minimum number of S-21 victims, their numbers are likely to be considerably greater than indicated.

2.3.3.4.3 Organisation of S-21

144. The Accused ran S-21 along hierarchical lines and established reporting systems at all levels to ensure that his orders were carried out immediately and precisely.[251] The following units operated at S-21 under the Accused's command.

2.3.3.4.3.1 The Documentation Unit

145. The Documentation Unit, also referred to as the "Personnel and Administration Unit", was responsible for registering and maintaining records of staff and detainees at S-

previously prisoners at S-24", E68.43; "S-21 Prisoners coming from S-24 but not clearly identified as former S-24 staff or S-24 prisoners", E68.44.

[248] *See e.g.,* "S-21 Prisoners Whose Origin Could Not Be Determined", E68.12.

[249] *See* T., 27 July 2009 (SUOS Thy), pp. 73-74; T., 28 July 2009 (SUOS Thy), pp. 12, 18-23; *see also* T., 2 July 2009 (NORNG Chanphal), p. 74; "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185503; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 102; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, pp. 35-36, ERN (English) 00192714-00192715.

[250] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 170, 229; T., 8 July 2009, pp. 1-3; "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185503.

[251] T., 1 April 2009 (Agreed Facts), pp. 59, 63; *see also* T., 23 April 2009 (Accused), pp. 30-35; T., 29 April 2009 (Accused), pp. 54-55; "Written Record of interview of Duch by CIJ on 29 November 2007, E3/17, ERN (English) 00154198-00154199.

21. Witness SUOS Thy headed the Documentation Unit and reported to the Accused through KHIM Vak *alias* Hor.[252]

146. Detainees were brought to the Documentation Unit handcuffed and blindfolded by the Special Unit. After the detainees' names, occupations and place of origin were recorded, they were taken to the nearby Photography Unit, where they were photographed, typically with an identification number. Children who were detained along with their parents were neither registered nor photographed. Following the taking of their photographs, detainees were placed in their respective detention cells by the guards and their location was communicated to the Documentation Unit.[253]

147. Detainees were sent to S-21 at all hours of the day. They typically arrived in groups of fewer than 20 but were on occasion sent *en masse* in groups of more than 100, particularly towards the end of 1978. When such large groups arrived, the detainees were brought directly, by truck, to the detention buildings where the Documentation Unit registered their names. Detainees who were former S-21 staff or those who were kept in the Special Prison were not brought to the Documentation Unit in person. Rather, KHIM Vak *alias* Hor communicated their information to the Documentation Unit so that they could be properly registered. The Documentation Unit also processed Vietnamese civilians and military personnel detained at S-21. A typewritten list of all newly-registered S-21 detainees was communicated daily by the Documentation Unit to Hor.[254]

148. The Documentation Unit also followed a strict protocol when detainees were removed from S-21 for execution. Witness SUOS Thy stated that "[r]egarding the outgoing prisoners, when there was an annotation from Duch a list would be given to Hor and Hor would send the list to me to extract the names and the room numbers and the

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[252] T., 1 April 2009 (Agreed Facts), pp. 58, 63; *see also* T., 27 April 2009 (Accused), pp. 36-38; T., 28 July 2009 (SUOS Thy), pp. 29-30.
[253] T., 27 July 2009 (SUOS Thy), pp. 69-70, 73-74, 81; *see also* T., 4 August 2009 (NHEM En statement read), pp. 108-110; T., 30 June 2009 (CHUM Mey), pp. 9-10; T., 1 July 2009 (BOU Meng), pp. 11, 20, 45; T., 2 July 2009 (NORNG Chanphal), p. 74.
[254] T., 27 July 2009 (SUOS Thy), pp. 73, 75-80, 85, 100; T., 28 July 2009 (SUOS Thy), p. 8; T., 16 July 2009 (HIM Huy), pp. 33-34; T., 4 August 2009 (NHEM En statement read), pp. 114-115; *see also* "S-21 Prisoner List containing names of Vietnamese prisoners entered on 28 April 1978", E3/435, ERN (English) 00181718.

buildings so that the guards would be able to identify them and to take them out."[255] Witness SUOS Thy confirmed that "[o]nly Duch had the authority to annotate anyone to be smashed, and they used the code name like in Khmer 'kam kam' which could be translated as 'smash'."[256] The detainees included in the list would be brought to the front gate, their identities verified once again by the Documentation Unit, and then transported to Choeung Ek for execution. The Documentation Unit would update the list of detainees who had been executed by 7 a.m. the following day.[257]

149. The thoroughness of the documentation kept at S-21 was illustrated by additional testimony at trial. Expert David CHANDLER stated that the archives of S-21 were likely the largest in the Santebal apparatus and were, under the leadership of the Accused, kept in a particularly professional way and in great detail. The archives discovered at S-21 included over 4,000 confessions, hundreds of pages of administrative documents, rosters of detainees, lists of executions, study session documents and self-criticism materials. In CHANDLER's opinion, the efficiency with which documents were processed at S-21 reflected both a desire on the part of the Accused to demonstrate the quality of the work being carried out under his supervision, as well as an attempt to respond to the needs of the CPK leadership.[258] He further added that "[a] prison of this dimensions had no precedent in Cambodian history that I am aware of, and an interrogation facility of this thoroughness […] capable of producing such masses of documents, was unprecedented in [the] Cambodian past as well."[259]

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[255] T., 27 July 2009 (SUOS Thy), p. 70.
[256] T., 27 July 2009 (SUOS Thy), pp. 95-96; s*ee also* T., 6 August 2009 (David CHANDLER), pp. 102-103; T., 28 July 2009 (SUOS Thy), p. 21.
[257] T., 27 July 2009 (SUOS Thy), pp. 70, 90-94, 97; T., 28 July 2009 (SUOS Thy), p. 15; *see also* Section 2.3.3.6.
[258] T., 6 August 2009 (David CHANDLER), pp. 23-25, 50, 61-63, 69-70, 100-101; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 154, ERN (English) 00192847; T., 28 May 2009 (Craig ETCHESON), pp. 20, 91-92.
[259] T., 6 August 2009 (David CHANDLER), p. 46.

2.3.3.4.3.2 The Interrogation Unit

150. The Interrogation Unit was tasked with obtaining written confessions from individuals detained within the S-21 complex detailing "their traitorous activities", as well as the names of other individuals implicated.[260]

151. The Interrogation Unit was divided into distinct groups, the leader of each of which "was accountable or had to answer" to the Accused.[261] These interrogation groups included the "cold group" (which did not use physical violence), the "hot group" (which would immediately use physical violence) and the "chewing group" (which used a mixture of cold and hot methods over an extended period of time). Detainees were often moved back and forth between these groups until their interrogation was deemed complete.[262]

152. In addition, as Chairman of S-21, the Accused created a separate group, comprised of wives of trusted S-21 staff, to interrogate female detainees. The Accused also created and trained a group, headed by HOEUNG Song Huor *alias* Pon, tasked solely with interrogating high-ranking detainees at S-21.[263]

153. The majority of those detained within the S-21 complex were systematically interrogated.[264] Interrogators did not choose the detainees they would question but were assigned to them.[265] Detainees were taken from their cells, handcuffed and blindfolded, and handed over to an interrogator by the guards.[266] A single staff member would

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[260] T., 16 June 2009 (Accused), p. 25; T., 18 May 2009 (Accused), pp. 56-57; T., 27 May 2009 (Accused), p. 52; *see also* T., 21 July 2009 (PRAK Khan), p. 19; T., 3 August 2009 (LACH Mean), p. 79.
[261] T., 29 April 2009 (Accused), p. 67; *see also* T., 1 April 2009 (Agreed Facts), pp. 85-86; T., 23 April 2009 (Accused), p. 34; T., 21 July 2009 (PRAK Khan), p. 20.
[262] T., 1 April 2009 (Agreed Facts), p. 86; T., 23 April 2009 (Accused), p. 34; T., 16 June 2009 (Accused), pp. 15, 17-20; T., 21 July 2009 (PRAK Khan), pp. 22-23.
[263] T., 23 April 2009 (Accused), pp. 34-35; T., 27 April 2009 (Accused), pp. 17, 73; T., 29 April 2009 (Accused), p. 71; T., 15 June 2009 (Accused), p. 24; T., 16 June 2009 (Accused), pp. 17, 49. The women interrogators were later executed as a result of internal purges at S-21.
[264] *See, however,* T. 21 July 2009 (PRAK Khan), p. 30 (testifying that 50-60% of detainees were not interrogated).
[265] T., 1 April 2009 (Agreed Facts), pp. 85-86.
[266] T., 27 July 2009 (SUOS Thy), pp. 85-86; T., 14 July 2009 (MAM Nai), p. 23; T., 21 July 2009 (PRAK Khan), pp. 25-26; T., 3 August 2009 (LACH Mean), pp. 83-84; T., 10 August 2009 (CHUUN Phal), p. 27.

typically conduct the interrogation,[267] though Vietnamese detainees were sometimes also interrogated with the assistance of an interpreter.[268] Interrogators routinely used violence, in addition to "doing politics",[269] to extract the detainees' written confessions.[270] Detainees who could not write dictated their confession to an S-21 staff member who would transcribe it.[271] Detainees were kept in individual cells between interrogation sessions.[272]

154. Interrogators would send their reports, along with any confessions obtained, to the Accused,[273] typically via their supervisor.[274] In the case of the most important detainees, these documents were communicated directly to the Accused via his personal messengers.[275] Each detainee's interrogation would continue, sometimes multiple times a day over an extended period of time, until the Accused considered his or her confession to be complete.[276]

155. Given that detainees were considered guilty by reason of their presence at S-21, the role of interrogators was simply to "validate the Party's verdict by extracting full confessions."[277] Thus, the contents of confessions were in many respects pre-ordained as interrogators, who were instructed by the Accused to establish links between the detainees and the CIA, KGB, and/or the Vietnamese, forced detainees into providing

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[267] T., 16 June 2009 (Accused), p. 79; T., 21 July 2009 (PRAK Khan), p. 24.
[268] T., 23 April 2009 (Accused), p. 34; T., 14 July 2009 (MAM Nai), pp. 22, 26-27; T., 15 July 2009 (MAM Nai), p. 36.
[269] T., 6 August 2009 (David CHANDLER), pp. 29-30 ("Doing politics is a more complicated area. This is everything but torture. This was questioning, cajoling, getting to know, trying to undermine, trying to befriend, trying to contradict; all these kind of interrogatory methods; some of them quite professional -- professionally done, others done in an extremely amateur fashion as ways of getting a confession without torture.")
[270] T., 27 April 2009 (Accused), p. 64; T., 6 August 2009 (David CHANDLER), p. 35; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 130, ERN (English) 00192823.
[271] T., 16 June 2009 (Accused), p. 25.
[272] T., 1 July 2009 (BOU Meng), p. 30.
[273] T., 14 July 2009 (MAM Nai), pp. 24-25, 28; T., 1 April 2009 (Agreed Facts), p. 70.
[274] T., 3 August 2009 (LACH Mean), p. 85; T., 27 April 2009 (Accused), p. 26.
[275] T., 27 April 2009 (Accused), p. 26.
[276] T., 1 April 2009 (Agreed Facts), pp. 85-86; T., 16 June 2009 (Accused), p. 28; T., 3 August 2009 (LACH Mean), pp. 85-86.
[277] "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 78, ERN (English) 00192771; T., 6 August 2009 (David CHANDLER), p. 27.

scripted answers.[278] As stated by Civil Party BOU Meng, who endured such an interrogation session:

> They put me to lie face down and then they started to beat me until they had enough, and then they kept asking me when I entered CIA and KGB and who introduced me into the agents. And I did not know how to respond to them because [… having] never been involved in such organization, how could I respond to them that I introduced anyone into the CIA, even myself. I did not know what CIA was.[279]

2.3.3.4.3.3 The Defence Unit

156. The Defence Unit, also referred to as the Military Unit, was comprised of two sub-units.[280]

157. The first sub-unit, the Guard Unit, was made up of staff whose duty it was to guard the detainees within the S-21 complex, deliver them to the interrogators and keep them alive until their interrogation was completed.[281] This sub-unit was typically divided into four groups with 10 to 12 guards in each group, including youths.[282] KHIM Vak *alias* Hor and his subordinate, Phal, administered the unit.[283]

158. The second sub-unit, the Special Unit, was responsible for receiving detainees and escorting them inside the S-21 complex. Detainees were typically arrested and brought to S-21 by their own units, though some were given a pretext to visit the Special Unit, at which point they would be arrested.[284] On occasion, the Special Unit was used for transport or to conduct arrests, including those of Vietnamese detainees, outside the confines of S-21.[285] The Special Unit was also tasked with guarding the outside of the S-

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[278] T., 6 August 2009 (David CHANDLER), pp. 28-29; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, pp. 81-82, 94, ERN (English) 00192774-0192775, 0192787; *see also* T., 21 July 2009 (PRAK Khan), p. 18; T., 3 August 2009 (LACH Mean), p. 78.
[279] T., 1 July 2009 (BOU Meng), p. 28; *see also* T., 30 June 2009 (CHUM Mey), p. 24.
[280] T., 27 April 2009 (Accused), pp. 18-21.
[281] T., 27 April 2009 (Accused), pp. 21, 23.
[282] T., 4 August 2009 (KHIEU Ches statement read), pp. 67-68; T., 10 August 2009 (CHUUN Phal), p. 18.
[283] T., 1 April 2009 (Agreed Facts), pp. 58, 63; T., 27 April 2009 (Accused), pp. 20-21.
[284] T., 15 June 2009 (Accused), pp. 18, 33-34; T., 27 July 2009 (SUOS Thy), pp. 82-83; T., 16 July 2009 (HIM Huy), pp. 12, 23; T., 19 May 2009 (Craig ETCHESON), p. 56.
[285] T., 16 July 2009 (HIM Huy), pp. 12, 30, 38; T., 20 July 2009 (HIM Huy), p. 26; T., 11 August 2009 (SAOM Som Ol statement read), pp. 67-68.

21 complex and intervening in emergencies.[286] Moreover, members of the Special Unit were responsible for transporting detainees to Choeung Ek for execution.[287] The Special Unit was initially headed by Peng, then by Witness HIM Huy.[288]

2.3.3.4.3.4 Other S-21 Units

159. A number of other units also operated within S-21. These included the Typewriting Unit (which typed up the detainees' confessions), the Telephone Unit (for calls to and from S-21), the Photography Unit (which took photographs of detainees when they arrived at S-21), the Medical Unit (which was tasked with treating S-21 staff and keeping S-21 detainees alive until their confession was completed), the Food Unit (which had a kitchen for the S-21 staff and another for the detainees), the Messenger Unit, and the Mapping Unit.[289]

160. A select number of S-21 detainees were also placed in S-21 workshops and tasked with producing CPK propaganda materials and repairing equipment.[290]

2.3.3.5 Responsibilities as Chairman of S-21

161. In addition to supervising the above units, the Accused carried out particular tasks within S-21, the most significant of which are discussed below.

2.3.3.5.1 Recruitment of staff

162. The Accused acknowledged that a number of his S-21 staff were former M-13 subordinates.[291] Further, he agreed that, as Chairman of S-21, he continued his former M-13 practice of recruiting young and impressionable staff to work as his subordinates.

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[286] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 38(d); T., 27 April 2009 (Accused), pp. 24-25; T., 15 June 2009 (Accused), p. 44; T., 17 June 2009 (Accused), pp. 11-12; T., 21 July 2009 (PRAK Khan), pp. 6-8.
[287] T., 16 July 2009 (HIM Huy), pp. 62-69, 95; *see also* Section 2.3.3.6.
[288] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 38(d); T., 20 July 2009 (HIM Huy), pp. 75-78.
[289] T., 1 April 2009 (Agreed Facts), pp. 59, 63; T., 27 April 2009 (Accused), pp. 25-29, 38; T., 28 April 2009 (Accused), p. 40; T., 15 June 2009 (Accused), pp. 39, 93; T., 4 August 2009 (NHEM En statement read), p. 106; T., 3 August 2009 (SEK Dan), pp. 7-8; T., 11 August 2009 (MAKK Sithim statement read), p. 38.
[290] T., 17 June 2009 (Accused), pp. 18-19, 49; *see also* Section 2.4.2.
[291] T., 1 April 2009 (Agreed Facts), pp. 58, 63.

In particular, he sought permission from SON Sen to recruit around 60 poor and uneducated teenagers from Kampong Chhnang Province.[292] As stated by the Accused regarding Witness CHUUN Phal:

> He was within the selected criteria of my request and his class origin was a poor peasant background. Therefore, his education was very low as evidenced in the Chamber today. Probably he could read a few words, that's all. And he fits the criteria for my request from the best. And his age of 15 or 16 would also fall within the criteria of my selection. I did not want to select any person who was already trained or educated by anybody. So I needed to select those who I could train psychologically and politically.[293]

2.3.3.5.2 Training of staff

163. Teaching, particularly political training, was one of the most important tasks at S-21 for the Accused, who noted that he alone was responsible for educating those who worked there. He also taught annually at meetings of S-21 cadres at a training school established near his home.[294] He applied lessons learned at the political school of the General Staff or at the annual Party Congress at compulsory, regular education meetings,[295] attended by the leaders of S-21 units.[296]

164. Further regular sessions at the training school included practical training in interrogation methods, increasing from annually in 1977 to monthly and weekly sessions in 1978.[297] The Accused trained his interrogators to use physical and psychological violence but instructed them to keep detainees alive until he considered their confessions to be complete.[298] The Accused stated that interrogation training was a way of avoiding S-21 staff killing the detainees.[299] He acknowledged that his teachings and instructions

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[292] T., 27 April 2009 (Accused), pp. 35-37, 88-90; T., 21 May 2009 (Craig ETCHESON), p. 23.
[293] T., 10 August 2009 (Accused), p. 64; *see also* T., 27 April 2009 (Accused), p. 83; T., 21 May 2009 (Craig ETCHESON), p. 23.
[294] T., 8 June 2009 (Accused), pp. 46-49; *see also* T., 8 June 2009 (Accused), pp. 35-36; T., 9 June 2009 (Accused), pp. 23-24.
[295] T., 1 April 2009 (Agreed Facts), pp. 67-68; T., 8 June 2009 (Accused), pp. 51-52; T., 30 April 2009 (Accused), p. 30.
[296] T., 8 June 2009 (Accused), pp. 39-40.
[297] T., 8 June 2009 (Accused), pp. 51-53; T., 16 June 2009 (Accused), p. 24; T., 22 June 2009 (Accused), pp. 117-118; T., 21 July 2009 (PRAK Khan), pp. 16-18.
[298] T., 1 April 2009 (Agreed Facts), pp. 85-86, 90-92; T., 21 July 2009 (PRAK Khan), pp. 17, 66.
[299] T., 29 April 2009 (Accused), p. 65; *see also* T., 21 July 2009 (PRAK Khan), pp. 17, 66.

were reflected in notebooks belonging to S-21 interrogators put before the Chamber.[300] These notebooks include instructions such as: "if Angkar instructs not to beat, absolutely do not beat. If the party orders us to beat, then we beat with mastery, beat them to talk, not to die, to escape, not to become so weak and feeble that they fall ill and we lose them."[301]

165. The consequence of the trainings, as acknowledged by the Accused, was that S-21 staff, including the youths he specifically sought out, were taught to obey orders, to be cruel, to detain, to interrogate, to torture and to kill. As stated by the Accused, "[t]hey changed their nature. They became from the gentle to become cruel […], very extreme in the matter […]. They were in the class wrath, class anger […] but the one who made the education, it was me, to turn them to be extreme, to be absolute."[302]

2.3.3.5.3 Role in arrests

166. The Amended Closing Order states:

> 51. According to DUCH, no one could be sent to S21 without a decision of the Party. DUCH explained that for the arrest of members of the Central Committee, the decision had to be made by its Standing Committee. For others, DUCH claimed that his superior, NUON Chea, called the head of the relevant unit for discussion and a joint decision on arrest. DUCH declared, and MÂM Nãi assumed, that for people coming from other regions, the decision to arrest was always made by the Central Committee, which contacted the relevant zones, sectors or districts in order to remove persons implicated by confessions. DUCH specified that, with the exception of important prisoners, he generally had no grasp of the specific rationale behind the imprisonment of persons at S21.
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> 52. Moreover, DUCH insisted *"S21 had no right to arrest anyone"*, adding that, in general, he was merely informed by the "*upper echelon*" of the arrest of prisoners so as to be ready to receive them. In fact, it did appear that prisoners were most often brought in by their units.

[300] T., 1 April 2009 (Agreed Facts), pp. 87, 89; T., 16 June 2009 (Accused), pp. 24, 37-38; T., 22 June 2009 (Accused), pp. 101-102; T., 15 July 2009 (MAM Nai), pp. 19-22; *see also* "Statistics list of Special Branch S-21 – Politics, Ideology, Organization", E3/426; "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73; "S-21 Notebook by MAM Nai *alias* Chan", E3/231.

[301] *See* "Statistics list of Special Branch S-21 – Politics, Ideology, Organization", E3/426, ERN (English) 00182969.

[302] T., 27 April 2009 (Accused), pp. 88-90; *see also* T., 8 June 2009 (Accused), pp. 43-44; T., 16 June 2009 (Accused), p. 25; T., 29 April 2009 (Accused), pp. 9-10; T., 17 June 2009 (Accused), p. 91; T., 23 April 2009, p. 33; *see also* T., 16 July 2009 (HIM Huy), p. 76; T., 21 July 2009 (PRAK Khan), pp. 18-19.

> Nevertheless, there is evidence that S21 personnel did carry out arrests.[303]

167. The Accused agreed with these statements.[304]

168. As a general rule, the echelons above the Accused made decisions regarding whom to arrest and send to S-21.[305] The Accused also occasionally passed down orders to his S-21 staff to effect arrests outside the confines of S-21.[306] The Accused was notified when arrests were being made and alerted his subordinates to the arrival of detainees.[307]

169. There is nevertheless evidence indicating that the Accused played a more active role in initiating arrests and that his views were sought and acted upon by his superiors. During a meeting attended by SON Sen, in relation to implementing CPK policy, the Accused identified suspects and discussed and cooperated on methods of arrest.[308] The meeting further authorised direct cooperation between S-21 and units targeted for arrests. The Accused, while conceding his presence at the meeting, disputed that he was an integral member, entitled to express opinions, claiming instead that his role was simply to note names and forward them to the meeting for decision.[309]

170. Further, in letters personally addressed to the Accused, SOU Met (the commander of Division 502) requested certain actions in relation to detainees dispatched by him to S-21.[310] The Accused was adamant that there was no direct communication between him and SOU Met and that this correspondence did not breach the rule prohibiting direct

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[303] Amended Closing Order, paras 51-52 (footnotes omitted).
[304] T., 1 April 2009 (Agreed Facts), pp. 73-75; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 111-115.
[305] T., 28 April 2009 (Accused), pp. 14-15, 33-34; T., 29 April 2009 (Accused), p. 23; T., 15 June 2009 (Accused), pp. 15-16, 18-19; T., 6 August 2009 (David CHANDLER), pp. 101-102.
[306] T., 1 April 2009 (Agreed Facts), pp. 74-75; T., 20 July 2009 (HIM Huy), pp. 66, 68; T., 16 July 2009 (HIM Huy), pp. 100-101.
[307] T., 15 June 2009 (Accused), p. 19; T., 27 May 2009 (Accused), pp. 39-40; T., 16 July 2009 (HIM Huy), pp. 23-24.
[308] T., 21 May 2009 (Craig ETCHESON), pp. 58-59; "Minutes of the Meeting with Comrade Tal Division 290 and Division 170", E3/160, ERN (English) 00182792.
[309] T., 26 May 2009 (Accused), pp. 52-58.
[310] "Written record of Analysis by Craig ETCHESON", E3/32, ERN (English) 00146851; "Sou Met's letter to Duch – 2 June 1977", E3/40; "Sou Met's letter to Duch – 1 April 1977", E3/210; "Sou Met's letter to Duch – 30 May 1977", E3/211; "Sou Met's letter to Duch – 1 June 1977", E3/212; "Sou Met's letter to Duch – 28 July 1977", E3/213; "Sou Met's letter to Duch – 10 August 1977", E3/214; "Sou Met's letter to Duch – 3 October 1977", E3/215; "Sou Met's letter to Duch – 4 October 1977", E3/216.

communication between sections or units; all were written at the direction of his superiors SON Sen or NUON Chea and with their knowledge, as were any responses. The Accused claimed that SON Sen and later NUON Chea's names were excluded from the correspondence to hide their involvement, but that the communications were either known to them or directed by them, and were handed to the Accused by his superior. The explanation given by the Accused that these letters were given to him by SON Sen personally lacks credibility, as in some letters he is informed by SOU Met that detainees would be sent to him that evening.[311] The fact that he was expecting detainees and ready to receive them implies that the letters came to him personally, and that SOU Met and the Accused communicated directly with each other regarding arrests, even if this was with the acquiescence of their respective superiors.

171. In addition, the Accused had significant influence with regard to the arrest of S-21 staff. First, decisions as to whether to send S-21 staff to S-24 for re-education were made by the S-21 Committee, not by the Accused's superiors.[312] Second, while the ultimate decision as to whether to arrest a particular S-21 staff member may have rested with his superiors, the Accused acknowledged that they systematically acted upon his recommendations. As stated by the Accused, "those people that Comrade Hor and I had made agreement, I reported to the upper echelon. I cannot recall that there was anyone who survived, or that the upper echelon decided to not arrest them or not to approve all the reports that I made to them."[313] The Accused exercised a certain amount of discretion in the matter and indicated that he did not report certain staff members, or reported them but did not recommend their arrests.[314]

172. The Accused was also present during the arrest of certain notable detainees, including KOY Thuon (Minister of Commerce and former Secretary of the Northern Zone), CHHIM Sam-Ok *alias* Panng (former Secretary of Office 870), NEY Saran *alias*

311 T., 27 May 2009 (Accused), pp. 35-40.
312 T., 15 June 2009 (Accused), pp. 31-32.
313 T., 15 June 2009 (Accused), pp. 19-21.
314 T., 16 June 2009 (Accused), pp. 68-69.

MEN San or Ya (Secretary of the Northeastern Zone) and NUN Huy *alias* HUY Sre (member of the S-21 Committee), some of which took place at his home.[315]

173. Moreover, as detailed below, the Accused reviewed and passed on to his superiors the detainees' confessions and lists of "traitors", which informed and facilitated further arrests.

2.3.3.5.4 Role as regards confessions

174. The Amended Closing Order states:

> 43. […] In addition to executing prisoners condemned in advance as traitors, an overriding purpose of S21 was to extract confessions from prisoners in order to uncover further networks of possible traitors. DUCH stated that "*the content of the confessions was the most important work of S21*". Confessions seem typically to have taken the form of political autobiographies by the prisoners in which they were compelled to denounce themselves and others as traitorously serving the intelligence agencies of foreign powers considered to be enemies of the Cambodian revolution. Those intelligence agencies included the United States CIA, the Soviet KGB and organs of the Vietnamese Communist Party. These confessions, some many hundreds of pages long, contain detailed descriptions not simply of alleged traitorous activities, but also of the structure and operation of all levels of the Party and of all administrative units. DUCH meticulously read, analysed, annotated and summarised the majority of these confessions for his superiors. [….][316]

175. The Accused agreed with these statements.[317]

176. Acting on the orders of his superiors, the Accused saw his role as Chairman of S-21 as interrogating detainees in order to trace "traitorous activities during the past and present time [… I]n order to facilitate the reading of the confession the prisoner had to extract the names whom he implicated."[318] To that end, the Accused reviewed the detainees' confessions and provided continued instructions to the interrogators until he

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[315] *See, e.g.,* T., 28 April 2009 (Accused), p. 33; T., 15 June 2009 (Accused), pp. 15-16, 18, 20; T., 22 June 2009 (Accused), p. 31; T., 1 April 2009 (Agreed Facts), p. 76; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 127; *see also* T., 19 May 2009 (Craig ETCHESON), p. 56.

[316] Amended Closing Order, para. 43 (footnotes omitted).

[317] T., 1 April 2009 (Agreed Facts), pp. 69-70.

[318] T., 8 June 2009 (Accused), p. 80; *see also* T., 23 April 2009 (Accused), p. 33; T., 26 May 2009 (Craig ETCHESON), p. 60

considered a confession to be complete.[319] A confession was improper if it was deemed insufficiently detailed or it failed to name other "traitors".[320] As stated by the Accused, "[i]f the prisoners did not give satisfactory confessions, then I would annotate on the confessions that they had to use more torture in order to get the confessions, and I was the one to decide to order the interrogators to torture more."[321] In the case of the most important S-21 detainees, the Accused would await specific instructions from his superiors as to the extent of mistreatment permissible during the interrogation.[322]

177. The Accused's annotations on confessions put before the Chamber are illustrative of his instructions to interrogators. On the confession of detainee DANH Siyan, the Accused wrote "interrogate meticulously, serious but moderate torture in order to find the network. Hit until she stops saying she went to Vietnam with her grandfather to cure his cancer and the problem of menstruation."[323] His annotation on the confession of detainee UM Soeun reads, "Not yet confessed. To be tortured",[324] while his annotation on the confession of detainee PRUM Samneang states, "[t]his female spoke quite little! No need to summarize! I do not want you to explain to me, beat her 40 times with the rattan stick and force her to keep writing. This afternoon, should I be dissatisfied with the confession, I will request Bong that more interrogations be made and to force her to write again. She was ill at the moment."[325] Interrogators also used annotations to keep the Accused appraised of the progress of their interrogations and of the state of the detainees.[326]

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[319] T., 16 June 2009 (Accused), pp. 27-28, 41, 54, 85-86; T., 6 August 2009 (David CHANDLER), p. 49; T., 21 July 2009 (PRAK Khan), pp. 27-29, 63-64.
[320] T., 1 April 2009 (Agreed Facts), pp. 90-92.
[321] T., 16 June 2009 (Accused), pp. 85-86; s*ee also* T., 21 July 2009 (PRAK Khan), p. 32.
[322] T., 22 June 2009 (Accused), pp. 18, 22.
[323] *See* "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185500; *see also* "Excerpt of Confession of DANH Siyan", E3/368, ERN (English) 00225275; T., 22 June 2009 (Accused), p. 19.
[324] *See* "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185500; *see also* "Excerpts of Confession of UM Soeun", E3/24, ERN (English) 00234676.
[325] "Excerpt of Confession of PRUM Samneang", E5/2.3, ERN (English) 00283975; *see also* "Excerpt of Confession of SAR Phon", E5/2.1, ERN (English) 00283973; T., 22 June 2009 (Accused), pp. 21-22, 39-40; "S-21 Confession of San *alias* Ya", E3/372, ERN (English) 00290115.
[326] *See e.g.* "Excerpts of Confession of UM Soeun", E3/24, ERN (English) 00223146; "Excerpts of Confession of LI Phel *alias* LI Phen *alias* Samrit", E3/234, ERN (French) 00296036.

178. Following his review, the Accused was solely responsible for communicating the detainees' confessions and the list of those they had implicated to his superiors.[327] To facilitate his superiors' work, the Accused included his annotations and summaries with these documents.[328] According to Expert David CHANDLER, the Accused worked hard to be as efficient as he could in this regard, partly to demonstrate his professionalism but also "to inform the [Party] leadership, in as much detail as possible whether and in what way its suspicions were justified for certain prisoners and to uncover strings of traitors, Vietnamese agents, and so forth."[329]

179. The Accused was aware that much of the information in the confessions he passed along to his supervisors was fabricated.[330] S-21 confessions were nevertheless used to decide upon the arrest of those denounced as enemy agents and often led to the arrest of many others implicated as traitors.[331] The confessions served the political interest of those in control of the CPK by justifying arrests, and implicating the networks of those sent to S-21.[332]

2.3.3.5.5 Role in executions

180. Every individual detained within the S-21 complex was destined for execution.[333] According to Expert David CHANDLER,

> the mandate that the defendant had at S-21 was to see to it that everyone who came into that prison left it for execution; that was its mandate. That was never withdrawn by a higher authority and therefore I don't think he

[327] T., 8 June 2009 (Accused), pp. 81-82; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 101, 124.
[328] T., 18 May 2009 (Accused), p. 51; T., 27 April 2009 (Accused), p. 50; T., 9 June 2009 (Accused), pp. 15-17; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 124.
[329] T., 6 August 2009 (David CHANDLER), p. 24.
[330] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 101; T., 28 April 2009 (Accused), p. 64; T., 16 June 2009 (Accused), pp. 28-29, 73.
[331] T., 1 April 2009 (Agreed Facts), p. 70; *see also* T., 23 April 2009 (Accused), p. 33; T., 27 April 2009 (Accused), p. 19; T., 18 May 2009 (Accused), p. 51; T., 15 June 2009 (Accused), p. 30; T., 16 June 2009 (Accused), pp. 48-49; T., 17 June 2009 (Accused), pp. 90-91; T., 6 August 2009 (David CHANDLER), pp. 12-13; T., 28 May 2009 (Craig ETCHESON), pp. 20, 91-92.
[332] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 98; T., 18 May 2009 (Accused), pp. 53-54; T., 8 June 2009 (Accused), p. 97; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, pp. 78, 154, ERN (English) 00192771, 00192847; T., 28 May 2009 (Craig ETCHESON), pp. 28-29, 91-92; T., 6 August 2009 (David CHANDLER), pp. 61-63.
[333] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 60.

> had to seek higher authority to supervise a system in which he had no choice about who got killed and who didn't. Everybody got killed, no matter what they'd done or who they were. […] Everybody who went there from the smallest child to the highest member of the Communist Party had the same fate.[334]

181. Initially, the Accused allowed KHIM Vak *alias* Hor to manage the timing of the detainees' executions. However, following an incident in which a detainee was killed before he provided a complete confession, the Accused insisted on personally acknowledging that the interrogation was complete before a detainee could be executed.[335] As stated by the Accused, whenever detainees were interrogated and the interrogation was completed, "then [Hor] would come and report to me and I would just give him a signal that the detainees would be able now to be taken away […]."[336] In some instances, mass executions occurred in which the Accused received and conveyed orders to execute without interrogations.[337] Following the Accused's assent, Hor would manage the execution of the S-21 detainees with the help of his subordinates.[338]

182. The Accused confirmed that documents put before the Chamber include his annotations ordering the execution of S-21 detainees. On a list containing the names of 17 prisoners (eight teenagers and nine children), the Accused wrote the order "Smash them to pieces."[339] On a longer list of detainees, the Accused's annotation reads "smash: 115; keep: 44 persons." The text below this annotation reads "Comrade Duch proposed to Angkar; Angkar agreed."[340] On a list of 20 female detainees, the Accused wrote annotations for each of them, ordering: "take away for execution," "keep for interrogation" or "medical experiment."[341]

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[334] T., 6 August 2009 (David CHANDLER), pp. 102-103.
[335] T., 17 June 2009 (Accused), pp. 7, 10-11, 22-24, 31, 65-66.
[336] T., 17 June 2009 (Accused), p. 31; *see also* T., 27 July 2009 (SUOS Thy), pp. 95-96.
[337] T., 1 April 2009 (Agreed Facts), pp. 94-96.
[338] T., 17 June 2009 (Accused), pp. 31, 37; T., 22 June 2009 (Accused), p. 64.
[339] T., 22 June 2009 (Accused), pp. 25-26; *see also* "S-21 Prisoner List of 30 May 1978", E3/367, ERN (English) 00001890.
[340] T., 22 June 2009, pp. 27-28; *see also* "List of names of prisoners – postponed in January 1977", E3/370, ERN (English) 00185356-00185357.
[341] T., 22 June 2009 (Accused), pp. 28-30; *see also* "List of female prisoners", E3/371, ERN (English) 00181789-00181790.

183. The Accused had the authority to delay the execution of detainees, including translators, mechanics and artists, who possessed valuable skills which could be used within S-21.[342]

2.3.3.6 Choeung Ek

184. The Amended Closing Order states:

> 29. Initially, prisoners were executed and buried in and around the S21 complex. At some time between 1976 and mid 1977, partly in order to avoid the risk of epidemic, DUCH decided to relocate the execution site to Choeng Ek, located approximately 15 km Southwest of Phnom Penh in Kandal province, and now the site of a memorial. The execution site consisted of a wooden house where prisoners were held until just before their execution, and a large area that consisted of pits for executions. However, even after Choeng Ek became the main killing site, certain executions and burials took place at or near S21.[343]

185. The Accused agreed with these statements.[344]

186. The Accused chose to relocate the S-21 execution and burial site to Choeung Ek of his own authority and informed his superiors of his decision.[345] Following the establishment of Choeung Ek, the Accused's superiors requested that the execution and burial site be moved to another pre-selected location. The Accused informed his superiors that he would be unable to do so for fear that others would find the remains of those already executed at Choeung Ek. His superiors acquiesced and the execution and burial site remained at Choeung Ek.[346]

187. A handful of guards were permanently stationed at Choeung Ek and were responsible for maintaining the site's secrecy, digging pits and burying the detainees' corpses.[347]

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[342] T., 17 June 2009 (Accused), pp. 18-19.
[343] Amended Closing Order, para. 29 (footnotes omitted).
[344] T., 1 April 2009 (Agreed Facts), pp. 61, 63.
[345] T., 28 April 2009 (Accused), p. 9; T. 17 June 2009 (Accused), pp. 29, 40; T., 29 April 2009 (Accused), p. 70.
[346] T., 28 April 2009 (Accused), pp. 9-10; T., 30 April 2009 (Accused), p. 7.
[347] T., 27 April 2009 (Accused), p. 25; T., 17 June 2009 (Accused), pp. 12, 34, 40-41; T., 16 July 2009 (HIM Huy), pp. 62-69, 95; T., 11 August 2009 (TAY Teng statement read), pp. 53-54.

188. S-21 detainees were transferred to Choeung Ek, handcuffed and blindfolded, in trucks by members of the Special Unit on the pretext that they were being relocated to a new house. Detainees who were too weak to walk were carried onto the trucks.[348] Upon their arrival at Choeung Ek, detainees were placed in a wooden hut and their names verified. The detainees were then individually led, still handcuffed and blindfolded, to the front of a freshly dug pit, where they were summarily executed.[349]

189. Following the establishment of Choeung Ek, certain individuals detained within the S-21 complex, including children, former S-21 staff members and important prisoners, continued to be executed and buried in or near the S-21 complex.[350] A number of individuals detained at S-24 were also sent directly to Choeung Ek for execution.[351]

2.3.3.7 S-24

190. The Amended Closing Order states:

> 30. DUCH recognised that S24 was part of S21. In principle, S24 was tasked with reforming and re-educating combatants and farming rice to supply Office S21 and its branches. […]
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> 50. Regarding S24, too few records have been found to precisely determine the total number of people sent there. Nevertheless it appears that there were several hundred people working at any one time, an estimate which DUCH confirmed. Several witnesses state that men, women and children were all held there. According to DUCH, there were two main categories of persons at Prey Sâr: persons whose relatives were considered suspect, and subordinates of arrested cadre. There were also combatants from various units and personnel from numerous ministries and offices around Phnom Penh together with members of their families. […]
>
> 72. […] [S24] was staffed by S21 cadre and combatants. DUCH stated that these people were not in "prison" in the same sense as those imprisoned at Tuol Sleng, a view shared by SAOM Met, who was himself sent to S24 for re-education. DUCH added that detainees and

[348] T., 27 April 2009 (Accused), p. 18; T., 17 June 2009 (Accused), pp. 39-40; T., 16 July 2009 (HIM Huy), pp. 12, 62-69, 95; T., 20 July 2009 (HIM Huy), pp. 5-6; T., 28 July 2009 (MEAS Pengkry statement read), pp. 91-93.
[349] T., 17 June 2009 (Accused), pp. 43-44, 54; T., 16 July 2009 (HIM Huy), pp. 64-68; T., 11 August 2009 (TAY Teng statement read), pp. 53-55.
[350] T., 17 June 2009 (Accused), pp. 14-15; T., 16 July 2009 (HIM Huy), pp. 52-53, 70-71; T., 20 July 2009 (HIM Huy), pp. 66-67.
[351] T., 1 April 2009 (Agreed Facts), p. 84; T., 24 June 2009 (Accused), pp. 53-54; T., 25 June 2009 (Accused), pp. 9-10.

> staff at Prey Sâr could not move around freely without authorisation, and claimed this rule also applied to him – a fact which other witnesses corroborated.[352]

191. The Accused agreed with these statements.[353]

192. S-24, also known as Prey Sar, was located outside of Phnom Penh near the execution site of Choeung Ek in the area of Wat Kdol, in the Dangkao district of Kandal Province.[354] S-24 was used as a re-education camp during IN Lorn *alias* Nat's, chairmanship of S-21.[355] Following the Accused's appointment as Chairman of S-21, S-24 fell under his authority.[356] The Accused stated that while S-24 was under his "complete supervision", he assigned KHIM Vak *alias* Hor and NUN Huy *alias* HUY Sre, the two other members of the S-21 Committee, to report to him about its daily affairs.[357]

193. NUN Huy *alias* HUY Sre worked exclusively at S-24, where he directly oversaw its day-to-day operations. Following HUY Sre's arrest in December 1978, Phal was assigned to directly manage S-24 until its abandonment on 7 January 1979. Throughout, the Accused received regular reports regarding the operations of S-24, including on the detainees' work regimes and the identity of those sent from S-24 to S-21 or Choeung Ek. He also testified that he visited S-24 on four occasions.[358]

194. According to the Accused, SON Sen made decisions regarding which members of the armed forces should be sent to S-24, while the upper echelons of the CPK decided with respect to members of the civilian units. The S-21 Committee had the authority to send S-21 staff to S-24 for re-education.[359]

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[352] Amended Closing Order, paras 30, 50, 72 (footnotes omitted).
[353] T., 1 April 2009 (Agreed Facts), pp. 61, 63, 71, 73; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 173.
[354] T., 1 April 2009 (Agreed Facts), pp. 62-63.
[355] T., 27 April 2009 (Accused), p. 66; T., 24 June 2009 (Accused), pp. 4, 48-49.
[356] T., 25 June 2009 (Accused), p. 14; T., 24 June 2009 (Accused), pp. 3-4.
[357] T., 28 April 2009 (Accused), pp. 16-18; *see also* T., 19 May 2009 (Craig ETCHESON), p. 53; T., 12 August 2009 (PHAK Siek statement read), p. 60.
[358] T., 23 April 2009 (Accused), p. 32; T., 27 April 2009 (Accused), p. 40; T., 24 June 2009 (Accused), pp. 27-28, 35; T., 25 June 2009 (Accused), pp. 8, 16-18, 43.
[359] T., 15 June 2009 (Accused), pp. 31-32; T., 24 June 2009 (Accused), pp. 38-39, 62-63.

195. Individuals sent to S-24 were first registered near the S-21 complex, on Street 360, and taken by the Special Unit to S-24, where their biographies and photographs were taken and they were put to work.[360]

196. Detainees at S-24 were largely comprised of the relatives or subordinates of people detained at the S-21 complex, and of combatants and personnel from ministries or from other public institutions. Men and women were segregated, and children, sometimes unaccompanied, were also held at S-24. According to the Accused, no Vietnamese or Westerners were detained at S-24.[361] While S-24 guards supervised and worked alongside those detained, they were not themselves detainees, unless arrested and taken formally into detention for some breach of their duties.[362]

197. Detainees were known as "elements",[363] and were divided into three groups: the first level, known as "better elements", were subjected to so-called "light tempering"; level two, or "fair elements", required only "intermediate" tempering, and level three ("bad elements"), required the harshest tempering.[364] The Accused did not dispute any part of these assertions.[365]

198. According to Expert David CHANDLER, one of the characteristics that distinguished S-24 from S-21 was that individuals held at the former had the possibility of release.[366] The Accused stated, however, that S-24 detainees were seldom released and that all were generally destined for execution regardless of their classification. The Accused testified that he provided those running S-24 with a standing order to execute its detainees in accordance with CPK policy. S-24 detainees slated for execution whose

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[360] T., 24 June 2009 (Accused), pp. 14, 39-40; T., 25 June 2009 (Accused), pp. 36-37.
[361] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 109; T., 1 April 2009 (Agreed Facts), pp. 71-73; T., 24 June 2009 (Accused), pp. 9-12, 44; T., 25 June 2009 (Accused), pp. 2, 27; T., 9 July 2009 (CHIN Met), p. 89; T., 12 August 2009 (BOU Thon), p. 8; T., 12 August 2009 (PHAK Siek statement read), pp. 57, 62-63; T., 12 August 2009 (KAING Pan statement read), pp. 69-70.
[362] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 172-173, 181; T., 24 June 2009 (Accused), p. 20; T., 9 July 2009 (CHIN Met), pp. 15-16; "Written Record of Interview of Duch by CIJ on 27 March 2008", E3/380, ERN (English) 00194548.
[363] T., 24 June 2009 (Accused), p. 56 (using the French phrase "composant").
[364] T., 1 April 2009 (Agreed Facts), pp. 82-84; T., 24 June 2009 (Accused), pp. 16, 20-21, 36-37; T., 25 June 2009 (Accused), pp. 30-31, 43-44.
[365] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 175; T., 1 April 2009 (Agreed Facts), pp. 82-84.
[366] T., 6 August 2009 (David CHANDLER), p. 10; *see also* T., 19 May 2009 (Craig ETCHESON), p. 54.

confessions were needed were first sent to S-21, while those whose confessions were not required were sent directly to Choeung Ek for execution. The Accused typically made this decision, though his subordinates could send detainees directly to Choeung Ek when their confessions were clearly unnecessary, as was the case with children.[367]

199. The Accused did not task S-24 staff with interrogating detainees and obtaining their confessions. The Accused nonetheless acknowledged that S-24 staff interrogated detainees, though he claims they did so without his authorisation. The Accused further agreed that S-24 staff mistreated detainees during these interrogations, including by shaving their heads, flaying their skin through electrocutions, and beating and whipping them.[368]

200. The number of detainees at S-24 cannot be stated with any precision. It is clear from the evidence that there were large numbers of staff as well as detainees at S-24, but no surviving written material has been put before the Chamber to clarify the total number of those detained over the whole period from 17 April 1975 to 6 January 1979. The Amended Closing Order states that there were several hundred people working at S-24 at any one time, an estimate with which the Accused agreed.[369] A written summary of statistics of Armed Forces indicates that in March 1977, there were 2,327 staff at S-21 and 1300 "elements" at S-24. These numbers were confirmed by the Accused.[370] Others, such as Witness PHAK Siek who was herself detained at S-24 for two years spoke of "a total of 500 to 600 prisoners at Prey Sar, both men and women."[371] Witness TAY Teng, held at S-24 for two months immediately prior to the fall of Phnom Penh, said that there were "200 people living there divided into groups of 20-25."[372]

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[367] T., 24 June 2009 (Accused), pp. 15, 18, 30-33, 50-54, 64-67, 71-72; T., 25 June 2009 (Accused), pp. 9-10, 20-22, 35.
[368] T., 24 June 2009 (Accused), pp. 24-25, 40, 43; T., 25 June 2009 (Accused), p. 7; T., 1 April 2009 (Agreed Facts), p. 92.
[369] Amended Closing Order, para. 50; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 110; T., 1 April 2009 (Agreed Facts), p. 71.
[370] T., 24 June 2009 (Accused), p. 56; "Joint Statistics of Armed Forces dated 7 April 1977", E3/146, ERN (English) 00183956; *see also* T., 27 May 2009 (Craig ETCHESON), pp. 70-71.
[371] T., 12 August 2009 (PHAK Siek statement read), p. 60.
[372] T., 11 August 2009 (TAY Teng statement read), p. 52.

201. Although many detainees and arrested staff of S-24 were transferred to the S-21 complex, by inference for interrogation and execution, an examination of lists of prisoners compiled at S-21 shows that the numbers of this group are also unclear. The Accused conceded in his response to the allegation in the Amended Closing Order that "at least" 571 persons were transferred.[373] In the Revised S-21 Prisoner List, the total number of detainees sent to the S-21 complex from S-24 remains unclear (Section 2.3.3.4.2). Detainees sent directly from S-24 to Choeung Ek for execution included women and children.[374]

202. The Chamber finds that the isolated and fragmentary documentation placed before it presents an incomplete picture of the numbers of those held, sent for execution, or surviving detention at S-24. For these reasons, the Chamber finds that the cumulative total detained at S-24 was no fewer than 1,300.

2.3.3.8 Abandonment of S-21

203. Following the fall of Phnom Penh (Section 2.1), the Accused and his staff fled S-21 on 7 January 1979, along with the approximately 15 detainees who had been working within the S-21 complex.[375] Staff at S-24 also fled on 7 January 1979, along with the remaining S-24 detainees.[376]

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[373] T., 1 April (Agreed Facts), p. 84; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 190.
[374] T., 24 June 2009 (Accused), p. 54; T., 1 April 2009 (Agreed Facts), p. 84; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 189; *see also* "Written Record of Interview of Duch by CIJ on 27 March 2008", E3/380, ERN (English) 00194550.
[375] T., 17 June 2009 (Accused), p. 19; T., 25 June 2009 (Accused), p. 24; T., 29 June 2009 (VANN Nath), p. 52; T., 30 June 2009 (CHUM Mey), p. 28; 1 July 2009 (BOU Meng), pp. 41, 80; T., 27 July 2009 (SUOS Thy), pp. 103-104.
[376] T., 24 June 2009 (Accused), p. 55; *see also* T., 30 June 2009 (Chum MEY), pp. 16-17.

2.4 Facts relevant to Crimes Against Humanity committed at S-21

204. During the course of the trial, evidence was put before the Chamber regarding the following crimes against humanity committed at S-21. Other facts which specifically concern Vietnamese prisoners of war and civilians, as well as Vietnamese sympathisers detained at S-21, have also been addressed by the Chamber in relation to grave breaches of the Geneva Conventions of 1949 (Section 2.6).

2.4.1 Murder and extermination

205. The Amended Closing Order states:

> 138. At S21, personnel, both directly and indirectly, caused the death of a large number of detainees. In many instances prisoners were deliberately killed through a variety of means. In other instances the perpetrators may not have intended to kill, but were aware that death could occur as a result of their conduct, for example when they beat or tortured prisoners.
>
> 139. The living conditions imposed at S21 were calculated to bring about the deaths of detainees. These conditions included but were not limited to the deprival of access to adequate food and medical care.
>
> 140. The unlawful deaths of over 12,380 detainees which occurred as a result of murder or the imposition of living conditions calculated to bring about death, constituted the mass killing of members of a civilian population, evidenced by documentary records, eye-witness accounts and the discovery of large numbers of bodies in mass graves.[377]

206. None of the detainees held within the S-21 complex were to be released as they were all due to be executed in accordance with the CPK policy to "smash" all enemies.[378] As stated by the Accused, "the main task of the [S-21] Committee was to detain the people who were sent by the Standing Committee in order to interrogate [torture], to get the confessions, and to smash them."[379]

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[377] Amended Closing Order, paras 138-140.
[378] T., 15 June 2009 (Accused), pp. 68-72; T., 17 June 2009 (Accused), pp. 20-24; T., 23 June 2009 (Accused), pp. 30-33; *see also* T., 16 July 2009 (HIM Huy), pp. 45-46; T., 21 July 2009 (PRAK Khan), p. 48; T., 6 August 2009 (David CHANDLER), pp. 25-28; T., 27 July 2009 (SUOS Thy), p. 98; T., 28 July 2009 (SUOS Thy), p. 48; *see also* Section 2.2.5.2.
[379] T., 17 June 2009 (Accused), p. 21; *see also* T., 15 June 2009 (Accused), pp. 35-36.

207. In addition to those who were executed, many detainees within the S-21 complex and at S-24 died as a result of their detention conditions.[380] The Accused indicated that detainees were deliberately fed starvation rations and given limited medical treatment.[381] Detainees also died as a result of interrogation and torture.[382]

208. The Accused agreed with the general accuracy of the information contained in the Revised S-21 Prisoner List, but acknowledged that the number of detainees who died or were executed was greater than the listed number (as amended) of 12,273.[383]

2.4.1.1 Execution of foreign nationals

209. The Accused confirmed that foreign nationals from various nations including Vietnam, Thailand, Pakistan, Laos, India, China, France, the United Kingdom, the United States, New Zealand and Australia were detained within the S-21 complex, where they died or were executed.[384] Although there were allegations that some of these foreign nationals were burned alive,[385] the Chamber is not satisfied that this has been proven to the required standard.

210. Numerous Vietnamese nationals and individuals believed to be Vietnamese spies were executed at S-21, particularly from 1977 until January 1979. The Chamber is satisfied that the execution of these individuals, many of whom were captured during the armed conflict with Vietnam, formed part of the CPK policy to eliminate all of its enemies.

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[380] T., 15 June 2009 (Accused), p. 92; T., 21 July 2009 (PRAK Khan), p. 48; T., 3 August 2009 (SEK Dan), p. 16; T., 28 July 2009 (SUOS Thy), pp. 14, 22.
[381] T., 15 June 2009 (Accused), pp. 84-85, 92; T., 27 April 2009 (Accused), p. 23; *see also* T., 6 August 2009 (David CHANDLER), pp. 87-89; T., 11 August 209 (MAKK Sithim statement read), pp. 38-41; T., 3 August 2009 (SEK Dan), pp. 9-10; T., 28 July 2009 (SUOS Thy), pp. 14, 22; T., 1 July 2009 (BOU Meng), p. 15.
[382] T., 17 June 2009 (Accused), p. 13; T., 28 July 2009 (SUOS Thy), p. 22; T., 11 August 2009 (HAN Iem statement read), p. 106; *see also* Section 2.4.4.
[383] T., 17 June 2009 (Accused), p. 6; "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185503; T., 8 July 2009 (Defence), p. 3; *see also* Section 2.3.3.4.2.
[384] T., 15 June 2009 (Accused), pp. 51-55; T., 20 July 2009 (Accused), p. 12; *see also* "Some files on foreigners who were detained or killed by the Khmer rouge at S-21", E52/4.62.
[385] Amended Closing Order, para. 122; *see also* T., 17 June 2009 (Accused), pp. 20, 27-28, 36-37; T., 5 August 2009 (Accused), pp. 52-53; T., 21 July 2009 (PRAK Khan), p. 50; T., 16 July 2009 (HIM Huy), pp. 59-61, 90-91; T., 5 August 2009 (CHEAM Sour), pp. 14-19, 40-42, 50-51.

2.4.1.2 Execution of high-ranking detainees

211. One of the defining characteristics of S-21 within the Santebal security apparatus was that it interrogated and executed high ranking CPK cadres, who were typically detained in the Special Prison.[386] Amongst these high ranking cadres were KOY Thuon (Minister of Commerce and Member of the Central and of the Standing Committees), CHAN Chakrei (Secretary of Sector 24 in the East Zone), MEN San *alias* Ya (Secretary of the Northeast Zone), SUOS Neou *alias* Chhouk (Vice Chairman of the General Staff), VORN Vet *alias* PENH Touk (Member of the Central and of the Standing Committees), CHHAI Kim Hour *alias* Hok (Chairman of the Energy Committee), KONG Sophal (Secretary of the Northwest Zone), Pang *alias* SOUR Sophan (Member of the Central Committee), as well as IN Lorn *alias* Nat (former Chairman of S-21).[387]

2.4.1.3 Execution of S-21 staff

212. A number of S-21 staff died or were executed after being detained for failing to perform their duty or being implicated by detainees' confessions.[388] S-21 staff lived in constant fear of being detained and executed. A number of former S-21 staff testified about their colleagues simply disappearing for no apparent reason.[389]

213. HUY Sre, as well as at least 21 members of the Medical Unit, 48 members of the Defence Unit and 34 members of the Interrogation Unit, including all of its female interrogators, were amongst the former S-21 staff who were detained and killed.[390] Their

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[386] T., 1 April 2009 (Agreed Facts), pp. 65-66; T., 19 May 2009 (Craig ETCHESON), p. 45; T., 27 May 2009 (Craig ETCHESON), p. 69; T., 15 June 2009 (Accused), pp. 45-46.

[387] *See, e.g.,* T., 15 June 2009 (Accused), pp. 15-16, 18, 25, 27-29, 45-46; T., 17 June 2009 (Accused), pp. 76-77, 80-83, 93-95; T., 16 July 2009 (HIM Huy), pp. 29-30, 51; T., 10 August 2009 (SAOM Met), pp. 76-86; T., 22 June 2009 (Accused), pp. 30-42; T., 18 August 2009 (Accused), p. 109; "Written Record of Interview of DUCH by CIJ on 29 November 2007", E3/17, ERN (English) 00154194.

[388] T., 15 June 2009 (Accused), pp. 19-20; T., 16 July 2009 (HIM Huy), pp. 70-73, 93-99; T., 20 July 2009 (HIM Huy), pp. 51-53; "S-21 Personnel Imprisoned at S-21", E68.40; *see also* T., 11 August 2009 (SAOM Met), pp. 16-17; T., 4 August 2009 (KHIEU Ches statement read), p. 69.

[389] T., 27 July 2009 (SUOS Thy), pp. 99-103; T., 28 July 2009 (SUOS Thy), pp. 64-65; T., 11 August 2009 (SAOM Met), pp. 16-17; T., 16 July 2009 (HIM Huy), pp. 97-99; T., 3 August 2009 (LACH Mean), p. 69; T., 4 August 2009 (LACH Mean), p. 52; T., 4 August 2009 (NHEM En statement read), pp. 106-108.

[390] T., 24 June 2009 (Accused), pp. 27-29; T., 3 August 2009 (Accused), pp. 23-24; T., 12 August 2009 (KAING Pan), pp. 73-74; T., 4 August 2009 (NHEM En statement read), pp. 107-108, 120-121; T., 21 July 2009 (PRAK Khan), pp. 20-21; T., 22 July 2009 (PRAK Khan), pp. 58-59; T., 16 July 2009 (HIM Huy),

family members were, in some instances, also detained and executed along with them. Notably, many of the S-21 staff who were executed, including IN Lorn *alias* Nat, were previously attached to Division 703 of the RAK, which was progressively purged throughout the period of S-21's operation.[391]

2.4.1.4 Execution of children

214. Children taken to S-21 were executed within the S-21 complex and at Choeung Ek. Children of a young age were typically executed immediately after being separated from their parents, though some were kept for a short period of time before being executed. The Accused indicated that an S-21 staff member known as Peng was responsible for their executions.[392]

215. Older children who could care for themselves were sent to S-24. Some of these children were then sent to Choeung Ek for execution. In one recorded instance, confirmed by the Accused, about 160 children held at S-24 were executed at Choeung Ek in July 1977, together with 18 adults.[393] Witness KAING Pan was the Chairwoman of a unit of 12 detainees at S-24, which cared for about 70 to 80 eight to ten year old children who had been separated from their parents. She stated that "the children were dumped there" and that more than 30 disappeared around the time the DK regime fell.[394] Witness BOU Thon observed ten babies at a child care centre at S-24, whose mothers were not permitted to care for them. Some were sick and some died.[395]

216. Although the Amended Closing Order alleges that in one instance, the Vietnamese son of a female prisoner was dropped from a three-story building in the vicinity of the

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pp. 72-74. For an indicative breakdown per unit of the S-21 staff who were detained, *see* "S-21 Personnel Imprisoned at S-21", E68.40.

[391] T., 16 July 2009 (HIM Huy), pp. 41-45, 74-75, 97-99; T., 11 August 2009 (SAOM Met), pp. 16-17; T., 21 July 2009 (PRAK Khan), pp. 35-36.

[392] T., 22 June 2009 (Accused), pp. 12, 26; T., 17 June 2009 (Accused), pp. 14-16, 24-25; T., 24 June 2009 (Accused), pp. 54, 67-68; T., 16 July 2009 (HIM Huy), p. 90; T., 20 July 2009 (HIM Huy), p. 59; T., 21 July 2009 (PRAK Khan), pp. 33-34; T., 28 July 2009 (SUOS Thy), pp. 18-19, 42.

[393] "Prisoners' names smashed by Brother Huy Sre", E3/405; T., 24 June 2009 (Accused), pp. 67-68; T., 25 June 2009 (Accused), pp. 8-10; T., 16 July 2009 (Accused), pp. 92-93; T., 16 July 2009 (HIM Huy), pp. 89-90.

[394] T., 12 August 2009 (KAING Pan statement read) pp. 69-73.

[395] T., 12 August 2009 (BOU Thon), p. 32.

S-21 complex,[396] the Chamber is not satisfied that this allegation has been proven to the required standard.

2.4.1.5 Mass executions

217. The mass executions of detainees were ordered by the Party Centre and took place on several occasions. These executions took place at Choeung Ek over the course of several days. Due to the large number of victims, the executions were often undertaken almost immediately after the detainees' arrival at the S-21 complex, with no interrogations taking place.[397]

218. Some of the mass executions were the result of purges within the CPK and RAK. According to the Accused, in early 1977, large numbers of cadres from the North Zone, Phnom Penh and the East Zone were executed. Shortly thereafter members of Division 920 of the RAK were executed. In early 1978, cadres from the West Zone were executed, followed by cadres from the Northwest Zone. One of the largest purges occurred towards the end of 1978, involving cadres from the East Zone.[398]

219. In January 1979, almost all remaining detainees within the S-21 complex were executed following an order by the Accused's superiors. Very few living detainees remained within the S-21 complex when Phnom Penh fell on 7 January 1979.[399]

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[396] Amended Closing Order, para. 127; *see also* T., 21 July 2009 (PRAK Khan), pp. 12, 51, 81-82; T., 22 July 2009 (PRAK Khan), pp. 5-6; T., 17 June 2009 (Accused), pp. 24-25; T., 22 July 2009 (Accused), p. 34.

[397] T., 15 June 2009 (Accused), pp. 32-33; T., 25 June 2009 (Accused), pp. 8-9; T., 17 June 2009 (Accused), pp. 16-18, 45-49; T., 16 July 2009 (HIM Huy), pp. 62-68, 101-105; T., 20 July 2009 (HIM Huy), pp. 34, 59-61, 69-70; T., 5 August 2009 (KUNG Phai statement read), p. 91; *see also* "Statistics of prisoners interrupted to interrogate in January 1977", E3/370; "Names of female prisoners, namely from the cement factory and K-15", E3/371.

[398] T., 17 June 2009 (Accused), pp. 16-17, 45-50, 83-86; *see also* T., 6 August 2009 (David CHANDLER), pp. 20-22; T., 20 July 2009 (HIM Huy), p. 34; T., 28 July 2009 (SUOS Thy), pp. 22-23. The Revised S-21 Prisoner List indicates 1,165 entries as having been arrested from the East Zone, 360 entries as having been arrested from the North and Central Zone, as well as 1,211 entries as having been arrested from the Northwest Zone; *see* "S-21 Prisoners coming from the East Zone", E68.45; "S-21 Prisoners coming from the Old North Zone/Central Zone", E68.47; "S-21 Prisoners coming from the Northwest Zone", E68.49.

[399] T., 2 July 2009 (Accused), pp. 83-85; T., 21 July 2009 (PRAK Khan), pp. 58-59; T., 22 July 2009 (PRAK Khan), p. 27; T., 28 July 2009 (SUOS Thy), pp. 12-13; T., 2 July 2009 (NORNG Chanphal), pp. 32-40. The last S-21 detainees to be executed were presumably members of the YO8 Unit who had been

2.4.1.6 Methods of execution

220. Detainees were typically executed by being struck at the base of the neck with a metal bar or another available object. Their throats or stomachs were then generally slit and their bodies pushed into pits, their blindfold and handcuffs removed, and the pits covered.[400]

221. In certain instances, mainly involving the execution of important detainees, their stomachs were split open and photographs were taken to prove their death to the Accused's superiors.[401]

222. During IN Lorn *alias* Nat's chairmanship, detainees were executed by being stabbed at the base of their throat. Regardless of the method of execution employed, the Accused indicated that the only thing that mattered was to "make sure that the prisoners were smashed."[402] Asked by the Chamber whether he taught S-21 staff how to execute detainees, the Accused, citing a Khmer saying, replied: "I do not need to teach crocodiles how to swim, because the crocodiles already know how to swim."[403]

223. The Accused confirmed that at least 100 S-21 detainees died after having their blood drawn by the S-21 Medical Unit.[404] Witness PRAK Khan testified that detainees would be made to lie on their back on a bed, their handcuffs removed and their legs shackled. They would be blindfolded while a needle was inserted into their veins and their blood drawn until they died.[405] The blood was given to the General Staff Hospital

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previously detained in connection with the death of Malcom CALDWELL. According to the Accused, they were killed with a bayonet while shackled to their beds; *see* T., 23 June 2009 (Accused), pp. 8-9.

[400] T., 16 July 2009 (HIM Huy), pp. 54-55; T., 11 August 2009 (TAY Teng statement read), pp. 54-57; *see also* T., 16 July 2009 (HIM Huy), pp. 67-68; T., 17 June 2009 (Accused), p. 45.

[401] T., 17 June 2009 (Accused), pp. 76-83; T., 22 June 2009 (Accused), p. 110. Photographs were also taken of detainees who died while in detention at S-21 as proof that they had not been released; *see* T., 4 August 2009 (NHEM En statement read), p. 111; T., 5 August 2009 (NHEP Hau statement read), pp. 73-75.

[402] T., 17 June 2009 (Accused), pp. 12, 76.

[403] T., 17 June 2009 (Accused), p. 12.

[404] T., 16 June 2009 (Accused), pp. 81-83, 95; *see also* T., 27 July 2009 (SUOS Thy), pp. 86-90; T., 28 July 2009 (SUOS Thy), pp. 36-37.

[405] T., 21 July 2009 (PRAK Khan), pp. 36-37.

for transfusions for RAK soldiers wounded during the conflict with the Vietnamese.[406] The Accused initially stated that this practice was initiated by IN Lorn *alias* Nat, and that he did not know of it. However, he subsequently clarified that it was initiated upon the order of SON Sen and that it ceased when all S-21 medics were themselves executed.[407]

224. The Accused also indicated that surgical operations were performed on detainees upon the order of SON Sen. The purpose of these operations was to train medical staff. It is unclear whether the detainees were still alive prior to these operations.[408] The Chamber is therefore not satisfied to the required standard that the death of detainees occurred as a direct consequence of surgical operations.

2.4.2 Enslavement

225. The Amended Closing Order states:

> 135. Certain detainees at S21 and Prey Sar were forced to work. Strict control and constructive ownership was exercised over all aspects of their lives by: limiting their movement and physical environment; taking measures to prevent and deter their escape; and subjecting them to cruel treatment and abuse. As a result of these acts, detainees were stripped of their free will.[409]

226. The Amended Closing Order characterised the main purpose of S-24 as to "reform and re-educate combatants and farming rice to supply Office S-21 and its branches."[410] The work was also described as "punitive hard labour" or "tempering." The Accused agreed with or did not dispute these descriptions.[411] He described the main purpose of the work undertaken by detainees at S-24 as "to have them work hard for the benefit of the Party, for the production of rice. And they had to learn to follow the superior and not to

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[406] T., 16 June 2009 (Accused), pp. 81-83; T., 22 June 2009 (Accused), pp. 112-115; T., 21 July 2009 (PRAK Khan), pp. 36-39.
[407] T., 16 June 2009 (Accused), pp. 81, 91-93; T., 17 June 2009 (Accused), p. 27; T., 22 June (Accused), pp. 112-114; *see also* T., 27 July 2009 (SUOS Thy), pp. 86-90; 28 July 2009 (SUOS Thy), pp. 36-37; T., 22 July 2009 (Accused), pp. 37-39.
[408] T., 16 June 2009 (Accused), pp. 81, 93-95; T., 22 June 2009 (Accused), pp. 112-115.
[409] Amended Closing Order, para. 135.
[410] Amended Closing Order, para. 30 (footnotes omitted).
[411] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 55-57, 172-173.

be rude or not to oppose the Party in any case whatsoever."[412] The Accused also agreed that S-24 was a place of enslavement where "elements" performed "forced labour."[413]

2.4.2.1 Living and working conditions at S-24

227. The Accused agreed that for the CPK, the term "element" meant detainee, and was applied to those who the Party suspected of being enemies. They were then detained and subjected to forced labour "like [an] animal so that they cannot oppose or fight against the Party."[414] They were also obliged to participate in self-criticism meetings, also called "tempering."[415]

228. Witness BOU Thon was detained at S-24 after the disappearance of her husband. She was not free to talk to other people (including children) working there, and was too frightened to criticise or to complain about issues such as the adequacy of food or health care. She was obliged to work long hours and was shut in at night. She described her conditions as being "like a prison without walls." She had no rights or freedom and was not permitted to make any decision by herself. She was told where to work, and was obliged "to abide by their orders", with "no right to contest or challenge anything."[416]

229. Witness MEAS Pengkry, arrested and sent to S-24 in 1977, spoke of the extremely long working hours and the arduous physical work involved in digging dykes and canals, and transplanting rice, and noted that the quantity of food for people expected to work under these conditions was inadequate.[417]

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[412] T., 24 June 2009 (Accused), p 17.
[413] T., 1 April 2009 (Agreement on Facts), pp. 82-84; T., 24 June 2009 (Accused), pp. 36-37, 59, 70-71; T., 25 June 2009 (Accused), pp. 31-32.
[414] T., 24 June 2009 (Accused), pp. 56-58.
[415] T., 24 June 2009 (Accused), pp. 36-37, 76; T., 8 July 2009 (CHIN Met), p. 86; T., 5 August 2009 (CHEAM Sour), p. 44; s*ee also* T., 11 August 2009 (TAY Teng statement read), pp. 47, 52; T., 12 August 2009 (KAING Pan statement read), p. 71; *see also* T., 15 July 2009 (MAM Nai), p. 59.
[416] T., 12 August 2009 (BOU Thon), pp. 3, 13, 33-34; *see also* T., 12 August 2009 (Accused), pp. 46-47.
[417] T., 28 July 2009 (MEAS Pengkry statement read), pp. 93-94; *see also* T., 12 August 2009 (PHAK Siek statement read), p. 58; T., 12 August 2009 (KAING Pan statement read), p. 72; T., 1 April 2009 (Agreed Facts), p. 83.

230. Civil Party CHIN Met was arrested in November 1977 aged 19 years.[418] After a period of detention she was sent to S-24 for re-education. She described long hours of work strictly supervised to ensure that work targets were met. Using hoes and baskets, she planted rice, built dams and dug canals. In her testimony, she described being forced to pull a plough with three others, being beaten when she fell and when exhausted, being warned to "try to do [her] best" or she would disappear.[419] This was reinforced when one of her co-workers became ill and disappeared. She spoke of her hopelessness, causing her to try to commit suicide, and of her constant fear, exhaustion, weakness due to overwork, and ill-health, all of which have left her with emotional problems and physical scarring. She noted that children were also forced to work and that "[i]t was pitiful to look at those children", the majority of whom died from hunger and sickness.[420]

231. In general, the Accused agreed that the conditions at S-24 were as described. He confirmed that detainees could not move freely around S-24 without authorisation, and that bad elements were shackled at night and were not permitted to live in ordinary houses. All detainees were strictly guarded day and night, and at work were closely supervised by the guards who by using force and insult, required them to work very hard.[421] The Accused described the extremely long hours of work which included early mornings and moonlit nights, as well as the harsh working conditions, agreeing that there might have been some cases where detainees were used in place of farm animals for ploughing.[422]

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[418] T., 8 July 2009 (CHIN Met), p. 42; T., 9 July (CHIN Met), p. 15; T., 9 July 2009 (Accused), p. 20; "Annex 2: Biography of Khim [Chin] Met", E2/80/4.2, ERN (English) 00347466; "Annex 1: Photograph of Chin Met", E2/80/4.1, ERN (English) 00343199; "Annex 1: Khmer Identification Card of CHIN Met, 14 February 2001", E2/80.1, ERN (English) 00322281.
[419] T., 8 July 2009 (CHIN Met), pp. 62-63.
[420] T., 8 July 2009 (CHIN Met), pp. 54, 60-61, 74, 89-90.
[421] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 55-57, 172-173, 176, 181-182; T., 1 April 2009 (Agreed Facts), pp. 82-84; s*ee also* T., 24 June 2009 (Accused), p. 20; T., 12 August 2009 (BOU Thon), pp. 32-34.
[422] T., 24 June 2009 (Accused), pp. 19-20, 42.

2.4.2.2 Enslavement of detainees within the S-21 complex

232. A very limited number of detainees were forced to work within the S-21 complex.[423] They included Witness VANN Nath and Civil Parties BOU Meng and CHUM Mey, all of whom were first arrested, shackled and imprisoned at S-21, before being selected to work within the complex. All described the terrible conditions of their capture and detention, the physical and mental abuse, torture and ever-present fear. When each was selected to work "temporarily",[424] they began working in the artists' or mechanics' workshops.[425] Both BOU Meng and VANN Nath were then able to sleep in or near their work area, guarded, locked in, but unshackled.[426] By contrast, CHUM Mey was returned each night to a room where he was shackled alongside other detainees.[427]

233. All worked very long hours under constant guard, with no freedom of movement. All knew that if they did not produce work of the standard required, they would be punished in some unspecified way.[428] BOU Meng was threatened that if he did not produce a good likeness of POL Pot, he would be punished.[429] The Accused came to view the artists work regularly, and on one occasion VANN Nath witnessed him forcing BOU Meng to fight another detainee, IM Chan, with black plastic tubes.[430] All were given better food, and conditions generally were a little better than when they were first detained. Nonetheless, under guard, effectively imprisoned and able to observe some of the treatment of other detainees, all lived in a state of constant terror.[431]

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[423] T., 17 June 2009 (Accused), pp. 18-19, 49. The Accused calculated a total of fifteen "people who had been used temporarily at S-21."
[424] VANN Nath saw the annotation "Keep for use temporarily" against his name on a list containing about ten names, dated during February 1978; *see* T., 29 June 2009 (VANN Nath), p. 68.
[425] T., 29 June 2009 (VANN Nath), pp. 24-26; T., 1 July 2009 (BOU Meng), pp. 34-35; T., 30 June 2009 (CHUM Mey), p. 14.
[426] T., 29 June 2009 (VANN Nath), pp. 34-35; T., 1 July 2009 (BOU Meng), p. 36.
[427] T., 30 June 2009 (CHUM Mey), p. 31.
[428] T., 29 June 2009 (VANN Nath), p. 26; T., 30 June 2009 (CHUM Mey), pp. 48-49.
[429] T., 1 July 2009 (BOU Meng), p. 64; *see also* T., 29 June 2009 (VANN Nath), pp. 56-58.
[430] T., 1 July 2009 (BOU Meng), p. 37; *see also* T., 29 June 2009 (VANN Nath), pp. 56-57; T., 1 April 2009 (Agreed Facts), pp. 88-89.
[431] T., 29 June 2009 (VANN Nath), pp. 66, 97; T., 1 July 2009 (BOU Meng), pp. 35, 84; T., 30 June 2009 (CHUM Mey), pp. 15, 77-78.

2.4.3 Imprisonment

234. The Amended Closing Order states:

> 134. There were no reasonable grounds and no legal basis justifying the arrest of the large number of individuals intentionally imprisoned at S-21. Moreover, prisoners were clearly deprived of basic rights such as being informed of the reason for their arrest. There is no evidence that any legal or judicial system was established or functioned in Cambodia between 17 April 1975 and 6 January 1979. There were no procedural safeguards, whether judicial or administrative, whereby detainees could challenge their imprisonment.[432]

2.4.3.1 Arbitrary deprivation of liberty

235. The Accused conceded that at least 12,273 men, women and children were detained at S-21. Some destined for S-21 were arrested by stealth, others simply handcuffed, blindfolded, processed and taken ultimately to a cell or large room where they would be shackled alongside other prisoners.[433]

236. S-24 also detained several hundred men, women and children at any one time. Most S-24 detainees were taken to the site and put to work. Only the bad elements were shackled and physically restrained. Those free of such physical restraints nonetheless had no freedom of movement and were guarded day and night.[434]

237. Detainees were transported from the S-21 complex to Choeung Ek handcuffed and blindfolded. Following their arrival at Choeung Ek, detainees were held briefly in a wooden hut and then led individually, or in small groups, to ditches to be executed.[435]

238. Among the detainees were young children and babies, as well as others who objectively, could not have been guilty of any offence. Also included were the family

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[432] Amended Closing Order, para. 134.
[433] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 102, 108; T., 1 April 2009 (Agreed Facts), pp. 75, 77; T., 15 June 2009 (Accused), pp. 15-16, 79-83; T., 16 July 2009 (HIM Huy), pp. 20-23.
[434] T., 1 April 2009 (Agreed Facts), p. 71.
[435] T., 17 June 2009 (Accused), pp. 43-44, 54; T., 16 July 2009 (HIM Huy), pp. 65-68; T., 11 August 2009 (TAY Teng statement read), p. 54.

members and subordinates of arrested persons, taken into custody because of their relationship to a detained person.[436]

2.4.3.2 Without due process of law

239. The common feature of all three sites was the absence of a formal process at any point in the arrest or detention informing the detainee of the reason for detention.[437] There was no trial,[438] access to legal advice, or ability to challenge the arrest, detention or ultimate execution. With rare exceptions, none would be released.[439] The Accused conceded that the practice of arrest, detention and execution without recourse to trial was "[…] not compatible with the existence of tribunals and procedural safeguards."[440] The absence of a legal or judicial procedure that enabled the detainees to challenge their detention was an egregious breach of their rights and one that led inevitably to fundamental miscarriages of justice.

2.4.4 Torture, including rape

240. The Amended Closing Order states:

> 136. The vast majority of persons interrogated at S21 were repeatedly and intentionally subjected to severe interrogation methods, which often resulted in serious physical injuries and severe mental harm. These methods were designed for the specific purpose of obtaining information or extracting confessions from the prisoners. Even if there were a requirement that perpetrators act in an official capacity, it is clear that in this case they acted in accordance with their defined roles within a clear command structure.
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> 137. There is evidence of at least one coercive sexual penetration committed at S21, when an interrogator inserted a stick into a female prisoner's genitals.[441]

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[436] T., 1 April 2009 (Agreed Facts), p. 65.
[437] T., 1 April 2009 (Agreed Facts), p. 77; T., 24 June 2009 (Accused), p. 69; T., 1 July 2009 (BOU Meng), pp. 11, 17-18.
[438] T., 1 July 2009 (BOU Meng) pp. 30-31.
[439] "Written Record of Interview of Duch by CIJ on 27 March 2008", E3/380, ERN (English) 00194552; T., 24 June 2009 (Accused), p. 30.
[440] T., 1 April 2009 (Agreed Facts), p. 70; *see also* T., 6 August 2009 (David CHANDLER), p. 34.
[441] Amended Closing Order, paras. 136-137.

2.4.4.1 The use of torture within the S-21 complex

2.4.4.1.1 Torture techniques

241. A variety of torture techniques were applied within the S-21 complex, resulting in severe physical pain and/or mental suffering. The Accused admitted that interrogators were permitted to use four violent interrogation techniques: beating, electrocution, asphyxiation with a plastic bag and "water-boarding."[442] The Accused has acknowledged that beating was the most common interrogation technique at S-21.[443] Beatings which in the view of the Chamber amounted to torture were of sufficient force or duration or were accompanied by other acknowledged torture techniques. Such beatings resulted in bleeding and multiple injuries such as broken limbs, loss of hearing, loss of teeth, scars and sometimes death.[444] Another common interrogation technique was electrocution,[445] which caused the detainees to lose consciousness – and in certain cases to become impotent, delirious or to die.[446] Placing a plastic bag over the detainees' head induced a sensation of suffocation and made them believe that they were dying. Death ensued in at least one instance. The Accused acknowledged that detainees were subjected to water-boarding, which entailed pouring water into their nose to induce a sensation of suffocation and drowning.[447]

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[442] T., 16 June 2009 (Accused), pp. 14, 44; "Written Record of Interview of Duch by the Co-Investigating Judges on 21 January 2008", E3/11, ERN (English) 00159557.

[443] T., 1 April 2009 (Agreed Facts), p. 90; T., 16 June 2009 (Accused), pp. 14, 54-56; T., 29 April 2009 (Accused), p. 19; s*ee also* T., 5 August 2009 (KUNG Phai statement read), p. 91; T., 1 July 2009 (BOU Meng), p. 12; T., 10 August 2009 (SAOM Met), p. 85.

[444] T., 1 July 2009 (BOU Meng), pp. 13, 32-33, 62, 72; T., 30 June 2009 (CHUM Mey), p. 11; "Two photographs of Civil Party Bou Meng's back (scars), taken after his hearing on 1 July 2009", E174; T., 16 June 2009 (Accused), p. 67; T., 17 June 2009 (Accused), p. 13.

[445] T., 29 April 2009 (Accused), p. 18; T., 16 June 2009 (Accused), pp. 14, 44; T., 5 August 2009 (KUNG Phai statement read), p. 91; T., 10 August 2009 (SAOM Met), pp. 85, 93-94; "Written Record of Interview of Prak Khan", E3/413, ERN (English) 0161554.

[446] T., 30 June 2009 (CHUM Mey), p. 27; T., 1 July 2009 (BOU Meng), pp. 30, 73; T., 22 July 2009 (PRAK Khan), p. 40; T., 11 August 2009 (SAOM Met), p. 25; T., 8 June 2009 (Accused), p. 109; T., 16 June 2009 (Accused), p. 59; T., 3 August 2009 (Accused), pp. 50-51; annotations on the "Confession of KE Kim Huot", E3/369, ERN (English) 00183290; *see also* "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 132, ERN (English) 00192825.

[447] T., 16 June 2009 (Accused), pp. 14, 22 27, 44-45, 52-54; T., 17 June 2009 (Accused), p. 13; "Defence Position on the Facts contained in the Closing Order", E5/11/6.1, para. 218; T., 10 August 2009 (SAOM Met), pp. 93-94; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161554.

242. In addition to the four authorised methods listed above, the Accused has acknowledged that a number of additional techniques were carried out by interrogators. Pliers were used to remove finger and toe nails, needles were inserted under them, and nails were punctured.[448] According to the Accused, these practices were a violation of his rules relating to the use of torture and he requested that the interrogators cease when he became aware of them.[449] Cigarette burns were also used, although this was not directed or authorised by the Accused.[450]

243. The practice of forcing detainees to pay homage to images of dogs, one with the head of Ho Chi Minh and the other with the head of Lyndon B. Johnson, caused the victims extreme humiliation and severe emotional distress.[451] The Accused has admitted that he encouraged this practice, which he considered very effective in obtaining confessions.[452] This technique caused severe mental suffering in the Cambodian cultural context.[453] The Accused believes that detainees were also made to kneel down and pay homage to objects such as tables and chairs, but opined that this was less humiliating and severe.[454]

244. The Accused has acknowledged that force-feeding of excrement was used as an interrogation technique.[455] He stated however that such treatment was a violation of his rules relating to the use of torture, although he failed to punish the interrogator who

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[448] T., 30 June 2009 (CHUM Mey), pp. 25-27, 68; T., 16 June 2009 (Accused), pp. 77-79; T., 22 June 2009 (Accused), pp. 86-87; T., 21 July 2009 (PRAK Khan), pp. 67-68; T., 10 August 2009 (SAOM Met), p. 93-94; T., 28 May 2009 (Craig ETCHESON), pp. 6-7; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161554.
[449] T., 16 June 2009 (Accused), pp. 77-78; T., 22 June 2009 (Accused), p. 88.
[450] T., 22 June 2009 (Accused), pp. 87, 105.
[451] T., 16 June 2009 (Accused), pp. 58-59; T., 22 June 2009 (Accused), p. 88; T., 1 July 2009 (BOU Meng), p. 37; T., 21 July 2009 (PRAK Khan), pp. 70-71; "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73, ERN (English) 00184496; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison", (book) by David CHANDLER, E3/427, pp. 132-134, ERN (English) 00192825-00192827.
[452] T., 1 April 2009 (Agreed Facts), p. 90; T., 22 June 2009 (Accused), p. 88.
[453] *See* T., 25 August 2009 (CHHIM Sotheara), pp. 8-9, 30, 45, 48.
[454] T., 16 June 2009 (Accused), pp. 87-88.
[455] T., 16 June 2009 (Accused), p. 87; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 222.

applied it to his former teacher KE Kim Huot *alias* Sot.[456] Certain detainees were also forced to drink urine.[457]

245. Additional methods were used to threaten detainees, to break their resistance and to keep them in a state of constant fear in order to facilitate their confessions. The Accused and interrogators used "propaganda", bluff and threats to scare detainees and induce them into confessing.[458] They were treated as enemies and addressed in a contemptuous manner.[459] Interrogators were also taught to exploit the fears of detainees and make threats concerning family members.[460] Techniques to scare detainees also included the display of torture instruments such as clamps, sticks, knives and axes in the interrogation room.[461]

246. The Amended Closing Order also alleges that there is evidence of at least one incident of rape at S-21.[462] The Accused acknowledged that an S-21 staff member inserted a stick into the vagina of a detainee during an interrogation.[463] He stated that he had a strong emotional reaction to this incident, but that he did not want to show his anger to his superiors and subordinates. He further stated that he did not know that this constituted a crime and treated the incident as any other violation of the regulation of torture. He reported the incident to his superior but did not get any response.[464] As a result, he reassigned the interrogator, who was no longer allowed to interrogate female detainees, and established a female interrogators team.[465] No sanction was otherwise

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[456] T., 22 June 2009 (Accused), pp. 21, 88; T., 16 June 2009 (Accused), p. 87; *see also* "Confession of KE Kim Huot", E3/369, ERN (English) 00183285, 00183288-00183289.
[457] T., 16 June 2009 (Accused), p. 87.
[458] *See* "Statistics list of Santebal S-21", E3/426, ERN (English) 00225392-00225393, 00225403.
[459] T., 16 June 2009 (Accused), p. 88; T., 15 June 2009 (Accused), p. 86; T., 21 July 2009 (PRAK Khan), p. 70.
[460] "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73, ERN (English) 00184511; T., 22 June 2009 (Accused), pp. 36-37.
[461] T., 16 June 2009 (Accused), p. 22; T., 21 July 2009 (PRAK Khan), p. 73.
[462] Amended Closing Order, para. 137.
[463] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 231; T., 16 June 2009 (Accused), pp. 78-79; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161555.
[464] T., 16 June 2009 (Accused), pp. 68-69, 79; T., 22 June 2009 (Accused), p. 42.
[465] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 231; T., 23 April 2009 (Accused), p. 35; T., 16 June 2009 (Accused), pp. 17, 79-80; T., 22 June 2009 (Accused), p. 42; T., 21 July 2009 (PRAK Khan), pp. 20-21.

taken against the perpetrator.[466] The Chamber is satisfied that this allegation of rape has been proved to the required standard.

247. Although the Accused stated that there was only one incident of rape at S-21,[467] several witnesses spoke about what appears to be a separate incident where Touch, an interrogator, raped a female detainee.[468] Touch was subsequently arrested and detained at S-21.[469] However, the Chamber is not satisfied that this allegation has been proved to the required standard.

248. The Accused acknowledged that detainees at S-24 were also subject to acts of violence during interrogations, though these were carried out without his authorisation.

2.4.4.1.2 Specific incidents of torture

249. Civil Party BOU Meng testified that he was tortured twice a day over two consecutive weeks. He was shackled by the ankles and forced to lie face-down on the ground, whilst derogatory language was used against him. His interrogators showed him the torture equipment and asked him to select the device he preferred. They took turns beating him on the back with a rattan stick and a whip, causing him to bleed all over the floor. He was also electrocuted, causing him to lose consciousness. BOU Meng still has scars as a result of these beatings. Every time he was beaten, he was asked questions regarding his involvement with the CIA and the KGB. The Accused did not dispute these facts.[470]

250. Civil Party CHUM Mey stated that he was interrogated for twelve days and nights. During these interrogations, he was shackled and insulted. He was repeatedly beaten and

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[466] T., 16 June 2009 (Accused), pp. 68-69; T., 22 June 2009 (Accused), p. 42; "Written Record of interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185502.
[467] T., 16 June 2009 (Accused), pp. 78-79; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 231.
[468] T., 22 July 2009 (PRAK Khan), pp. 43-44; T., 21 July 2009 (PRAK Khan), pp. 79-80; T., 4 August 2009 (LACH Mean), pp. 40-41.
[469] T., 22 July 2009 (PRAK Khan), p. 43; T., 21 July 2009 (PRAK Khan), p. 79; T., 4 August 2009 (LACH Mean), p. 41.
[470] T., 1 April 2009 (Agreed Facts), p. 91; T., 16 June 2009 (Accused), p. 86; T., 1 July 2009 (BOU Meng), pp. 12-13, 27-30, 32, 73-77; *see also* "Two photographs of Civil Party BOU Meng's back (scars), taken after his hearing on 1 July 2009", E174.

lashed with sticks, and broke one of his fingers trying to defend himself against the beatings. When he persisted in denying any involvement with the CIA or KGB, an interrogator pulled out toenails from both his feet, causing him to tremble in pain. Afterwards, he could hardly walk. He was also electrocuted on two occasions and fell unconscious each time. The interrogation only stopped after he "confessed" to having joined both the CIA and the KGB. The Accused has acknowledged these facts.[471] The Chamber finds that the allegations of torture by BOU Meng and CHUM Mey have been proved to the required standard.

251. The Accused has denied the use of techniques such as plunging detainees in a water jar or suspending them by their hands tied behind their back,[472] as shown in one of Witness VANN Nath's paintings.[473] The Chamber finds however that the testimony of Witness VANN Nath, who saw and painted this scene, is consistent and reliable and meets the standard required to prove torture.

2.4.4.2 Purpose of torture

252. According to the Accused, the purpose of torture at S-21 was

> the infliction of suffering, of additional suffering, to the victims to force them to confess. Therefore it was both the force physically, the physical pain, and with the scolding, with the verbal abuse, it contributed to the psychological suffering upon the confessors so that they would give in to confession.[474]

253. Similarly, the interrogator's notebook entitled "Statistics List" states that "[t]he objective of torturing is to get their answers; it is not done for fun. Therefore, we must make them feel pain so that they will respond quickly. Another objective is to make them

[471] T., 1 April 2009 (Agreed Facts), p. 91; T., 16 June 2009 (Accused), p. 86; T., 30 June 2009 (CHUM Mey), pp. 11, 13-14, 22-27 29, 67-68, 73.
[472] T., 16 June 2009 (Accused), pp. 89-90, "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 225, 227.
[473] "Painting of S-21 prisoner Vann Nath depicting torture in the yard of Office S-21", E3/260; T., 29 June 2009 (VANN Nath), pp. 33-34, 47 ("painting number 12").
[474] T., 16 June 2009 (Accused), p. 51.

afraid."[475] This is confirmed by the so-called Pon-Tuy notebook, which advises that beatings are meant to inflict pain.[476]

254. The use of these various interrogation techniques, whether resulting in physical pain or mental suffering, were designed to obtain confessions,[477] which detailed the detainee's biography, the nature of the crimes and "traitorous" activities, his or her personal involvement in them, as well as network of "traitors".[478] The interrogation would end only when the confession was deemed adequate and complete. The confessions were then examined by the upper echelon and used for two main purposes: first to justify the decision to arrest the particular detainee who wrote the confession, and second to obtain information to investigate and eventually arrest the people implicated in the confessions.

255. A further purpose of torture at S-21 was punishment.[479] Torture at S-24 was also used to punish prisoners who failed to follow discipline or did not work according to the standards imposed, to prevent detainees from rebelling or escaping, and during the more limited interrogations carried out at S-24.[480]

2.4.4.3 Official capacity of the perpetrators

256. S-21 and S-24 staff, including interrogators, acted under a clearly-established hierarchy, under the orders or delegated authority of the Accused, who himself acted on the orders of the Standing Committee. Given their position in the State apparatus, the Chamber concludes that the S-21 interrogators and S-24 staff who perpetrated acts of torture acted in an official capacity.

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[475] "Statistics list of Santebal S-21", E3/426, ERN (English) 00225393.
[476] "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73, ERN (English) 00184496.
[477] T., 16 June 2009 (Accused), p. 55; T., 3 August 2009 (LACH Mean), p. 90; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161559; "Statistics list of Santebal S-21", E3/426, ERN (English) 00225406.
[478] T., 16 June 2009 (Accused), pp. 25, 48; T., 21 July 2009 (PRAK Khan), pp. 19, 27, 64-66; T., 29 June 2009 (VANN Nath), pp.17-18; "Statistics list of Santebal S-21", E3/426, ERN (English) 00225380.
[479] T., 29 June 2009 (VANN Nath), pp. 33-34, 47, 66 with reference to "Painting of S-21 prisoner Vann Nath depicting torture in the yard of Office S-21" ("Painting number 12"), E3/260; T., 15 June 2009 (Accused), p. 92.
[480] T., 24 June (Accused), pp. 24-43; T., 25 June (Accused), pp. 5-7; T., 1 April 2009 (Agreed Facts), p. 92; T., 8 July 2009 (CHIN Met), p. 73.

2.4.5 Other inhumane acts

257. The Amended Closing Order states:

> 143. Prisoners at S-21 suffered serious bodily and mental harm from inhumane acts which included deliberate deprivation of adequate food, sanitation and medical treatment. Prisoners were beaten and subjected to stringent restrictions during detention. These severe conditions, individually or collectively, depressed, degraded, and dehumanised detainees ensuring that they were always afraid.[481]

258. The Accused agreed that the living conditions, combined with the detention, interrogation and disappearance of detainees, severely impaired their physical and psychological health and that they lived in a permanent climate of fear.[482]

259. All detainees held at S-21 and S-24 were deemed to be enemies and deprived of their basic rights. The Accused indicated that, as everyone was destined for execution, there was no need to treat detainees humanely.[483] Expert David CHANDLER expanded on the conditions of the detainees and stated that "when they arrived in trucks [they were] already non-humans. The objective was to keep them in that condition and, yes, to break them down and mercy would have had no place in the prison."[484]

2.4.5.1 Detention conditions within the S-21 complex

260. With the exception of certain important detainees, detainees entering the S-21 complex were stripped of their clothes and other belongings and left to wear their underwear or short trousers.[485] They were then detained in either individual cells or in collective cells in groups of at least 20 to 30 or more.[486] The individual cells were small makeshift rooms and lacked windows or adequate lighting, while collective cells were larger rooms with bars mounted on the windows. Detainees were chained and shackled to

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[481] Amended Closing Order, para. 143.
[482] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 169-171; T., 15 June 2009 (Accused), p. 91; *see also* T., 22 June 2009 (Accused), p. 86.
[483] T., 15 June 2009 (Accused), pp. 35-36; T., 22 June 2009 (Accused), p. 86.
[484] T. 6 August 2009 (David CHANDLER), pp. 41-42, 88-89.
[485] T., 10 August 2009 (CHHUN Phal), pp. 22-23; T., 28 July 2009 (SUOS Thy), pp. 28-29; T., 29 June 2009 (VANN Nath), pp. 29, 94-95; T., 30 June 2009 (CHUM Mey), p. 43; T., 15 June 2009 (Accused), p. 35; T., 20 July 2009 (HIM Huy), p. 46; T., 15 June 2009, (Accused), pp. 45-46.
[486] T., 1 July 2009 (BOU Meng), p. 21; T., 30 June 2009 (CHUM Mey), p. 47.

a metal bar in their cells.[487] The cells had no bedding, mattresses or mosquito nets. All detainees were required to sleep on the concrete floor and kept under constant armed guard.[488]

261. Husbands, wives and family members were separated and not allowed any contact. Women, some of whom were pregnant, were held together in specific common cells, but were not chained or shackled. Children were also separated from their parents or family relatives.[489]

262. From their cells or the workshops, detainees could hear screaming and crying coming from the S-21 complex.[490]

263. When moved from their cells, detainees were consistently handcuffed and blindfolded, leaving them disoriented and afraid.[491] Witness VANN Nath described his shock at the sight of a malnourished detainee carried by young guards with his hands and feet tied to a wooden pole. The detainee was blindfolded but still alive and talking when he was loaded onto a truck and taken away.[492]

264. Detainees saw that other detainees returning from interrogations showed signs of severe beating, mutilation, bruises and cuts. Some detainees died in their cells due to such abuses or as a consequence of the conditions of detention and their bodies could be left lying there for hours.[493] In many cases, detainees removed from the common cells never

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[487] T., 30 June 2009 (CHUM Mey), p. 72; T., 1 July 2009 (BOU Meng), p. 22; T., 15 June 2009 (Accused), pp. 39-42; T., 10 August 2009 (CHHUN Phal), pp. 21-22; T., 20 July 2009 (HIM Huy), p. 36; T., 21 July 2009 (PRAK Khan), pp. 43-45.

[488] T., 15 June 2009 (Accused), p. 45; T.,10 August 2009 (SAOM Met), pp. 81-82; T., 4 August 2009 (KHIEU Ches statement read), p. 73.

[489] T., 15 June 2009 (Accused), pp. 43-44, 64, 88; T., 17 June 2009 (Accused), p. 25; T., 22 June 2009 (Accused), p. 12; T., 24 June 2009 (Accused), pp. 68, 74; T., 21 July 2009 (PRAK Khan), p. 46; T., 27 July 2009 (SUOS Thy), pp. 97-98; T., 1 July 2009 (BOU Meng), pp. 50, 78; T., 10 August 2009 (CHHUN Phal), p. 21.

[490] T. 29 June 2009 (VANN Nath), pp. 83-84; T. 30 June 2009 (CHUM Mey), pp. 30, 55, 78; T., 1 July 2009 (BOU Meng), pp. 81-82; *see also* T., 11 August 2009 (TAY Teng statement read), p. 51.

[491] T., 1 July 2009 (BOU Meng) pp. 26-27; T., 14 July 2009 (MAM Nai), pp. 31-32; T., 21 July 2009 (PRAK Khan), p. 26; T., 10 August 2009 (SAOM Met), p. 80.

[492] T., 29 June 2009 (VANN Nath), p. 48; *see also* T., 1 July 2009 (BOU Meng) p. 48.

[493] T., 4 August 2009 (KHIEU Ches statement read), p. 73; T., 11 August 2009 (HAN Iem statement read), pp. 105-106; T., 16 July 2009 (HIM Huy), p. 47; T., 20 July 2009 (HIM Huy), pp. 47-48; T., 21 July 2009 (PRAK Khan), p. 45; T., 30 June 2009 (CHUM Mey), p. 78; T. 15 June 2009 (Accused), pp. 42-43;

returned. The conditions of detention imposed upon detainees left them in constant fear of being removed, beaten, tortured and executed.[494]

265. The impact of the conditions of detention upon the detainees was such that some detainees attempted suicide. Witness VANN Nath described how he saw a female detainee elude a guard and kill herself by jumping off the upper floor of the building where they were detained.[495]

266. Former detainees and S-21 survivors Witness VANN Nath and Civil Parties CHUM Mey and BOU Meng described the harsh conditions endured by all detainees and how they were treated like "animals."[496] Civil Party CHUM Mey provided the following account of being held in an individual cell:

> "[W]hen I entered that room and cell I could not expect that I would survive. At that time I only lay down on my back waiting just to be killed. It was the first time that I lay down directly on the floor, first time in my life, and it was the first time in my life that I was hosed with water

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T., 11 August 2009 (MAKK Sithim statement read), pp. 38-41; *see also* T., 29 June 2009 (VANN Nath), pp. 22-23.

[494] T., 30 June 2009 (CHUM Mey), pp. 45, 78-79; T., 1 July 2009 (BOU Meng), p. 77; T., 29 June 2009 (VANN Nath), p. 63-64 ("from the feeling that I had at the time that I came across three prisons and when I arrived at S-21, while I was being photographed I had a feeling that that was a detention centre closer to the senior leadership and I had a slim hope that there might be justice and that because we did not do anything wrong, and if Angkar found that we didn't make any offence, then we would be released. That was the feeling I had at the time. However, after I entered the second floor of the D building two days later, my hope just died. It's gone. That was also based on the behaviours of the young prison guards, so I completely lost my hope. They degraded us. It's indescribable, the way they treated us, the prisoners. Sometimes when we laid down, when they woke us up sometimes while it was just -- while we were asleep they suddenly woke us up and if we could not sit up on time then they used their rubber -- their tyre thongs to kick our heads. So with such a view for the last few days when I was there, I lost my hope and when I compared my detentions to the sector and the zone prison, I could not have any hope. The situation, the security was tight. We were forbidden [not] to talk to any other inmates and that at S-21 is where I really had the real test of being detained in the prison conditions. My hope was zero.")

[495] T., 29 June 2009 (VANN Nath), pp. 101-102; *see also* T., 21 July 2009 (PRAK Khan), p. 48. The Accused acknowledged being aware of these situations and, particularly in the case of important detainees such as KOY Thuon, he put in place measures to ensure that detainees could not commit suicide before completing the interrogation; *see* T., 15 June 2009 (Accused), pp. 87-88.

[496] T., 29 June 2009 (VANN Nath), pp. 20-21; *see also* pp. 90-91 ("It is only the comparison of our life during that time because we were entitled the status as human beings although we were detained, then we would be treated different from animals because even animals, domestic animals, would be fed or would be given food and would never been kicked days and nights like that. When human being was deprived of their movement and we were inflicted with tortures, physically and mentally, and that's why I could l presume that we were between animals and human beings."); *see also* T., 1 July 2009 (BOU Meng), p. 76; T., 30 June 2009 (CHUM Mey), pp. 34-35; T., 15 June 2009 (Accused), p. 86.

> when I was detained there. Even if you raise a pig you have to give food to the pig, but for me I only got a spoonful of very thin gruel."[497]

267. These S-21 survivors all spoke of the severe physical and mental harm suffered by all the detainees while in detention and its continuing impact throughout their lives.[498] Civil Party CHUM Mey described how he continues to suffer because of his detention:

> Whenever the word Tuol Sleng prison comes to my mind I could not hold my tears. It drops automatically. Every single day when I have heard about S-21, about Tuol Sleng, about torture, then my tears just keep flowing. And in my mind I do not know what's going to happen to me in the future, as I could not control my tears when I have heard such words. […] I was told [by the Trans-Cultural Psychosocial Organisation ("TPO")] that because of the anger of the trauma I suffered during the Khmer Rouge regime that I need to keep my mind free from those feelings. However hard I try, my tears still drop.[499]

2.4.5.2 Deprivation of adequate food

268. Food rations were extremely scarce and usually consisted of rice gruel, rice soup or banana stalk served twice a day. Guards would scoop the food from a bowl into mugs or plates and order the detainees in the common rooms to distribute it among themselves.[500] Due to the scarcity of food, detainees resorted to eating insects that fell on the floor, for

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[497] T., 30 June 2009 (CHUM Mey), pp. 64-65.

[498] T., 29 June 2009 (VANN Nath), pp. 54-55 ("Q. We have seen that you […] returned not too long after you left S-21, back to where S-21 was set up, to paint paintings. Your also partook in documentary films and I believe you also wrote a book. Can you tell us why it is so important for you to testify in this way? A. Your Honour, Mr. President, this is what I have thought since I was detained at S 21. I determined if one day I survived and had freedom and that I could leave that location, I would compile the events to reflect on what happened so that the younger generation knew - would know of our suffering […]. So I had to reveal, I had to write, I had to compile, and it can be served as a mirror to reflect to the younger generation of the lives of those who were accused with no reason, who committed no wrong, and that they were punished that way. That was the very suffering that we received and the suffering that we had because we told them the truth and they did not believe it. There was nothing else more than that. That's why I determined, I attempted, and I tried to explain to the younger children through various programs, through them, so that the younger generation would understand the experience so that they would consider and that they would try to avoid the repeat of such historical events."); T., 1 July 2009 (BOU Meng), pp. 61-62, 71-74, 85-86.

[499] T., 30 June 2009 (CHUM Mey), pp. 68-70.

[500] T., 29 June 2009 (VANN Nath), pp. 20, 28; T., 1 July 2009 (BOU Meng), pp. 15, 23; T., 3 August 2009 (LACH Mean), pp. 73-74; T., 5 August 2008 (NHEP Hau statement read), pp. 69-71; T., 10 August 2009 (CHHUN Phal), pp. 23, 55-56; T., 11 August 2009 (HAN Iem statement read), p. 105; T., 16 July 2009 (HIM Huy), p. 47.

which they could be beaten if a guard saw them.[501] Witness VANN Nath described being so hungry that if he had been offered human flesh, he would have eaten it.[502]

269. Consequently, detainees suffered severe weight loss and became extremely weak.[503] The Accused acknowledged that the deprivation of adequate and sufficient food was deliberate and meant to debilitate the detainees in order to maintain control over the prison population, prevent riots and facilitate the generation of confessions.[504]

2.4.5.3 Lack of sanitation and hygiene

270. Detainees were not permitted to wash in hygienic conditions. They were washed at irregular intervals when their cells were cleaned, by hosing water from a window or door. The detainees were allowed to stand up, but due to the chains and shackles they had difficulty removing their clothes completely, which became soaked with water. Civil Party BOU Meng recalled that when naked, detainees would be mocked and insulted by the guards who would comment on their physical appearance.[505]

271. Male detainees had beards and long hair, and many detainees developed skin rashes from lying on the wet floor. They were constantly bitten by mosquitoes and other insects.[506]

272. Detainees had to defecate and urinate in the cells, using ammunition boxes or other plastic containers.[507] Civil Party CHUM Mey described this as an extremely degrading

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[501] T., 29 June 2009 (VANN Nath), pp. 22, 69; T., 1 July 2009 (BOU Meng), p. 66; *see also* T., 22 June 2009 (Accused), pp. 13-14;
[502] T., 29 June 2009 (VANN Nath), p. 23.
[503] T., 1 July 2009 (BOU Meng), p. 15; T., 28 July 2009 (SUOS Thy), pp. 14, 22.
[504] T., 15 June 2009 (Accused), pp. 84-85, 92; T., 27 April 2009 (Accused), p. 23; *see also* T., 6 August 2009 (David CHANDLER), pp. 87-88.
[505] T., 29 June 2009 (VANN Nath), pp. 22, 30; T., 1 July 2009 (BOU Meng), pp. 25-26, 75-76; *see also* T., 15 June 2009 (Accused), pp. 40-41; T., 10 August 2009 (CHHUN Phal), pp. 23-25; T., 4 August 2009 (KHIEU Ches statement read), p. 68; T., 3 August 2009 (LACH Mean), pp. 74-75; T., 10 August 2009 (SAOM Met), p. 83.
[506] T., 29 June 2009 (VANN Nath), p. 22; T., 1 July 2009 (BOU Meng), pp. 21, 76.
[507] T., 1 July 2009 (BOU Meng), p. 22; T., 15 June 2009 (Accused), p. 42; T., 3 August 2009 (LACH Mean), p. 75; T., 5 August 2009 (NHEP Hau statement read), pp. 60-61; T.,10 August 2009 (SAOM Met), p. 83.

experience because of having to ask for the containers, and as it was done where they slept and ate and in the presence of the guards and other detainees.[508]

2.4.5.4 Deprivation of medical treatment

273. Detainees were provided with minimal or no medical treatment. Cuts, bruises and other injuries following torture were treated with salty water, inadequate medication or other locally-produced medicines of scant or no effectiveness. Due to the harsh conditions of detention, detainees developed skin rashes, malaria, diarrhoea and severe dehydration, which were generally left unattended or given insufficient treatment.[509] After the S-21 Medical Unit was purged, no medical treatment was provided to the detainees.[510]

274. The Accused indicated that the sole purpose of any medical treatment provided was to keep the detainees alive for their interrogations.[511]

2.4.5.5 Blood drawing and medical experiments

275. The Chamber has noted the practice of forced blood-drawing at S-21 (Section 2.4.1.6). The Accused has conceded that detainees were subjected to medical experiments, which frightened them since they were unaware of the nature of the medication given to them.[512] The Chamber finds that these acts caused the detainees serious mental suffering, in addition to any physical suffering they experienced.

2.4.5.6 Treatment of detainees at Choeung Ek and S-24

276. The Chamber has noted the conditions under which S-21 detainees were transported to and kept at Choeung Ek prior to their executions (Section 2.3.3.6), which would have

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[508] T., 30 June 2009 (CHUM Mey), pp. 34-35, 71.
[509] T., 3 August 2009 (SEK Dan), pp. 9-10, 17-19; T., 11 August 2009 (MAKK Sithim statement read), p. 41; T., 21 July 2009 (PRAK Khan), p. 45; T., 30 June 2009 (CHUM Mey), p. 27.
[510] T., 15 June 2009 (Accused), p. 93; T., 3 August 2009 (SEK Dan), pp. 6-7; T., 11 August 2009 (MAKK Sithim statement read), p. 37.
[511] T., 15 June 2009 (Accused), pp. 39, 92-93; T., 27 April 2009 (Accused), p. 23.
[512] In fact the paracetamol had been substituted by the Accused, who knew the medication to be harmless. T., 16 June 2009 (Accused), pp. 96-98.

caused them severe anguish. The Chamber further notes that it appears some detainees were aware of the reason for which they were being taken to Choeung Ek.[513]

277. The Chamber has noted the working conditions of detainees at S-24 (Sections 2.3.3.7 and 2.4.2.1). Former S-24 detainees also testified to the mistreatment they endured there. Witness BOU Thon was beaten, resulting in facial scarring, and felt "dehumanized because my life was in the hands of them and they could make any decision to kill me any time they wished to do so."[514] Witness PHAK Siek was detained at S-24 in March 1977 after her superior officer had been arrested. She was told that if the "leaders are traitors […] the subordinates are too"[515] but that "if you build yourself well, you will stay alive. If not, you will die."[516] She understood clearly that any offence such as eating crabs, snails, sugar palm or fruit would result in harsh punishment. On one occasion she observed a woman who emerged from overnight detention with a swollen face and was paraded as an enemy. Witness PHAK Siek was assigned weekly to burn the clothing of those who had been taken away and did not return.[517]

278. Other detainees were noticeably thin and fearful. Although they harvested rice and corn in abundance, they were not permitted to eat the produce.[518] Food, consisting of rice or thin gruel, was provided twice a day, but so-called bad elements received even less.[519] The Accused acknowledged that beatings were practiced on detainees placed in a detention room for failing to follow the discipline. Interrogation and torture also took place at S-24 but without his direct authorisation.[520] The Accused noted that starvation was a deliberate CPK policy applied at S-24, acknowledging that he delivered "surplus"

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513 T., 17 June 2009 (Accused), p. 43; T., 30 June 2009 (CHUM Mey), pp. 43-45, 79.
514 T., 12 August 2009 (BOU Thon), pp. 33-34.
515 T., 12 August 2009 (PHAK Siek statement read), p. 61.
516 T., 12 August 2009 (PHAK Siek statement read), p. 56.
517 T., 12 August 2009 (PHAK Siek statement read), p. 59.
518 T., 12 August 2009 (BOU Thon), pp. 28, 34; T., 8 July 2009 (CHIN Met), pp. 62-63.
519 "Written Record of Interview of Witness of BOU Thon", E3/493, ERN (English) 00163763; "Defence Position on the Facts Contained in the Closing Order, E5/11/6.1, para. 177; T., 1 April 2009 (Agreed Facts), p. 83; T., 8 July 2009 (CHIN Met), pp. 62-63.
520 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 232-234; T., 1 April 2009 (Agreed Facts), p. 92; T., 24 June (Accused), pp. 24-25, 40-41, 43; T., 25 June 2009 (Accused), p. 7; *see also* Section 2.3.3.7.

rice grown at S-24 to the Central Committee.[521] Nonetheless, he compared the food and medical care at S-24 favourably to that available to detainees at S-21.[522]

2.4.6 Persecution on political grounds

279. The Amended Closing Order states:

> 141. The judicial investigation demonstrated that detainees at S21 were denied fundamental rights including: life; liberty; security of person; due process; and freedom of movement. These fundamental rights were denied or infringed from the moment of their arrest and throughout their detention, interrogation, re-education or execution. Detainees were denied these fundamental rights based upon their real or perceived political beliefs or political opposition to those in power in the CPK. Detainees were subject to arbitrary and unlawful detention, torture, enslavement, murder, and other inhumane acts.
>
> 142. DUCH was aware of the discriminatory policies by which S21 operated, and his intent to discriminate in accordance with these policies can be inferred from his actions, his positions at S21, his status as a CPK Party member, and his relationships with the CPK leadership.[523]

280. The denial of fundamental rights to detainees at S-21 which the Amended Closing Order indicates amount to persecution comprises the discrete crimes against humanity of murder, extermination, enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts. The Chamber has already described the nature of these offences committed at S-21 and makes findings on whether they amount to persecution in Section 2.5.3.14.

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521 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 177 – 178.
522 T., 24 June 2009 (Accused), pp. 22-24.
523 Amended Closing Order, paras 141-142.

2.5 Applicable Law and Findings on Crimes against humanity

281. The Chamber has subject-matter jurisdiction over crimes against humanity pursuant to Article 5 of the ECCC Law.[524] Article 5 of the ECCC Law provides:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.
>
> Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:
>
> - murder;
> - extermination;
> - enslavement;
> - deportation;
> - imprisonment;
> - torture;
> - rape;
> - persecutions on political, racial, and religious grounds;
> - other inhumane acts.

282. The Amended Closing Order charges the Accused with the following crimes against humanity: (i) murder; (ii) extermination; (iii) enslavement; (iv) imprisonment; (v) torture; (vi) rape; (vii) persecution on political grounds;[525] and (viii) other inhumane acts.[526]

283. As a preliminary matter, and in accordance with the principle of legality (Section 1.5), the Chamber must establish that these offences constituted crimes under national or international law during the 17 April 1975 to 6 January 1979 period.

284. Cambodian law contained no provisions relevant to crimes against humanity, nor was Cambodia between 1975 and 1979 a party to any international treaty relevant to these crimes. The Chamber must therefore consider whether crimes against humanity as defined in Article 5 of the ECCC Law formed part of customary international law during this period.

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[524] *See* ECCC Agreement, Article 2.2.
[525] The Amended Closing Order indicts the Accused for persecution only on political grounds, which is narrower than the offence of persecution as envisaged by Article 5 of the ECCC Law.
[526] Amended Closing Order, pp. 44-45.

285. The notion of crimes against humanity as an independent juridical concept, and the imputation of individual criminal responsibility for their commission, was first recognised in Article 6(c) of the Charter of the International Military Tribunal for the Trial of the Major War Criminals annexed to the London Agreement of 8 August 1945 ("Nuremberg Charter" and "Nuremberg Tribunal"),[527] which granted the Nuremberg Tribunal jurisdiction over this crime. Crimes against humanity were included as a distinct category of crime in the Nuremberg Charter so that acts by perpetrators against their fellow nationals, which might not otherwise have been covered by traditional formulations of war crimes, would not escape prosecution by the Nuremberg Tribunal.[528]

286. Jurisdiction over crimes against humanity was also included in Article 5(c) of the Charter of the International Military Tribunal for the Far East of 19 January 1946 ("Tokyo Charter")[529] and in Law No. 10 of the Control Council for Germany ("Control Council Law No. 10"),[530] which were utilised for additional prosecutions for atrocities committed during the Second World War.

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[527] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945 (82 UNTS 279). Article 6(c) of the Nuremberg Charter described crimes against humanity as: "murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war[,] or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of [the] domestic law of the country where perpetrated"; *see also* Protocol Rectifying Discrepancy in Text of Charter, 6 October 1945, reprinted in *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946*, Vol. 1, pp. 17-18.

[528] *See Prosecutor v. Tadić*, Opinion and Judgment, ICTY Trial Chamber (IT-94-1-T), 7 May 1997 ("*Tadić* Trial Judgement"), paras 618-619.

[529] Annexed to the Special Proclamation of 19 January 1946 by the Supreme Commander of the Allied Powers in the Far East. Article 5(c) of the Tokyo Charter described crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

[530] Control Council Law No. 10 (1945), reprinted in *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. I, pp. XVI-XIX. Article II of Control Council Law No. 10 described crimes against humanity as: "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

287. The prohibition of crimes against humanity was subsequently affirmed by the General Assembly[531] and by the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal ("Nuremberg Principles"), adopted by the International Law Commission in 1950 and submitted to the General Assembly.[532] The General Assembly further proclaimed the need for international cooperation in the detection, arrest, extradition and punishment of persons guilty of crimes against humanity.[533]

288. Following the Nuremberg-era tribunals, codifications of international law on genocide and apartheid, two of crimes against humanity's most egregious manifestations, confirmed the customary status of the prohibition of crimes against humanity.[534] Criminal prosecutions for crimes against humanity also continued domestically in the decades after the Second World War.[535]

289. More recently, jurisdiction over crimes against humanity was provided for in the Statutes of the ICTY,[536] the International Criminal Tribunal for Rwanda ("ICTR"),[537] the Special Court for Sierra Leone ("SCSL")[538] and the ICC.[539] These international criminal

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[531] Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, UNGA Res. 95 (I) of 11 December 1946.
[532] International Law Commission Report on the Nuremberg Principles, 5 UN GAOR, Supp. No. 12, UN Doc. A/1316 (1950).
[533] Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, UNGA Res. 3074 (XXVIII) of 3 December 1973; *see also* UNGA Res. 2712 (XXV) of 15 December 1970.
[534] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 1; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article I.
[535] *See e.g.,* the *Attorney-General of the Government of Israel v. Adolph Eichmann* (1962), 36 ILR 277.
[536] Article 5 of the ICTY Statute ("The [ICTY] shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.")
[537] Article 3 of the ICTR Statute ("The [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.")
[538] Article 2 of the SCSL Statute ("The [SCSL] shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape,

tribunals have reaffirmed the continued customary status of crimes against humanity under international law.[540] As stated by the Trial Chamber of the ICTY in its *Tadić* judgment, "since the [Nuremberg] Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned."[541]

290. While consistently forming part of customary international law since the Nuremberg Charter, crimes against humanity have been variously defined and its elements have been refined throughout the years. This reflects both the crime's customary nature and the fact that the tribunals' jurisdictions over the crime were not always co-extensive with the full scope permitted under customary international law.[542] The principle of legality prevents neither a reliance on unwritten custom nor a determination through a process of interpretation and clarification as to the elements of a particular crime. As detailed below, the formulation of crimes against humanity adopted in Article 5 of the ECCC Law comports with that existing under customary international law during the 1975 to 1979 period.

291. In particular, the Chamber notes that Article 5 of the ECCC Law does not require a link between crimes against humanity and armed conflict. Although Article 6(c) of the Nuremberg Charter required a nexus between crimes against humanity and armed conflict,[543] such a nexus was not included in the 1945 Control Council Law No. 10,[544] the

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sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecution on political, racial, ethnic or religious grounds; (i) Other inhumane acts.")

[539] Article 7 of the ICC Statute ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […].")

[540] *Tadić* Trial Judgement, para. 623; *Akayesu* Appeal Judgement, paras 465-466; *Prosecutor v. Sesay et al.,* Judgement, SCSL Trial Chamber (SCSL-04-15-T), 2 March 2009 ("*Sesay* Trial Judgement"), paras 57-59; *see also* Article 7 (Crimes against humanity) Introduction, of the ICC's "Elements of Crimes" (ICC-ASP/1/3 (part II-B), entry into force 9 September 2002), para. 1.

[541] *Tadić* Trial Judgement, para. 623.

[542] *See e.g., Prosecutor v. Akayesu*, Judgment, ICTR Appeals Chamber (ICTR-96-4-A), 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 465 (noting that the discriminatory grounds requirement in Article 3 of the ICTR Statute and the armed conflict requirement in Article 5 of the ICTY Statute were jurisdictional in nature and not part of the customary international law definition of crimes against humanity).

[543] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Article 6(c) (stating that crimes against humanity must be carried out "in execution of or in connection with [a war crime or a crime against peace].")

1948 Convention on the Prevention and Punishment of the Crime of Genocide,[545] the 1954 International Law Commission's Draft Code of Offenses against the Peace and Security of Mankind,[546] the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[547] and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.[548] The notion of armed conflict also does not form part of the current-day customary definition of crimes against humanity.[549]

292. International tribunals that have subsequently considered the issue have also found that the notion of crimes against humanity existed independently from that of armed conflict under customary international law prior to 1975. The ICTY Appeals Chamber has stated that the armed conflict requirement in Article 6(c) of the Nuremberg Charter was a jurisdictional issue, thus implying that it was not required under customary international law even in 1945.[550] The Grand Chamber of the European Court of Human Rights has noted that, while the nexus with armed conflict initially formed part of the customary definition of crimes against humanity, this nexus may no longer have been relevant as of 1956.[551] The Group of Experts for Cambodia appointed pursuant to General Assembly Resolution 52/135 similarly concluded that "[t]he bond between crimes against

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[544] *See Ohlendorf and Others Case ('Einsatzgruppen case')*, Judgment of 8-9 April 1948, *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. IV, p. 499 (finding that Control Council Law No. 10 was not limited to offences committed during or in connection with the war); *see, however, Flick and Others Case*, Judgment of 22 December 1947, *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. VI, pp. 1212-1214.

[545] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 1.

[546] UN Doc A/2693 (1954); *see also* the 1991 and 1996 versions of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (UN Docs A/46/10 (1991) and A/51/10 (1996), respectively), which also do not contain an armed conflict nexus.

[547] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UNGA Res. 2391 (XXVIII) of 26 November 1968, Annex, Article I(b) (concerning crimes against humanity "whether committed in time of war or in time of peace.")

[548] International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article I.

[549] *See Prosecutor v. Tadić*, Judgement, ICTY Appeals Chamber (IT-94-1-A), 15 July 1999 ("*Tadić* Appeal Judgement"), para. 249; *see also* the Statutes of the ICTR, SCSL and of the ICC, none of which link crimes against humanity to armed conflict.

[550] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 140.

[551] *Korbely v. Hungary*, Judgement, ECtHR Grand Chamber (no. 9174/02), 19 September 2008, para. 82.

humanity and armed conflict appears to have been severed by 1975."[552] The Chamber therefore considers that the lack of any nexus with armed conflict in Article 5 of the ECCC Law comports with the customary definition of crimes against humanity during the 1975 to 1979 period.

293. Further, the underlying offences with which the Accused is charged pursuant to Article 5 of the ECCC Law have been recognised since the Nuremberg-era tribunals as constituting crimes against humanity and prosecuted as such where the crime's *chapeau* requirements are otherwise satisfied. The offences of murder, extermination, enslavement, other inhumane acts and persecution on political grounds were explicitly included as constituting crimes against humanity in Article 6(c) of the Nuremberg Charter, Article 5(c) of the Tokyo Charter and Article II of Control Council Law No. 10. The offences of imprisonment, torture and rape were also explicitly included as constituting crimes against humanity in Article II of Control Council Law No. 10 and were subsumed as other inhumane acts in Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter. The Statutes of the ICTY, ICTR, SCSL and of the ICC include all of these underlying offences as crimes against humanity.

294. It was thus foreseeable during the 1975 to 1979 period that the Accused could be held criminally liable for the offences with which he is charged pursuant to Article 5 of the ECCC Law. The law providing for the Accused's criminal responsibility was also sufficiently accessible considering its international customary basis.

295. In addition, the appalling nature of the offences charged pursuant to Article 5 of the ECCC Law helps to refute any claim that the Accused would have been unaware of their criminal nature.[553]

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[552] Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 (annexed to document A/53/850-S/1999/231), 18 February 1999, para. 71.

[553] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Odjanović's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 42 (noting that the immorality or appalling character of an act may play a role in refuting any claim that its perpetrator did not know of its criminal nature).

296. The Chamber finds that, at all times relevant to the Amended Closing Order, offences charged against the Accused pursuant to Article 5 of the ECCC Law constituted crimes under international law.

2.5.1 Chapeau requirements for Article 5 of the ECCC Law

297. Offences listed in Article 5 of the ECCC Law can constitute crimes against humanity only if the following *chapeau* prerequisites are established to the required standard: (i) there must be an attack; (ii) it must be widespread or systematic; (iii) it must be directed against any civilian population; (iv) it must be on national, political, ethnical, racial or religious grounds; (v) there must be a nexus between the acts of the accused and the attack; and (vi) the accused must have the requisite knowledge.[554]

2.5.1.1 Attack

298. An attack is a course of conduct involving the multiple commission of acts of violence.[555] The acts which constitute an attack need not themselves be punishable as crimes against humanity. They will nevertheless often be of the kind of mistreatment listed as an underlying offence in Article 5 of the ECCC Law. The accused does not have to commit all of the acts of violence that make up the attack – the accused's acts need only be part of the broader attack. There may exist, within a single attack, a combination of acts of violence, for example acts of murder, rape and torture.[556]

299. Although the notion of an attack is distinct from that of armed conflict, an attack on a civilian population may precede, outlast or continue through an armed conflict.[557]

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[554] Article 5 of the ECCC Law also requires that crimes against humanity be committed during the period of 17 April 1975 to 6 January 1979 (Section 1.4.1).
[555] *Prosecutor v. Nahimana et al.,* Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 918.
[556] *Nahimana* Appeal Judgement, para. 917-918, *citing Prosecutor v. Kayishema et al.,* Judgement, ICTR Trial Chamber (ICTR-95-1-T), 21 May 1999 ("*Kayishema et al.* Trial Judgement"), para. 122.
[557] *Prosecutor v. Kunarac et al.,* Judgement, ICTY Appeals Chamber (IT-96-23 & IT-96-23/1-A), 12 June 2002, para. 86 ("*Kunarac* Appeal Judgement"); *Sesay* Trial Judgement, paras 77, 949.

2.5.1.2 Widespread or systematic

300. In accordance with customary international law, the attack must be either widespread *or* systematic.[558] The term "widespread" refers to the large-scale nature of the attack and the number of victims, while the term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[559] While the requirements are alternatives, in practice these criteria may often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. A widespread attack may refer either to the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[560]

301. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, or any identifiable patterns of crimes may be taken into account to determine whether the attack satisfies either or both of the "widespread" or "systematic" requirements.[561] While the existence of a policy or plan may be evidentially relevant in establishing the widespread or systematic nature of the attack, it does not constitute an independent legal element of the crime.[562] Only the attack, not the underlying acts, need be widespread or systematic.[563]

2.5.1.3 Directed against any civilian population

302. The attack must be directed against any civilian population. The "population" element is intended to imply crimes of a collective nature and excludes single or isolated

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[558] *Tadić* Trial Judgement, paras 646-648; *Prosecutor v. Akayesu,* Judgement, ICTR Trial Chamber (ICTR-96-4-T), 2 September 1998 ("*Akayesu* Trial Judgement"), para. 579 fn. 144.
[559] *Kunarac* Appeal Judgement, para. 94; *Nahimana* Appeal Judgement, para. 920; *Sesay* Trial Judgement, para. 78.
[560] *Blaškić* Trial Judgement, para. 206.
[561] *Kunarac* Appeal Judgement, para. 95.
[562] *Kunarac* Appeal Judgement, para. 98 fn. 114; *Gacumbitsi* Appeal Judgement, para. 84; *Sesay* Trial Judgement, para. 79.
[563] *Kunarac* Appeal Judgement, para. 96; *Gacumbitsi* Appeal Judgement, para. 102; *Sesay* Trial Judgement, para. 89.

acts, which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.[564]

303. The use of the term "population" does not mean that the entire population of the geographical entity in which the attack took place must be subjected to that attack. It is "sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population' as opposed to a limited and randomly-selected number of individuals."[565]

304. Civilian status is defined through the provisions of the law of armed conflict, particularly Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention, which establish that members of the armed forces and other combatants (militias, volunteer corps and members of organized resistance groups) cannot claim civilian status. The civilian population therefore includes all persons who are not members of the armed forces or otherwise recognised as combatants.[566] Members of the armed forces are not considered "civilians" merely because they were not engaged in combat at the time of their arrests. Accordingly, soldiers *hors de combat* do not qualify as civilians for the purposes of Article 5 of the ECCC Law.[567] As a general presumption, the armed law enforcement agencies of a State are considered to be civilians for purposes

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564 *Tadić* Trial Judgement, paras 644 and 648.

565 *Kunarac* Appeal Judgement, para. 90; *Prosecutor v. Sesay et al.*, Judgement, SCSL Appeals Chamber (SCSL-04-15-A), 26 October 2009 ("*Sesay* Appeal Judgement"), para. 719.

566 *Prosecutor v. Blaškić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004 ("*Blaškić* Appeal Judgement"), paras 110-113; *Sesay* Trial Judgement, para. 82.

567 *Prosecutor v. Mrkšić et al.*, Judgement, ICTY Appeals Chamber (IT-95-13/1-A), 5 May 2009 ("*Mrkšić* Appeal Judgement"), para. 35 (reversing the Trial Chamber's more expansive definition of civilians on the basis of accepted principles of customary international law); *see also Blaškić* Appeal Judgement, para. 110. *See however* Common Article 3 of the Geneva Conventions, which provides that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." That these persons are protected in armed conflicts reflects a principle of customary international law (*ibid.,* para. 113, footnote 220).

of international humanitarian law.[568] A person shall be considered to be a civilian for as long as there is doubt as to his or her status.[569]

305. The jurisprudence of the *ad hoc* Tribunals has stressed that this population must be "predominantly civilian" and "the primary object of the attack."[570] This does not imply that the population shall be comprised only of civilians. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[571] The civilian status of the victims, the number of civilians, and the proportion of civilians within a population are factors relevant to the determination of whether the requirement that an attack be directed against a "civilian population" is fulfilled.[572]

306. For the purposes of this *chapeau* requirement, the *ad hoc* Tribunal jurisprudence has evaluated situations in which civilians and soldiers co-exist within the same geographical area subjected to an attack, and where victims of alleged crimes against humanity comprise both civilians and military personnel.[573] The ICTY Appeals Chamber has noted that when discussing "whether a population is civilian based on the proportion of civilians and combatants within it, that is, [where] the status of the population has yet to be determined or may be changing due to the flow of civilians and military personnel", it is inevitable in wartime conditions that combatants may become intermingled with the civilian population. However, "provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population."[574]

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[568] *Sesay* Trial Judgement, para. 87 (noting that this same presumption will not exist for forces that operate under the control of the military.)
[569] *Blaškić* Appeal Judgement, para. 111.
[570] *Kunarac* Appeal Judgement, para. 91.
[571] Article 50(3) of Additional Protocol I; *see also Mrkšić* Appeal Judgement, para. 25; *Sesay* Trial Judgement, para. 87.
[572] *Mrkšić* Appeal Judgement, paras 32-33 and 36 (finding that of the 194 persons taken from the Vukovar hospital and later executed by Serb forces on 20 November 1991, 181 were known to be active in the Croatian forces in Vukovar and were thus predominantly non-civilian).
[573] *See e.g., Prosecutor v. Dragomir Milošević,* Judgement, ICTY Appeals Chamber (IT-98-29/1-A), 12 November 2009 ("*Dragomir Milošević* Appeal Judgement"), paras 50, 139 (determining the population of Sarajevo to have preserved its civilian status despite the stationing of approximately 40,000 to 45,000 Bosnian Army troops within the city and the continual flow of civilians and combatants due to wartime conditions).
[574] *Prosecutor v. Galić,* Judgement, ICTY Appeals Chamber (IT-98-29-A), 30 November 2006, para. 137.

307. Although this jurisprudence has not directly considered a situation in which the entire population of a territory – including both civilian and military elements – is encompassed within an attack, the Chamber finds that the following relevant principles may be distilled from this jurisprudence when determining whether such an attack may be considered to have been "directed against" a civilian population for the purposes of Article 5 of the ECCC Law.

308. When considering the general requirements of crimes against humanity, the laws of armed conflict play an important role in the assessment of the legality of the acts committed in the course of a conflict and whether the civilian population may be described as having been targeted as such.[575] The relevant jurisprudence has accordingly emphasised that in the context of a crime against humanity, the civilian population must be the primary object of an attack.[576] In this regard, the expression "directed against" a civilian population serves to clarify that "customary international law obliges parties to the conflict to distinguish at all times between the civilian population and combatants, and obliges them not to attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage anticipated."[577]

Consequently, "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined" (*Blaškić* Appeal Judgement, para. 115); *see also Prosecutor v. Mrkšić et al.*, Judgement, ICTY Trial Chamber (IT-95-13/1-T), 27 September 2007 ("*Mrkšić* Trial Judgement"), paras 468-472 (although no exact count of the number of civilian and combatant casualties was possible, the attack by Serb forces was described as an attack against the Croat and other non-Serb civilian population in the wider Vukovar area, given its clearly unlawful character, extensive damage caused to civilian property, and the number of civilians killed, wounded or displaced).

575 *Prosescutor v. Galić,* Judgement, ICTY Trial Chamber (IT-98-29-T), 5 December 2003 ("*Galić* Trial Judgement"), para. 144 (noting that in the context of an armed conflict, the determination that an attack is unlawful in light of the law of armed conflict is critical in determining whether the general requirements of crimes against humanity have been met. Otherwise, unintended civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity and lawful combat would, in effect, become impossible).

576 *Kunarac* Appeal Judgement, para. 91 ("to the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."); *see also Mrkšić* Appeal Judgement, para. 23.

577 *Prosecutor v. Kunarac,* Judgement, ICTY Trial Chamber (IT-96-23-T and IT-96-23/1-T), 22 February 2001 ("*Kunarac* Trial Judgement"), para. 426.

309. The factors relevant to determining whether the attack was so directed include: the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, and the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[578]

310. The prohibition against targeting the civilian population does not exclude the possibility of civilian casualties incidental to an attack aimed at legitimate military targets. However, indiscriminate attacks, that is attacks that affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians.[579] Where the civilian population is the intended target of an attack, this jurisprudence has not, however, required that the civilian population be the *sole or exclusive* object of that attack.

311. Where the civilian population is the object of an attack, the ICTY Appeals Chamber has further clarified that "there is no requirement nor is it an element of crimes against humanity that the *victims* of the underlying crimes be civilians."[580] Thus, a soldier who is *hors de combat* may be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met.[581]

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[578] *Mrkšić* Appeal Judgement, para. 25.

[579] *Prosecutor v. Martić*, Judgement, ICTY Appeals Chamber (IT-95-11-A), 8 October 2008 ("*Martić* Appeal Judgement"), paras 255, 259-261 (endorsing the Trial Chamber's finding that the shelling of Zagreb to amount to a widespread attack directed against a civilian population "due to the characteristics of the weapon used and the large-scale nature of the attack"); *see also Galić* Trial Judgement, para. 60 ("certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack"); *Prosecutor v. Strugar*, Judgement, ICTY Appeals Chamber (IT-01-42-A), 17 July 2008 ("*Strugar* Appeal Judgement"), para. 275 ("the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population").

[580] *Mrkšić* Appeal Judgement, para. 32 (emphasis added); *see also Dragomir Milošević* Appeal Judgement, para. 96 (where finding that attacks were directed against the civilian population, a Chamber is not required to find that all victims of individual crimes were civilians).

[581] *Martić* Appeal Judgement, paras 309-313; *see also Sesay* Trial Judgement, para. 82 (affirmed in *Sesay* Appeal Judgement, para. 1069); *cf. Mrkšić* Appeal Judgement, paras 36, 42-43 (acquittals for crimes against humanity upheld as the crimes in question were directed against a specific group of individuals selected on the basis of their perceived involvement in the Croatian armed forces. As such, they were treated differently from the civilian population of Vukovar and these crimes were not intended to form part of the broader attack against the civilian population. There was accordingly no nexus between the acts of

312. The reference to "any" civilian population ensures that the nationality or ethnicity of the population is immaterial. Provided the victims were targeted as part of an attack against a civilian population, it is unnecessary to demonstrate that they were linked – politically, ethnically, or otherwise – to any particular group.[582] Crimes against humanity may therefore include a State's attack on its own population.[583]

2.5.1.4 On national, political, ethnical, racial or religious grounds

313. Article 5 of the ECCC Law further requires that the acts be "committed as part of a widespread or systematic attack directed against any civilian population, *on national, political, ethnical, racial or religious grounds*."[584] The Chamber interprets Article 5 of the ECCC Law as an added jurisdictional requirement which goes to the nature of the attack, not to the underlying offences.[585] The Chamber notes that any discriminatory basis requirement under the Nuremberg Charter, the Tokyo Charter and Control Council Law No. 10 was limited to the underlying offence of persecution, for which a discriminatory intent was specifically required. All other offences as crimes against humanity in these instruments existed independently of any discriminatory basis.

314. Aside from the ECCC Law, the sole other instance of where a discriminatory requirement has been required in relation to the *chapeau* requirements of crimes against humanity is the ICTR Statute.[586] Despite differences in wording of both provisions, the

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the accused and the attack itself or between the crimes committed against the prisoners at Ovčara and the widespread or systematic attack against the civilian population of Vukovar).

[582] *Kunarac* Trial Judgement, para. 423; *see also Attorney-General of the State of Israel v. Enigster,* District Court of Tel Aviv, 4 January 1952. *See further Prosecutor v. Semanza,* Judgement and Sentence, ICTR Trial Chamber (ICTR-97-20-T), 15 May 2003 ("*Semanza* Trial Judgement"), para. 330 ("victim[s] of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack").

[583] *Mrkšić* Trial Judgement, para. 441 (noting that historically, one of the main distinguishing factors between war crimes and crimes against humanity was that the former could only be committed against enemy nationals, whereas crimes against humanity could also be committed against the state's own population).

[584] Emphasis added; *cf.* French and Khmer versions of Article 5 of the ECCC Law

[585] *See also* Article 9 of Agreement (referring to "crimes against humanity as defined in the 1998 Rome Statute of the ICC", whose definition of crimes against humanity also limits any discriminatory requirement to the underlying offence of persecution).

[586] Article 3 of ICTR Statute provides that "[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or

discriminatory grounds contained in the *chapeau* provisions of Article 5 of the ECCC are similar to those listed in Article 3 of the ICTR Statute. They constitute a jurisdictional requirement that narrows the scope of the ECCC's jurisdiction over crimes against humanity further than would otherwise have been necessary under customary international law during the 1975 to 1979 period. Subsequent jurisprudence from international criminal tribunals, as well as the ICC Statute, has since clarified that except in the case of persecution, a discriminatory intent is not required by customary international law as a legal ingredient for all crimes against humanity.[587] A contrary interpretation would add a requirement of discriminatory intent with respect to all crimes against humanity, rendering redundant the express reference to discrimination within the offence of persecution in Article 5 of the ECCC Law.[588]

315. The required discriminatory grounds have been interpreted broadly and have also included negatively-defined groups or individuals such as victims of acts which "were manifestly part of the generalised and systematic attack [by Serb forces] launched against the non-Serb civilian population of the Foča municipality."[589]

316. The *Josef Altstötter and Others* case identified opposition to political ideas as the relevant discriminatory basis in relation to the specific offence of persecution. In addressing generally the notion of discrimination on political grounds, the Nuremberg Tribunal noted as follows:

> Coming into the category of cases upon political grounds, we must remember that "political" in Law No. 10, written to apply in the Third Reich, cannot be read in the sense of "political" as it is known in countries which enjoy a two or more party system. "Political" as all Nazi

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systematic attack against any civilian population *on national, political, ethnic racial or religious grounds*: …." (emphasis added).

[587] *See Tadić* Appeal Judgement, para. 305; *Prosecutor v Bagosora et al.,* Judgement, ICTR Trial Chamber (ICTR-98-41-T), 18 December 2009 ("*Bagosora* Trial Judgement"), paras 2166, 2208 (noting that the additional *chapeau* requirement that crimes against humanity have to be committed "on national, political, ethnic, racial or religious grounds" does not mean that a discriminatory intent must be established) and Article 7(1)(h) of the ICC Statute.

[588] The *chapeau* in Article 5 of the ECCC Law refers to discrimination on "national, political, ethnical, racial or religious grounds" while the offence of persecution listed thereunder refers to discrimination on "political, racial, and religious grounds".

[589] *Prosecutor v. Krnojelac,* Judgement, ICTY Trial Chamber (IT-97-25-T), 15 March 2002 ("*Krnojelac* Trial Judgement"), para. 50.

> judges construed it – and the defendant Cuhorst construed it – meant any person who was opposed to the policies of the Third Reich, and being opposed to the policies of the Third Reich was in turn construed as meaning the doing of an act which was contrary to the successful conduct of the war.[590]

317. ICTY Trial Chambers have subsequently found that the targeted group may include persons who are "defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group," on grounds that "it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status."[591] Persons "suspected of being members of these [religious, political or ethnic] groups are also covered as possible victims of discrimination", and the required element of discrimination is met "even if the suspicion proves inaccurate."[592] Where the perception of the perpetrator provides the basis of the discrimination in question, the consequences are real for the victim even if the perpetrator's classification may be incorrect under objective criteria.[593]

2.5.1.5 Nexus between the acts of the accused and the attack

318. The acts of the accused must, by their nature or consequences, objectively be a part of the attack, such that they are not wholly divorced from the context of the attack.[594] A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. The crime

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[590] *Judgement of Josef Altstotter and others*, Law Reports of Trials of War Criminals, vol. 6, p. 81, fn. 1 (noting that the death sentence against a 65 year old senile man for taking cigarettes from postal packages was an act of extermination on political grounds, noting that the victim "was a rather useless eater, and for this reason, he would constitute a person in the community who should be exterminated by Cuhorst's standards …. [I]n addition, his taking of cigarettes that were allegedly intended for soldiers certainly constituted political opposition to the aims of the Reich as Cuhorst saw it, and justified his death sentence on that ground.")

[591] *Prosecutor v. Naletilić et al.,* Judgement, ICTY Trial Chamber (IT-98-34-T), 31 March 2003 ("*Naletilić* Trial Judgement"), para. 636.

[592] *Prosecutor v. Kvočka,* Judgement, ICTY Trial Chamber (IT-98-30/1-T), 2 November 2001, para. 195 ("*Kvočka* Trial Judgement").

[593] *Naletilić* Trial Judgement, para. 636, fn. 1572: "[T]his interpretation [is] consistent with the underlying ratio of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. … [I]n such cases, a factual discrimination is given as the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator."

[594] *Kunarac* Appeal Judgement, para. 99.

must not, however, be an isolated act. A crime would be regarded as an isolated act when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[595]

2.5.1.6 Knowledge requirement

319. It may be inferred from Article 5 of the ECCC Law that, in order to convict, an accused must have known that there is an attack on the civilian population and that his acts are a part thereof.[596] The accused needs to understand the overall context in which the acts took place, but need not know the details of the attack or share the purpose or goal behind the attack.[597] It is irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim.[598] Evidence of knowledge depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary according to the circumstances.[599]

2.5.2 Findings on chapeau requirements for Article 5 of the ECCC Law

2.5.2.1 Attack

320. The Chamber has described the broader events in Cambodia, and hence the fate that befell the entire Cambodian population, between April 1975 and January 1979. Against the backdrop of an international armed conflict (Section 2.1), this included the KPNLAF entry into Phnom Penh and seizure of power on 17 April 1975, the forcible transfer of residents of Phnom Penh and other "Khmer Republic strongholds" to the countryside, enforced labour under extremely difficult conditions, dismantling of the judiciary and other organs of state, and the parallel construction of institutions and structures designed

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[595] *Kunarac* Appeal Judgement, para. 100; *Mrkšić* Appeal Judgement, para. 41; *Semanza* Trial Judgement, para. 326.
[596] *See Blaškić* Appeal Judgement, para. 126; *Prosecutor v. Gacumbitsi,* Judgement, ICTR Appeals Chamber (ICTR-2001-64-A), 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), para. 86; *Sesay* Trial Judgement, para. 90.
[597] *Kunarac* Appeal Judgement, paras 102-103; *Sesay* Trial Judgement, para. 90.
[598] *Kunarac* Appeal Judgement, para. 103.
[599] *Blaškić* Appeal Judgement, para. 126.

to consolidate and reinforce total control of the country by the CPK (Section 2.2). It was squarely within this context that S-21 was created and operated (Section 2.3).

2.5.2.2 Widespread or systematic

321. Paragraph 132 of the Amended Closing Order characterised the crimes committed at S-21 as constituting a "discrete widespread or systematic attack against the civilian population detained therein." The Chamber agrees with the Co-Investigating Judges that the magnitude and number of the crimes committed at S-21, and their organized and prolonged character ensure that taken as a whole, they were sufficient to meet the requirements of scale or systematicity for the purposes of crimes against humanity.

2.5.2.3 Directed against any civilian population

322. Although the attack on the Cambodian population occurred in parallel with an international armed conflict between Cambodia and Vietnam, in fact the CPK primarily targeted its own nationals. This attack, which was mirrored within S-21, was against "enemies" of the regime, whether they were civilians or members of the former LON Nol or RAK military personnel (Sections 2.2.5.2, 2.2.6, 2.3.3.4.2 and 2.5.3.14.1).

323. The Chamber has found that those detained at S-21 were drawn from all parts of the country and from all sectors of Cambodian society (Section 2.3.3.4.2). The testimony of an extremely small number of survivors and an examination of the prisoner lists confirm that Cambodian nationals detained and executed at S-21 included officials from DK government offices, as well as ordinary citizens such as farmers, teachers, professors, students, doctors, lawyers and engineers. The relatives and subordinates of these nationals were also detained. Ordinary citizens who testified at trial and confirmed much of this analysis included Witnesses VANN Nath, and NORNG Chanphal, and Civil Parties BOU Meng and CHUM Mey.[600]

324. Although there were significant numbers of Cambodian military personnel among the detainees, their approximate numbers and exact percentages were unable to be

[600] *See generally* T., 29 June 2009 (VANN Nath); T., 30 June 2009 (CHUM Mey); T., 1 July 2009 (BOU Meng); T., 2 July 2009 (NORNG Chanphal).

determined (Section 2.3.3.4.2). Former LON Nol military personnel (and their subordinates and family members) were assumed to oppose the CPK. The RAK soldiers were targeted not as part of any military offensive but as the result of internal purges directed at both civilian and military perceived as "enemies" of the regime (Sections 2.2.5.2 and 2.5.3.14.1).

325. The Chamber finds that the attack was directed at the entire Cambodian population and did not differentiate between military and civilian personnel. Crimes against humanity were therefore committed against a collectivity of persons at S-21, and were all-encompassing, engulfing both civilian and military elements without distinction. The attack can accordingly be said to have been directed against a civilian population.

2.5.2.4 On national, political, ethnical, racial or religious grounds

326. Vietnamese prisoners of war and civilians as well as their family members and a limited number of other foreign nationals were also detained at S-21 (Sections 2.3.3.4.2 and 2.4.1.1). The Vietnamese detainees were considered to be external enemies who threatened the CPK regime by reason of the armed conflict between Vietnam and Cambodia (Section 2.1), while some of the other nationals appear to have been detained on suspicion of spying for foreign governments as members of the CIA or KGB (Section 2.5.3.14.1).

327. There is no evidence that enables the Chamber to conclude that there was a common linking factor among those detained, other than their perceived opposition to the CPK (Section 2.5.3.14.1). They were all classified as "enemies" by the CPK, even if in fact, they were not opposed to the regime (Section 2.5.3.14.2). The justification for the attack was ideologically-driven, seeking to detain, and either reform or eliminate, all real or perceived adversaries of the CPK (Sections 2.2.5.2 and 2.2.6). The Chamber accordingly finds that the attack in question was carried out, at a minimum, on political grounds.

2.5.2.5 Nexus between the acts of the Accused and the attack

328. The evidence satisfies the Chamber that S-21 was an integral part of the CPK political and military structure, and was considered vital to achieving the Party's political

objectives (Sections 2.2.5 and 2.3.3.1). It implemented CPK policies such as the "smashing" of CPK enemies (Section 2.2.5.2). The Accused's role as Chairman of S-21, reporting directly to members of the Standing Committee, gave him a unique vantage-point from which to implement this policy. The Chamber infers that he was aware of the objectives of this policy and that S-21 was an important component in implementing it.

2.5.2.6 The Accused's knowledge

329. The Accused was also aware of the wider attack against the Cambodian civilian population and that politically-motivated or arbitrary extra-judicial killings were committed by military units throughout Cambodia and were continued in security centres, of which S-21 was an important example (Section 2.2.5.2). He implemented the procedures introduced at M-13 to detain, interrogate, and execute every person who came through the gates of S-21 (Sections 2.3.2 and 2.2.5.2). He was familiar with the accusations against the detainees, knew that a significant proportion were false, yet strictly implemented the policy of detention and execution (Sections 2.4.1, 2.4.3 and 2.5.3.14.1). The Chamber accordingly finds that the Accused knew the purposes that S-21 served in supporting and implementing the attack, and intended his actions to contribute to that purpose.

2.5.3 Law and findings on offences as crimes against humanity

330. The Amended Closing Order charges the Accused with the following crimes against humanity: (i) murder; (ii) extermination; (iii) enslavement; (iv) imprisonment; (v) torture; (vi) rape; (vii) persecution on political grounds; and (viii) other inhumane acts.

2.5.3.1 Murder and extermination

331. Murder, a well-established crime under customary international law,[601] requires the death of the victim resulting from an unlawful act or omission by the perpetrator.[602] The

[601] *Prosecutor v. Vasiljević,* Judgement, ICTY Trial Chamber (IT-98-32-T), 29 November 2002 ("*Vasiljević* Trial Judgement"), para. 205; *Sesay* Trial Judgement, para. 137; *Akayesu* Trial Judgement, para. 587.
[602] *Prosecutor v. Fofana et al.*, Judgement, SCSL Trial Chamber (SCSL-04-14-T), 2 August 2007 ("*Fofana* Trial Judgement"), para. 143; *Prosecutor v. Kvočka et al.,* Judgement, ICTY Appeals Chamber

conduct of the perpetrator must have contributed substantially to the death of the victim.[603]

332. The elements of murder can be satisfied whether or not it is shown that a victim's body has been recovered.[604] The fact of a victim's death can be inferred circumstantially, including from proof of the following: incidents of mistreatment directed against the victim, patterns of mistreatment and disappearances of other individuals, a general climate of lawlessness at the place where the acts were allegedly committed, the length of time that has elapsed since the person disappeared, and the fact that the victim has failed to contact other persons that he or she might have been expected to contact, such as family members.[605] The victim's death as a result of the perpetrator's act or omission must be the only reasonable inference that can be drawn from the evidence.[606]

333. It must be shown that the act or omission of the perpetrator was undertaken with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death.[607]

334. Extermination, whose customary status is also undisputed,[608] is characterized by an act, omission or combination of each that results in the death of persons on a massive scale.[609]

(IT-98-30/1-A), 28 February 2005 ("*Kvočka* Appeal Judgement"), para. 261; *Akayesu* Trial Judgement, para. 589.

[603] *Brdjanin* Trial Judgement, para. 382.

[604] *Tadić* Trial Judgement, para. 240 (observing that a feature of the Balkan conflict was widespread killings, as well as the indifferent and callous treatment of the dead. Since these were not times of normalcy, it would be inappropriate to apply rules of some national systems that require the production of a body as proof of death. However, there must be evidence to link injuries received to a resulting death).

[605] *Krnojelac* Trial Judgement, para. 327.

[606] *Krnojelac* Trial Judgement, para. 326; *Kvočka* Appeal Judgement, para. 260; *Fofana* Trial Judgement, para. 144.

[607] *Blagojević* Trial Judgement, para. 556.

[608] *Prosecutor v. Krstić,* Judgement, ICTY Trial Chamber (IT-98-33-T), 2 August 2001 ("*Krstić* Trial Judgement"), para. 492.

[609] *Blagojević* Trial Judgement para. 572; *Prosecutor v. Seromba*, Judgement, ICTR Appeals Chamber (ICTR-01-66-A) 12 March 2008 ("*Seromba* Appeal Judgement"), para. 189.

335. The perpetrator's role in the death of persons on a massive scale may be remote or indirect.[610] Actions constituting extermination include creating conditions of life that are aimed at destroying part of a population, such as withholding food or medicine.[611]

336. There is no minimum threshold for the number of victims targeted.[612] Rather, the question of whether the requirement of scale has been met is assessed on a case-by-case basis against all relevant circumstances.[613] Nonetheless, it has been suggested that one or a limited number of killings would not be sufficient to constitute extermination.[614]

337. Extermination contemplates acts or omissions that are collective in nature rather than directed towards specific individuals.[615] There is however no requirement that the perpetrator intended to destroy a group or part of a group to which the victims belong.[616] Knowledge of a "vast scheme of collective murder" is not an element of extermination.[617]

338. It must be shown that the perpetrator acted with "the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons."[618]

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610 *Sesay* Trial Judgement para. 130; *Seromba* Appeal Judgement, para. 189.

611 *Prosecutor v. Brdjanin*, Judgement, ICTY Trial Chamber (IT-99-36-T), 1 September 2004 ("*Brdjanin* Trial Judgement"), para. 389; *Krstić* Trial Judgement, para. 498.

612 *Prosecutor v. Ntakirutimana et al.*, Judgement, ICTR Appeals Chamber, (ICTR-96-10-A and ICTR-96-17-A), 13 December 2004, para. 516; *Prosecutor v. Stakić*, Judgement, ICTY Appeals Chamber (IT-97-24-A), 22 March 2006 ("*Stakić* Appeal Judgement"), para. 260.

613 *Prosecutor v. Stakić*, Judgement, ICTY Trial Chamber (IT-97-24-T), 31 July 2003 ("*Stakić* Trial Judgement"), para. 640; *Blagojević* Trial Judgement, para. 573.

614 *Vasiljević* Trial Judgement, para. 227.

615 *Vasiljević* Trial Judgement, para. 227; *Stakić* Trial Judgement, para. 639.

616 *See Vasiljević* Trial Judgement, para. 227; *Prosecutor v. Musema,* Judgement, ICTR Appeals Chamber (ICTR-96-13-A), 16 November 2001, para. 366; *Prosecutor v. Stakić*, Judgement, ICTY Trial Chamber (IT-97-24-T), 31 July 2003, para. 639.

617 *Stakić* Appeal Judgement, para. 259.

618 *Bagosora* Trial Judgement, para. 2191. An earlier ICTR Judgement held that extermination may encompass intentional, reckless, or grossly negligent acts or omissions: *Kayishema et al.* Trial Judgement, para. 146. The ICTY later held intent cannot be a lower threshold than that required for murder as a crime against humanity, and therefore proof of recklessness or gross negligence was not sufficient to hold an accused criminally responsible for extermination: *Stakić* Trial Judgement, para. 642.

2.5.3.2 Findings on murder and extermination

339. The Chamber finds that during the period of S-21's operation, as the result of deliberate and unlawful acts, S-21 and S-24 detainees were executed by S-21 staff within the S-21 complex and at Choeung Ek (Section 2.4.1). The Chamber further finds that S-21 and S-24 detainees died as the result of unlawful omissions known to be likely to lead to their death and as a consequence of the conditions of detention imposed upon them (Sections 2.4.5.1-2.4.5.4).

340. Due to the inaccuracy of the existing record, the Chamber finds that it is not possible to quantify the precise number of the detainees who died and were executed. On the basis of the Revised S-21 Prisoner List, the Chamber quantifies this number to be no fewer than 12,272 detainees.[619]

341. Due to their massive scale, the Chamber finds that the deaths and executions which were illegally perpetrated upon the entire S-21 detainee population amount to both murder and extermination.

2.5.3.3 Enslavement

342. The prohibition against slavery is unambiguously part of customary international law.[620] Enslavement is characterised by the exercise of any or all powers attaching to the right of ownership over a person.[621] Indicia of enslavement include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[622]

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[619] The Chamber notes that the Revised S-21 Prisoner List includes the name of Civil Party CHUM Mey who survived his detention at S-21, amongst the 12,273 individuals listed as having been detained and thus, with very few exceptions, executed; *see* "Revised S-21 Prisoner List", E68.1, entry No. 1583; *see also* Section 2.3.3.4.2

[620] *Krnojelac* Trial Judgement, para. 353.

[621] *Kunarac* Appeal Judgement, para. 116.

[622] *Kunarac* Appeal Judgement, para. 119.

343. Proof that the victim did not consent to being enslaved is not required, as enslavement is characterised by the perpetrator's exercise of power.[623] The question of whether the victim has consented may however be relevant to determining if the perpetrator exercised these powers over the victim.[624] The absence of consent may be presumed in situations where the expression of consent is impossible.[625]

344. Forced or involuntary labour may also constitute enslavement.[626] The ICTY Trial Chamber has noted that "[w]hat must be established is that the relevant persons had no real choice as to whether they would work."[627] A Chamber shall decide if the labour is forced or involuntary on the basis of the recognised factors outlined above.[628] The elements of the crime of enslavement may be satisfied without evidence of additional ill-treatment.[629]

345. It must be shown that the perpetrator intentionally exercised any or all of the powers attaching to the right of ownership.[630]

2.5.3.4 Findings on enslavement

346. The Chamber finds that S-21 staff deliberately exercised total power and control over the S-24 detainees and over a small number of detainees assigned to work within the S-21 complex. These detainees had no right to refuse to undertake the work assigned to them, and did not consent to their conditions of detention (Section 2.4.2). The Chamber therefore finds that their forced or involuntary labour, coupled with their detention, amounted to enslavement.

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623 *Kunarac* Appeal Judgement, para. 120.
624 *Kunarac* Appeal Judgement, para. 120.
625 *Kunarac* Appeal Judgement, para. 120.
626 *Sesay* Trial Judgement, para. 202.
627 *Krnojelac* Trial Judgement, para. 359; *Sesay* Trial Judgement, para. 202.
628 *See Sesay* Trial Judgement, para. 202.
629 *Pohl and Others Case,* Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10,* Vol. 5, p. 970*, cited in Kunarac* Appeal Judgement, para. 123: *see also Sesay* Trial Judgement, para. 203.
630 *Kunarac* Appeal Judgement, para. 116.

2.5.3.5 Imprisonment

347. Imprisonment refers to the arbitrary deprivation of an individual's liberty without due process of law.[631] The customary status of the prohibition of arbitrary imprisonment under international law initially developed from the laws of war and is supported by human rights instruments.[632]

348. An initial deprivation of liberty will be arbitrary if no legal basis exists to justify it.[633] If national law is relied upon as a justification in this regard, it must be established that the relevant provisions do not violate international law.[634] If a legal basis for the initial deprivation does exist, it must continue to exist throughout the period of imprisonment.[635] Where a lawful basis of imprisonment ceases to apply, continued imprisonment may be considered arbitrary.[636]

349. Not every minor infringement of liberty forms the material element of imprisonment as a crime against humanity; the deprivation of liberty must be of similar gravity and seriousness as the other crimes enumerated as crimes against humanity in Article 5 of the ECCC Law.[637]

350. It must be shown that the perpetrator intended to arbitrarily deprive the individual of liberty, or that he acted in the reasonable knowledge that his or her actions were likely to cause the arbitrary deprivation of physical liberty.[638]

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631 *Prosecutor v. Simić et al.,* Judgement, ICTY Trial Chamber (IT-95-9-T), 17 October 2003, para. 64; *Prosecutor v. Kordić et al.,* Judgement, ICTY Trial Chamber (IT-95-14/2-T), 26 February 2001 ("*Kordić* Trial Judgement"), para. 302; *Krnojelac* Trial Judgement, para. 113.

632 *Krnojelac* Trial Judgement, para. 109; *Kordić* Trial Judgement, paras 299-300.

633 *Krnojelac* Trial Judgement, para. 113-114.

634 *Krnojelac* Trial Judgement, para. 114; *Prosecutor v. Ntagerura*, Judgement, ICTR Trial Chamber (ICTR-99-46-T), 25 February 2004 ("*Ntagerura* Trial Judgement"), para. 702.

635 *Krnojelac* Trial Judgement, para. 114.

636 *Krnojelac* Trial Judgement, para. 114.

637 *See Ntagerura* Trial Judgement, para. 702. This finding contrasts with the earlier judgement of Krnojelac, where the ICTY Trial Chamber held that "any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5(e) of the [ICTY] Statute as long as the other requirements of the crime are fulfilled''; *Krnojelac* Trial Judgement, para 112.

638 *Simić et al.* Trial Judgement, para. 64; *Krnojelac* Trial Judgement, para. 115.

2.5.3.6 Findings on imprisonment

351. The Chamber finds that detainees at S-21 were intentionally and arbitrarily imprisoned with no legal basis. There was no legal or judicial system and therefore those imprisoned had no access to the procedural safeguards enabling them to challenge their arrest, detention or ultimate execution (Section 2.4.3). The imprisonment of the very large numbers of detainees at all sites was a serious breach of their rights to liberty, on a similar scale of gravity to other crimes against humanity.

2.5.3.7 Torture

352. The prohibition on torture has acquired the status of a peremptory or non-derogable principle of international law.[639] As such, it is not possible to authorize torture via a legislative, administrative or judicial act.[640]

353. The crime of torture is proscribed and defined by numerous international instruments, including the 1975 United Nations General Assembly Declaration on Torture, adopted by consensus,[641] and the 1984 Convention against Torture.[642] The definition in the 1984 Convention against Torture,[643] which closely mirrors that of the 1975 General Assembly Declaration, has been accepted by the ICTY as being declaratory of customary international law.[644] The Chamber accordingly finds that this definition had in substance been accepted as customary by 1975.

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[639] *Prosecutor v. Furundzija,* Judgement, ICTY Trial Chamber (IT-95-17/1), 10 December 1998 ("*Furundzija* Trial Judgement"), paras 151-153; *Krnojelac* Trial Judgement, para. 182.
[640] *Furundzija* Trial Judgement, paras 155-156.
[641] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 3452 (XXX), of 9 December 1975.
[642] Convention Against Torture, 10 December 1984, 1465 UNTS 85; *see also* The Universal Declaration of Human Rights, UNGA Res. 217 (III), of 10 December 1948, Article 5.
[643] Article 1 of the 1984 Torture Convention defines torture in the following terms: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."
[644] *Prosecutor v. Delalić et al.,* Judgement, ICTY Trial Chamber (IT-96-21-T), 16 November 1998 ("*Čelebići* Trial Judgement"), para. 459; *Kunarac* Appeal Judgement, para. 146; *Prosecutor v. Furundzija,*

354. Torture comprises the infliction, by an act or omission, of severe pain or suffering, whether physical or mental.[645]

355. In determining whether an act or omission constitutes severe pain or suffering, the Chamber is required to consider all subjective and objective factors.[646] Objective factors include the severity of the harm inflicted. Subjective criteria may include the age, sex, state of health of the victim, or the physical or mental effect of treatment on a particular victim.[647] In addition, the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim have all been considered relevant factors.[648] The consequences of the act or omission need not be visible on the victim to constitute torture,[649] and nor is there a requirement that the injury be permanent.[650] Further, there is no exhaustive classification of the acts that may constitute torture.[651] Acts that have been considered sufficiently severe as to constitute torture may arise from conditions imposed upon detention and have included beating, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, to rape or to kill relatives.[652] Certain acts are considered by their nature to constitute severe pain and suffering.[653] These acts include rape[654] and the mutilation of body parts.[655]

Judgement, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000 ("*Furundzija* Appeal Judgement"), para. 111; *Furundzija* Trial Judgement, paras 160-161; *see also* Decision on Appeal against the Closing Order, paras 66-67.

645 *Kunarac* Appeal Judgement, para. 142; *Ntagerura* Trial Judgement, para. 703.
646 *Kvočka* Trial Judgement, para. 143.
647 *Kvočka* Trial Judgement, para. 143.
648 *Krnojelac* Trial Judgement, para. 182.
649 *Kunarac* Appeal Judgement, para. 150.
650 *Kvočka* Trial Judgement, para. 148; *Brdjanin* Trial Judgement,, para. 484.
651 *Čelebići* Trial Judgement, para. 469.
652 *Čelebići* Trial Judgement, para. 467; *see also Kvočka* Trial Judgement, para. 151.
653 *Kunarac* Appeal Judgement, para. 150.
654 *Brdjanin* Trial Judgement, para. 485; *Kunarac* Appeal Judgement, para. 150.
655 *Kvočka* Trial Judgement, para. 144.

356. The crime of torture requires that the act or omission is inflicted in order to attain a certain result or purpose.[656] Such purposes include obtaining information or a confession, or punishing, intimidating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.[657] These purposes do not constitute an exhaustive list under customary law and are instead representative.[658] There is no requirement that the act is committed exclusively for a particular purpose.[659] A particular purpose must be "part of the motivation behind the conduct, and it need not be the predominant or sole purpose"[660]

357. The 1984 Convention Against Torture requires that the act of torture is undertaken at the instigation of a public official or "other person acting in an official capacity", or with that person's consent or acquiescence.[661] The ICTY has since clarified that there is no requirement under contemporary international humanitarian law for the involvement of a State official in acts constituting torture,[662] although the fact that a perpetrator acted in an official capacity may be an aggravating factor relevant to sentencing.[663] The Chamber finds, however, that in 1975, the involvement of a State official was a requirement for an act to constitute torture under customary international law.

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[656] *Krnojelac* Trial Judgement, para. 180. Under the ICC Statute, there is no requirement that the perpetrator acted with any specific purpose: Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), 2187 UNTS 90, Article 7(1)(f), (7)(2)(e).

[657] *Kunarac* Trial Judgement, para. 485; *see also Krnojelac* Trial Judgement, para. 184. The particular purpose of coercing the individual or a third person "for any reason based on discrimination of any kind" appears in the 1984 Convention Against Torture while it is not contained in the 1975 General Assembly Declaration: Convention Against Torture, 10 December 1984, 1465 UNTS 85, Article 1(1).

[658] *Čelebići* Trial Judgement, para. 472.

[659] *Kunarac* Trial Judgement, para. 486.

[660] *Kunarac* Trial Judgement, para. 486.

[661] Convention Against Torture, 10 December 1984, 1465 UNTS 85, Article 1(1).

[662] *Kunarac* Trial Judgement, paras. 470, 496 (noting the different aims of human rights law (as restraining the excesses of the State) and humanitarian law (as a means to reduce violence during hostilities) and finding that there is no requirement under international humanitarian law for the involvement of a State official in acts constituting torture, even if this may be required under human rights law); *see further Kunarac* Appeal Judgement, para. 147 ("the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, but does not wholly reflect customary international law regarding the meaning of the crime of torture generally"). Earlier judgements held that at least one actor must be a public official or be acting in a non-private capacity (*see e.g. Furundzija* Appeal Judgement, para. 111; *Akayesu* Appeal Judgement, para. 593).

[663] *Kunarac* Trial Judgement, para. 494.

358. The pain and suffering amounting to torture must be inflicted intentionally.[664]

2.5.3.8 Findings on torture

359. The Chamber finds that staff at S-21 and S-24 used interrogation techniques on detainees, with the intention of causing severe pain and suffering (Section 2.4.4.1.1). These techniques were applied in an environment of extreme fear where threats were routinely put into practice and caused detainees severe pain and suffering, both physical and mental. Given their position in the State apparatus, the Chamber finds that the S-21 interrogators and S-24 staff who perpetrated acts of torture acted in an official capacity.

360. The Chamber finds that the following interrogation techniques, as applied at S-21, inflicted severe physical pain or mental suffering for the purpose of obtaining a confession or of punishment, and constituted torture: severe beating, electrocution, suffocation with plastic bags, water-boarding, puncturing, inserting needles under or removing finger and toe nails, cigarette burns, forcing detainees to pay homage to images of dogs or objects, forced feeding of excrement and urine, direct or indirect threats to torture or kill the detainees or members of their family, the use of humiliating language, plunging detainees' heads in a water jar and lifting by the hands tied in the back, and one proven instance of rape. The Chamber further finds that this list is not exhaustive and that other torture techniques may have been carried out.

2.5.3.9 Rape

361. Rape has long been prohibited in customary international law and has been described as "one of the worst suffering a human being can inflict upon another."[665]

362. Rape is the sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of

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[664] *Krnojelac* Trial Judgement, para. 130; *Furundzija* Trial Judgement, para. 162.

[665] *Kunarac* Trial Judgement, para. 655; *Sesay* Trial Judgement, para. 144; Article II(1)(c) of Control Council Law No. 10 (1945), reprinted in *Trials of War Criminal Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. I*, p. 7; *Article 44 of the Instructions for the Government of Armies of the United States in the Field* (Lieber Code), 24 April 1863; Article 27 of Geneva Convention IV.

the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.[666]

363. Most cases of rape as a crime against humanity will be committed in coercive circumstances in which true consent will not be possible.[667] Absence of consent may be evidenced by the use of force. Neither force nor threat of force by the perpetrator is an element *per se* of rape, as there are factors other than force which would render an act of sexual penetration non-consensual, and there is no requirement of resistance on the part of the victim.[668]

364. The social stigma attaching to rape victims in certain societies might render any proof of this crime difficult. The international jurisprudence has therefore accepted that circumstantial evidence may be used to demonstrate rape.[669]

365. The requisite intention for rape is that the perpetrator acted with the intent to "effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[670]

2.5.3.10 Findings on rape as torture

366. While rape comprises a separate and recognized offence both within the ECCC Law and international criminal law, it is undisputed that rape may also constitute torture where all other elements of torture are established (Section 2.5.3.7). The Chamber considers that the conduct alleged in the Amended Closing Order to constitute rape clearly satisfy

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[666] *Kunarac* Appeal Judgement, para. 127; *Semanza* Trial Judgement, paras 344-345. *Sesay* Trial Judgement, paras 145-146. An alternative conceptual definition was propounded by the ICTR Trial Chamber in *Akayesu*, being "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive": *Akayesu* Trial Judgement, para. 598. However, the ICTY Trial Chamber in *Furundžija* decided a more precise definition would better accord with the "criminal law principle of specificity" and so adopted the more technical definition also employed above: *Furundzija* Trial Judgement, para. 177. The *Furundžija* formulation has been applied frequently and adopted by the ICTY Appeals Chamber. The ICTR Trial Chamber in *Muhimana* found the two formulations were "not incompatible or substantially different in their application": *Prosecutor v. Muhimana*, Judgement and Sentence, ICTR Trial Chamber (ICTR-95-1B-T), 28 April 2005, para. 550.

[667] *Kunarac* Appeal Judgement, para. 130; *Kvočka* Trial Judgement, para 178.

[668] *Kunarac* Appeal Judgement, paras 128-129.

[669] *Prosecutor v. Muhimana*, Judgement, ICTR Appeals Chamber, (ICTR-95-1B-A), 21 May 2007, para. 49; *Sesay* Trial Judgement, para. 149.

[670] *Kunarac* Appeal Judgement, paras 127-129; *Bagosora* Trial Judgement, para. 2200.

the legal ingredients of both rape and also of torture.[671] It has further evaluated the evidence in support of this charge to be credible (Section 2.4.4.1.1). The Chamber considers this instance of rape to have comprised, in the present case, an egregious component of the prolonged and brutal torture inflicted upon the victim prior to her execution and has characterized this conduct accordingly.

2.5.3.11 Other inhumane acts

367. Other inhumane acts comprise a residual offence which is intended to criminalise conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.[672] The act or omission must be "sufficiently similar in gravity to the other enumerated crimes" to constitute an inhumane act.[673] The customary status of this crime is also well established.[674]

368. For an inhumane act to be established, it must be proved that the victim suffered serious harm to body or mind, and that the suffering was the result of an act or omission of the perpetrator.[675]

369. The seriousness of the act is to be assessed on a case-by-case basis, taking account of individual circumstances.[676] These circumstances may include "the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim."[677] There is no requirement that the suffering have long term effects, although this may be relevant to the determination of the seriousness of the act.[678]

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671 Amended Closing Order, paras 136, 137.
672 *Kordić* Appeal Judgement, para. 117; *Bagosora* Trial Judgement, para. 2218.
673 *Naletilić* Trial Judgement, para. 247; *Prosecutor v. Niyitegeka*, Judgement, ICTR Trial Chamber (ICTR-96-14-T), 16 May 2003 ("*Niyitegeka* Trial Judgement"), para. 460.
674 *Čelebići* Trial Judgement, para. 517; *Prosecutor v. Brima et al*., Judgement, SCSL Appeals Chamber (SCSL-04-16-A), 22 February 2008 ("*Brima* Appeal Judgement"), para. 183.
675 *Kordić* Appeal Judgement, para. 117.
676 *Kordić* Appeal Judgement, para. 117; *Kayishema et al.* Trial Judgement, paras 148-151.
677 *Prosecutor v. Vasiljević*, Judgement, ICTY Appeals Chamber (IT-98-32-A), 25 February 2004 ("*Vasiljević* Appeal Judgement"), para. 165.
678 *Vasiljević* Appeal Judgement, para. 165; *Blagojević* Trial Judgement, para. 627.

370. Examples of inhumane acts which have been found to constitute crimes against humanity include forcible displacement and forcible transfer,[679] severe bodily harm,[680] detention in brutal and deplorable living conditions,[681] as well as beatings and other acts of violence.[682]

371. The requisite intention to inflict inhumane acts is satisfied when the perpetrator had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or knew that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon the human dignity.[683] This intention must be found to have existed at the time of the act or omission.[684]

2.5.3.12 Findings on other inhumane acts

372. The Chamber finds that S-21 detainees suffered serious bodily and mental harm from the deplorable conditions of detention deliberately imposed upon them by S-21 staff. These conditions included shackling and chaining, blindfolding and handcuffing when being moved outside the cells, severe beatings and corporal punishments, detention in overly small or overcrowded cells, lack of adequate food, hygiene and medical care (Section 2.4.5). Detainees were also subjected to blood drawing and medical tests (Section 2.4.5.5).

373. These acts and omissions routinely degraded and dehumanized the detainees, leaving them in a state of constant fear. They have the same gravity as the other underlying offences of crimes against humanity and qualify as separate acts that fall within the category of other inhumane acts.

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[679] *Prosecutor v. Blagojević et al.*, Judgement, ICTY Trial Chamber (IT-02-60-T), 17 January 2005 ("*Blagojević* Trial Judgement"), paras. 629-630; *Krstić* Trial Judgement, para. 523; *Stakić* Trial Judgement, para. 723.
[680] *Kvočka* Trial Judgement, para. 208
[681] *Krnojelac* Trial Judgement, para. 133.
[682] *Kvočka* Trial Judgement, para. 208.
[683] *Niyitegeka* Trial Judgement, para. 460; *Kordić* Appeal Judgement, para. 117.
[684] *Blagojević* Trial Judgement, para. 628; *Krnojelac* Trial Judgement, para. 132; *Fofana* Trial Judgement, para. 150.

2.5.3.13 Persecution on political grounds

374. Persecution has long been proscribed as a crime under customary international law.[685] The crime of persecution has in the case law of the *ad hoc* Tribunals come to describe large-scale and discriminatory offending in situations involving massive criminality but which may not entail the necessary physical destruction or exterminatory intent required for genocide.[686]

375. Whilst an offence charged before the Nuremberg and Tokyo Tribunals, the elements of this offence received limited elaboration prior to the establishment of the *ad hoc* Tribunals.[687] It has instead fallen to the international jurisprudence post-1992 to outline the contours of this offence. As the *Kordić* Trial Judgement notes:

> Neither international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice systems. The Trial Chamber agrees […] that the crime of persecution needs careful and sensitive development in light of the principle of *nullum crimen sine lege*.[688]

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[685] *See e.g.,* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Article 6(c); Tokyo Charter, Annexed to the Special Proclamation of 19 January 1946 by the Supreme Commander of the Allied Powers in the Far East, Article 5(c); Control Council Law No. 10 (1945), Article 5(c) *reprinted* in Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. I, pp. XVI-XIX.

[686] *See Prosecutor v. Kupreškić et al.,* Judgement, ICTY Trial Chamber (IT-95-16-T), 14 January 2000 ("*Kupreškić et al*. Trial Judgement"), para. 636 ("persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate […]. While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea,* genocide is an extreme and most inhuman form of persecution.")

[687] *See e.g., Judgement of Josef Altstotter et al.,* Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950), Vol. VI, p. 954. For a review of the relevant Nuremberg-era jurisprudence as well as subsequent jurisprudence from national courts, see *Tadić* Trial Judgement, paras 699-710; *Kupreškić et al*. Trial Judgement, paras 586-614.

[688] *See Kordić* Trial Judgement, para. 192 (noting that the international crime of persecution "has never been comprehensively defined" and citing *inter alia Tadić* Trial Judgement, para. 694).

376. The Chamber finds that as early as 1975, persecution nonetheless clearly included 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."[689]

377. This act or omission must actually discriminate: a discriminatory intention is not sufficient, the act or omission must have discriminatory consequences.[690] An act is discriminatory when a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds, namely on a political, racial or religious basis.[691] In this case, the Accused has been indicted only for persecution on political grounds.[692]

378. Persecutory acts include (but are not limited to) the other underlying offences for crimes against humanity,[693] for example murder, extermination, enslavement, imprisonment and torture.[694] While no comprehensive enumeration of other acts constituting persecution is possible, relevant examples include harassment, humiliation and psychological abuse, confinement in inhumane conditions, cruel and inhumane treatment, deportation, forcible transfer and forcible displacement, and forced labour assignments.[695] Such acts must be of "equal gravity or severity" to the specified

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[689] *Bagosora* Trial Judgement, para. 2208; *Prosecutor v. Ruggiu*, Judgement and Sentence, ICTR Trial Chamber (ICTR-97-32-1), 1 June 2000, para. 21; *Prosecutor v. Simic et al.,* Judgment, ICTY Appeals Chamber (IT-95-9-A), 28 November 2006 ("*Simić et al.* Appeal Judgement)", para. 177.

[690] *Blagojević* Trial Judgement, para. 583.

[691] *Blagojević* Trial Judgement, para. 583; *see also Kvočka* Trial Judgement, para. 195 and *Kvočka* Appeal Judgement, para. 363 ("The Trial Chamber found that all the detainees in the Omarska camp were non-Serbs or persons suspected of sympathizing with non-Serbs. …. [T]here is no doubt that the underlying crimes were committed upon discriminatory grounds, and had discriminatory effects.")

[692] Amended Closing Order, para. 141.

[693] *Semanza* Trial Judgement, paras 347-349; *see also Kupreškić et al*. Trial Judgement, paras 609-614 (concluding that the notion of persecution before the Nuremberg Tribunal included acts others than those offences specifically enumerated as crimes against humanity).

[694] *Blagojević* Trial Judgement, paras 583, 585; *Kordić* Appeal Judgement, para. 114 and *Kupreškić et al*. Trial Judgement, para. 615.

[695] *Kvočka* Appeal Judgement, paras. 325 and 335; *Blagojević* Trial Judgement, para. 586; *Blaškić* Appeal Judgement, para. 153; *Simić et al.* Trial Judgement, para. 85. For a general discussion on the acts encompassing persecution and a review of the relevant Nuremberg-era jurisprudence as well as subsequent jurisprudence from national courts, *see Tadić* Trial Judgement, paras 699-710; *Kupreškić et al*. Trial Judgement, paras 586-615.

underlying offences to constitute persecution[696] and must be evaluated not in isolation but in context, by looking at their cumulative effect.[697] Not every denial of a human right may constitute a crime against humanity, and to reach the level of gravity required the act or omission generally needs to be a gross or blatant denial of a fundamental human right.[698]

379. The perpetrator must have carried out the act or omission "deliberately with the intention to discriminate on one of the listed grounds."[699] This requires "evidence of a specific intent to discriminate on political, racial or religious grounds."[700] There is no requirement in law that the perpetrator possess a "persecutory intent" over and above a discriminatory intent. The existence of a "specific intent to cause injury to a human being because he belongs to a particular community or group" is sufficient to establish the intent required for the crime of persecution.[701] This specific intent is not a legal element of the other underlying crimes against humanity.[702]

380. The requisite discriminatory intent may not be inferred directly from the general discriminatory nature of an attack, but may be inferred from this context if "in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent."[703]

2.5.3.14 Findings on persecution on political grounds

381. The offences charged as persecution in the current case are all recognized international crimes of significant gravity, which violated the fundamental rights of the S-21 detainees and which have comprised before other international tribunals the

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[696] *Kordić* Appeal Judgement, para. 671; *Blaškić* Appeal Judgement, para. 131; *Prosecutor v. Krnojelac*, Judgement, ICTY Appeals Chamber (IT-97-25-A), 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 199.
[697] *Kupreškić et al*. Trial Judgement, para. 622; *Semanza* Trial Judgement, para. 349; *Blaškić* Appeal Judgement, para. 135.
[698] *Blagojević* Trial Judgement, para. 580; *Prosecutor v. Ruggiu*, Judgement and Sentence, ICTR Trial Chamber (ICTR-97-32-1), 1 June 2000, para. 21.
[699] *Bagosora* Trial Judgement, para. 2208; *Blaškić* Appeal Judgement, para. 131; *Kordić* Appeal Judgement, para. 101.
[700] *Kvočka* Appeal Judgement, para. 460.
[701] *Blaškić* Appeal Judgement, para. 165.
[702] *Tadić* Appeal Judgement, para. 305.
[703] *Krnojelac* Appeal Judgement, para. 184; *Blaškić* Appeal Judgement, para. 164.

ingredients of the offence of persecution (Section 2.5.3.13). They are alleged in this case to cumulatively amount to persecution on grounds that the Accused's criminal conduct in relation to them was accompanied by a specific intent to discriminate on political grounds.

2.5.3.14.1 The discriminatory policies underlying these offences

382. The Accused admitted that anyone sent to S-21 and perceived as a political opponent of the Party was singled out as an enemy and destined for execution.[704] He further stated that the Party Centre decided who were its enemies and had to be eliminated, irrespective of whether or not this assessment was correct.[705] It has been shown that S-21 sought to unearth any conspiracy against the CPK and then to provide material to confirm the leadership's suspicions. S-24 was similarly tasked with "re-educating" the detainees, particularly concerning their stance towards the CPK.[706]

383. Regarding the basis of the policies implemented at S-21, the Chamber notes that the first detainees at S-21 were former LON Nol officials and soldiers arrested immediately after the Khmer Rouge took power and executed because of their allegiance with the previous regime.[707] Intellectuals, students and diplomatic staff living abroad who were recalled to Cambodia were on arrival sent to re-education camps or to S-21. According to Expert David CHANDLER, they were suspected by the Party of having been in contact with foreigners or of having formed alliances with foreign powers.[708] Other intellectuals within Cambodia were also initially sent to the North West Zone and subsequently purged at S-21.[709]

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[704] T., 1 July 2009 (Accused), pp. 90-91.
[705] T., 22 June 2009 (Accused), pp. 82-83; *see also "Photograps",* E3/379; T., 10 June 2009 (Accused), p. 56; T., 22 June 2009 (Accused), p. 103*; see also* T., 6 August 2009 (David CHANDLER) p. 24.
[706] T., 6 August 2009 (David CHANDLER), pp. 22, 24, 45. T., 17 June (Accused), p. 21; T., 24 June 2009 (Accused), p. 17.
[707] T., 15 June 2009 (Accused), p. 7.
[708] T., 12 August 2009 (Accused), pp. 41-43; T., 16 July 2009 (HIM Huy), pp. 20-22; T., 20 July 2009 (HIM Huy), pp. 7-8; T., 12 August 2009 (BOU Thon), p. 36-38; *see also* T., 27 May 2009 (Craig ETCHESON), p. 66.
[709] T., 6 August 2009 (David CHANDLER), pp. 18-19.

384. Fundamental to the implementation of DK policies was the "30 March 1976 Directive", which provided authority to execute those suspected of being enemies of the Party (Section 2.2.6). As the revolution progressed, the Party Centre began to perceive enemies everywhere and became more concerned about internal rather than external enemies.[710] At S-21, the word "enemy" became synonymous with anyone suspected of betraying the Party.[711]

385. From 1976 onwards, a large number of S-21 detainees were combatants and cadres of DK and CPK suspected because of their biographies or relationship with other perceived Party enemies.[712] Staff of S-21 were also increasingly detained and purged upon being accused of sabotaging the Party, after being implicated in confessions or simply for committing mistakes while working.[713] Prominent individuals, mainly high-ranking CPK members, were arrested or executed upon the direct order of the Standing Committee.[714]

386. Foreigners, including Vietnamese nationals, as well as some Buddhist monks and members of Cambodian ethnic minorities, were also detained at S-21 as a real or perceived threat to the Party. Although some Vietnamese nationals were arrested and detained initially due to the armed conflict with Vietnam, the Accused indicated that the CPK policy concerning Vietnamese nationals, as well as religious and other minorities, was to regard all such individuals as "spies" acting against the Party.[715] Conversely, in a rare departure from its policies, members of a delegation of FULRO were released from S-21 upon the order of the Party Centre once they were instead deemed to be political supporters.[716] Individuals mistakenly arrested and detained were otherwise executed to preserve the secrecy of S-21 operations.[717]

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[710] T., 6 August 2009 (David CHANDLER), p. 14.
[711] T., 4 August 2009 (LACH Mean), p. 20.
[712] T., 15 June 2009 (Accused), pp. 7-8.
[713] T., 11 August 2009 (SAOM Met), pp. 16-17; T., 22 July 2009 (PRAK Khan), pp. 49-51; T., 20 July 2009 (HIM Huy), pp. 49-52; T., 15 June 2009 (Accused), pp. 8-9.
[714] T., 22 June 2009 (Accused), p. 28; *see also* T., 23 June 2009 (Accused), p. 29; T., 21 July 2009 (PRAK Khan), p. 65.
[715] T., 10 June 2009 (Accused), pp. 23-27, 52-57.
[716] T., 10 June 2009 (Accused), pp. 27-30.
[717] T., 6 August 2009 (David CHANDLER), pp. 26-29, 113-114.

387. Detainees were typically accused of involvement with the CIA or KGB intelligence agencies or with the Vietnamese government.[718] However, these expressions were eventually used at S-21 as catch-all phrases for enemies of the Party.[719] It was important only that detainees admitted to being enemies and name "strings of traitors".[720]

388. By the end of the regime, all individuals not supportive of the regime were considered to be its political enemies and were guilty simply by virtue of having been accused.[721] The process of elimination of Party enemies turned into paranoia and eventually contributed to the destruction of the CPK itself.[722] Expert David CHANDLER agreed that S-21 operations were vital to the CPK objective of controlling its enemies.[723] It was also his view that the revolution required "headlong enthusiasm" and did not provide any opportunity to hesitate or contradict its leadership.[724]

2.5.3.14.2 Discriminatory consequences of these policies

389. The Chamber has in essence found that any individual detained at S-21, considered rightly or wrongly to be connected to any political group other than the CPK and typically with some class background to which it objected, was a target of discrimination. The Chamber has previously found the motivation behind CPK policy at S-21 to be akin to that identified by other international tribunals as amounting to discrimination on political grounds (Section 2.5.1.4).

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[718] T., 16 June 2009 (Accused), pp. 71-74; T., 30 June 2009 (CHUM Mey), p. 24; T., 1 July 2009 BOU Meng), pp. 27-28.
[719] T., 30 June 2009 (Accused), p. 76; T., 16 June 2009 (Accused), pp. 70-73*; see also* T., 6 August 2009 (David CHANDLER), pp. 16, 28-29.
[720] T., 6 August 2009 (David CHANDLER), pp. 33, 51-54.
[721] T., 6 August 2009 (David CHANDLER), pp. 21-23, 27, 113-114.
[722] "Voices from S-21 - Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 75, ERN (English) 00192754: "Reigns of terror and continuous revolutions (in Democratic Kampuchea the two phenomena overlapped) require a continuous supply of enemies. When these enemies are embedded in a small, inexperienced political party, ethnically indistinguishable from the majority of the population, attempting to purge all its enemies can have disastrous effects. As Duch and his colleagues did what they were told, they undermined Cambodia's military effectiveness, dismantled the administrative structure of the country, and destroyed the Party. The killing machine at S-21 had no brakes because the paranoia of the Party Centre had no limits"; *see also* T., 6 August 2009 (David CHANDLER), p. 22.
[723] T., 6 August 2009 (David CHANDLER), p. 22 (*citing* "Voices from S-21 - Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 75, ERN (English) 00192754,).
[724] T., 6 August 2009 (David CHANDLER), pp. 75-76; *see also* T., 2 September 2009 (Accused), pp. 76-77, 79.

390. It was the Party Centre which defined the nature and composition of the targeted groups, encapsulating all real or perceived political opponents, including their close relatives or affiliates (Sections 2.2.5.2, 2.2.6 and 2.5.3.14.1). While many of these offences were perpetrated against individuals merely perceived to be enemies of the CPK, the Chamber finds that all victims suffered the same grave discriminatory consequences of acts perpetrated in furtherance of this specific discriminatory intent.

2.5.3.14.3 The Accused's specific intent

391. The Chamber must determine whether, in relation to these acts, the Accused possessed the specific discriminatory intent required to support conviction for persecution.

392. The Chamber finds by a majority (Judge CARTWRIGHT dissenting) that the Accused shared the intent motivating CPK policy to eliminate all political enemies as identified by the Party Centre, and to imprison, torture, execute and otherwise mistreat S-21 detainees on political grounds.

2.5.3.14.4 Opinion of the majority

393. The evidence at trial showed, and the Accused himself admitted, that he consciously, willingly and zealously sought to implement the CPK policy to eliminate all political enemies as identified by the Party Centre and to imprison, torture, execute and mistreat S-21 detainees on political grounds.[725]

394. The Accused knew that not all those held at S-21 were in fact enemies of the Party, but that they were in any event detained, interrogated and executed.[726] Despite this, he unquestioningly carried out all tasks required of him, and managed S-21 operations in a way which ensured that all detainees, including those merely perceived to be enemies of the CPK, suffered the same grave consequences of acts perpetrated in furtherance of this specific discriminatory intent.

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[725] T., 16 September 2009 (Accused), pp. 42-43 (admission of having implemented "in a devoted and merciless fashion" the persecution by the CPK of detainees at S-21); *see also* T., 1 April 2009 (Agreed Facts), pp. 64-65; T., 23 June 2009 (Accused), pp. 24, 48-49.

[726] T., 22 June 2009 (Accused), p. 102; T., 4 August 2009 (LACH Mean), pp. 35-36; T., 6 August 2009 (David CHANDLER), pp. 25-29.

395. Using all possible means, including torture, the Accused strove assiduously to implement CPK ideology. He continuously provided to his superiors the names of all persons whom he well understood would then inevitably be considered as traitors and political enemies. In so doing, he not only implemented discriminatory CPK policies but influenced the definition of the groups subjected to them. The Accused acknowledged that he instructed his staff to regard persons arrested by Angkar as enemies[727], and described his role as "eradicat[ing] their proper vision and … indoctrinat[ing] them with criminal ideology."[728] He also, without mercy, ordered the execution of all the detainees once they confessed to his satisfaction their guilt as opponents of the Revolution. He was well aware that these confessions would be used to arrest still more political enemies, and for propaganda purposes. He used his discretion, as Secretary of the S-21 Committee to order the transfer of his staff to S-24 for re-education, and as Chairman of S-21 to influence and facilitate his superiors' decisions to arrest and smash S-21 staff whom he perceived as enemies on the basis of their behaviour, their biography or their implication in a detainee's confession. He also recruited young and impressionable individuals with suitable political characteristics, namely poor and uneducated peasants who were easier to indoctrinate.[729]

396. The majority of the Chamber finds that the Accused's conduct demonstrates his specific intent to target his victims because they belonged to the group targeted on the basis of the discriminatory CPK policy implemented at S-21. The overwhelming inference from the totality of evidence at trial is therefore that the Accused possessed the specific intent required for the offence of persecution. The Chamber recalls that there is no requirement in law that the perpetrator possess a persecutory intent over and above this necessary discriminatory intent (Section 2.5.3.13).

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[727] T., 2 September 2009 (Accused), pp. 80-81; T., 27 June 2009 (Accused), p. 17; *see also* T., 16 September 2009 (Accused), pp. 37-38*; see also* T., 21 July 2009 (PRAK Khan), p. 18; T., 4 August 2009 (LACH Mean), p. 20.
[728] T., 2 September 2009 (Accused), pp. 81-82.
[729] T., 27 April 2009 (Accused), pp. 82-83 (admitting that only M-13 staff or those who were recruited by him and who had good biographies were not affected by the purges); *see also* Section 2.3.3.5.1.

2.5.3.14.5 Dissenting opinion of Judge Cartwright

397. I agree with my colleagues in the analysis of the law and in the factual analysis of the context within which the Accused as Chairman of S-21 managed its operations. I differ when considering the inferences to be drawn from his implementation of CPK policies at S-21.

398. I am in complete agreement that the Accused assiduously implemented CPK policies to detain, interrogate, and, where he deemed it appropriate, to torture and then execute all those imprisoned at S-21. I also agree that the CPK policy was discriminatory on political grounds. The Accused knew that not all detainees held at S-21 were in fact enemies of the Party, but that many were in any event detained, interrogated and executed.[730] He also knew that a large number of the confessions completed by the detainees were partially or wholly incorrect and that many confessed wrongly to activities or membership of suspected groups such as the CIA or KGB.

399. In reaching my view of the facts, I place emphasis on the unanimous finding that it was the CPK that identified "enemies" and for the most part ordered their arrest. I also note that the Accused was unaware of the highly confidential 30 March Directive and could not therefore be said to share its policy.[731] His task, which he accepted as a loyal and efficient member of the Party, was to implement unquestioningly all tasks required of him. In this manner, he materially assisted the implementation of the CPK policies against S-21 detainees. Although finding the Accused to be aware of the discriminatory basis of these policies, the inferences that I draw from the evidence lead me to conclude that it has not been proved to the required standard that he personally possessed the discriminatory intent required to support a conviction for persecution on political grounds.

[730] T., 22 June 2009 (Accused), p. 102; T., 4 August 2009 (LACH Mean), pp. 35-36; T., 6 August 2009 (Davjd CHANDLER), pp. 25-29.
[731] T., 30 April 2009 (Accused), pp. 17-22.

2.6 Law and Findings on Grave Breaches of the Geneva Conventions of 1949

400. The Chamber has subject-matter jurisdiction over grave breaches of the Geneva Conventions of 1949 pursuant to Article 6 of the ECCC Law. Article 6 of the ECCC Law provides:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:
>
> - wilful killing;
> - torture or inhumane treatment;
> - wilfully causing great suffering or serious injury to body or health;
> - destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
> - compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> - wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
> - unlawful deportation or transfer or unlawful confinement of a civilian;
> - taking civilians as hostages.[732]

401. The Amended Closing Order charges the Accused with the following grave breaches of the Geneva Conventions of 1949: (i) wilful killing; (ii) torture or inhumane treatment; (iii) wilfully causing great suffering or serious injury to body or health; (iv) wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial; and (v) unlawful confinement of a civilian.[733]

402. As a preliminary matter, the Chamber must establish that these offences constituted crimes under national or international law during the 17 April 1975 to 6 January 1979 period.

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[732] Article 6 of the ECCC Law essentially mirrors the grave breaches provisions of the Geneva Conventions of 1949 with two exceptions: (1) the grave breaches provisions explicitly include "biological experiments" as a form of torture or inhuman treatment; and (2) the grave breaches provisions require that the destruction and appropriation of property be "extensive".

[733] Amended Closing Order, p. 44.

403. Cambodia and Vietnam ratified the four Geneva Conventions of 1949 dated 12 August 1949 (collectively "Geneva Conventions")[734] on 8 December 1958 and 28 June 1957, respectively.[735] All four Geneva Conventions contain a "grave breaches" provision that applies to acts committed against "protected" persons or property within the context of an armed conflict of an international character.[736] Notably, each grave breaches provision enumerates particular offences for which universal mandatory criminal jurisdiction exists among the contracting States.[737] Under all four Geneva Conventions, the grave breaches provisions prohibit wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health.[738] Under Geneva Convention III Relative to the Treatment of Prisoners of War ("Geneva Convention III") and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV"), respectively, the grave breaches provisions also include depriving a prisoner of war or a civilian of the rights of fair and regular trial.[739] Additionally, the unlawful confinement of a civilian is considered a grave breach under Geneva Convention IV.[740]

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[734] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 ("Geneva Convention I"); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 UNTS 85 ("Geneva Convention II"); Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 ("Geneva Convention III"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 ("Geneva Convention IV", and collectively "Geneva Conventions").

[735] *See* ICRC, *State Parties / Signatories: Geneva Conventions of 12 August 1949*.

[736] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147; *see also Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, paras 80-81, 84.

[737] Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146 (each of which states in relevant part, "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.")

[738] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

[739] Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

[740] Geneva Convention IV, Article 147.

404. The Geneva Conventions' grave breaches provisions, which explicitly prohibit and identify as criminal the offences listed in Article 6 of the ECCC Law, were binding on Cambodia at the relevant time. The Chamber recalls that the principle of legality is also satisfied where a State is already treaty-bound by a specific convention.[741]

405. Further, the Geneva Conventions, and particularly their grave breaches provisions, codified core principles of customary international law.[742] The list of grave breaches was included in the Geneva Conventions largely on the basis of crimes pursued by the Nuremberg-era tribunals and recognised at the time of enactment as criminal according to general principles of law across national legal systems.[743] Subsequent jurisprudence from international tribunals has reaffirmed the customary status of the Geneva Conventions, including their grave breaches provisions,[744] as well as the individual criminal responsibility that attaches to violations of these norms.[745]

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[741] *See* Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 (annexed to document A/53/850-S/1999/231), 18 February 1999, para. 73 (stating that "Cambodia, Laos, Thailand and Viet Nam were parties to all four Geneva Conventions of 1949 during the period at issue, although none became a party to the 1977 Additional Protocols before 1980. The grave breaches of the provisions of the Geneva Conventions thus apply, although criminality extended beyond these grave breaches under the customary law of the time.") (footnotes omitted); *see also* Section 1.5.

[742] *See* ICRC, *Commentary to Geneva Convention II*, (Pictet ed. 1960), specifically Article 62, pp. 281-283 ("a Power which denounced the Convention would nevertheless remain bound by the principles contained in it in so far as they are the expression of inalienable and universal rules of customary international law."); ICRC, *Commentary to Geneva Convention III,* (Pictet ed. 1960), specifically Article 142, pp. 646-648; ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), specifically Article 158, pp. 623-626.

[743] *See* ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, (J-M. Henckaerts and L Doswald-Beck eds. 2005) p. 574; ICRC, *Commentary to Geneva Convention I*, (Pictet ed. 1952), specifically Article 50, p. 371.

[744] *Prosecutor v. Delalić et al.*, Judgement, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001 ("*Čelebići* Appeal Judgement"), paras 112-113 (recognising the customary nature of the Geneva Conventions); *Simić et al.* Trial Judgement para. 86; *see also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits Judgment, ICJ (ICJ Reports 1986), 27 June 1986, p. 114, para. 218 ("the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such [fundamental general] principles [of humanitarian law]"); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ (ICJ Reports 1996), 8 July 1996, p. 226, para. 79 ("the fundamental rules [contained in the Geneva Conventions] are to be observed by all States whether or not they have ratified the conventions […] because they constitute intransgressible principles of international customary law").

[745] *Prosecutor v. Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber (IT-01-47-AR72), 16 July 2003, para. 34, citing *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 134; *Tadić* Trial Judgement, para. 577.

406. It was accordingly foreseeable at the relevant time that the Accused could be held criminally liable for any acts listed as grave breaches of the Geneva Conventions. The law providing for this liability was also accessible to the Accused considering its international conventional and customary basis. This holds true notwithstanding that the Geneva Conventions do not specify the criminal sanctions to be imposed for violations of their grave breaches provisions.[746]

407. Moreover, the appalling nature of the offences constituting grave breaches of the Geneva Conventions helps to refute any claim that the Accused would have been unaware of their criminal nature.[747]

408. The Chamber consequently finds that, at all times relevant to the Amended Closing Order, offences charged against the Accused pursuant to Article 6 of the ECCC Law constituted crimes under international law.

2.6.1 Chapeau requirements for Article 6 of the ECCC Law

409. Article 6 of the ECCC Law incorporates the conditions of applicability contained in the Geneva Conventions. Accordingly, an accused may be found responsible for grave breaches only when these are perpetrated against persons or property regarded as "protected" by the Geneva Conventions and within the context of an international armed conflict.

410. These jurisdictional prerequisites have been set out in a useful five-part test by the ICTY, whose Statute similarly confers jurisdiction over grave breaches of the Geneva Conventions.[748] The following general requirements must be established to the required

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[746] *See Trial of The Major War Criminals Before the International Military Tribunal: Nuremberg, 27 August 1946 – 1 October 1946*, (1948), Vol. 22, pp. 463-464 (stating that individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches).

[747] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 42 (noting that the immorality or appalling character of an act may play a role in refuting any claim that its perpetrator did not know of its criminal nature).

[748] The jurisprudence of the ICTY is more extensive than that of the other *ad hoc* international tribunals on the issue as the Statutes of the ICTR and SCSL do not confer upon those Tribunals jurisdiction over offences as grave breaches of the Geneva Conventions given the non-international character of the conflicts that concern them.

standard: (i) the existence of an armed conflict; (ii) the international character of the armed conflict; (iii) a nexus between the acts of the accused and the armed conflict; (iv) the "protected persons" status of the victims under the Geneva Conventions; and (v) the knowledge of the accused.[749]

2.6.1.1 Existence of an armed conflict

411. The Geneva Conventions' common Article 2 ("Common Article 2") provides that the Conventions' provisions, including their grave breaches provisions, apply to:

> all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

412. Interpreting Common Article 2, the jurisprudence of the ICTY established that in the absence of a declared war, an "armed conflict" exists whenever there is a resort to armed force between States (where the armed conflict is of an international nature) or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State (when it is of an internal nature).[750]

2.6.1.2 International character of the armed conflict

413. Common Article 2 further requires that the armed conflict be one of an international character.[751]

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[749] *See Prosecutor v. Naletilić et al.*, Judgement, ICTY Appeals Chamber (IT-98-34-A), 3 May 2006 ("*Naletilić* Appeal Judgement"), para. 110, citing *Tadić* Appeal Judgement, para. 80. Article 6 of the ECCC Law, unlike Article 2 of the ICTY Statute, also requires that the acts be committed during the period of 17 April 1975 to 6 January 1979. The Chamber is aware of this requirement as it applies to all the charges before it, including offences charged pursuant to Article 6 of the ECCC Law.

[750] *Čelebići* Trial Judgement, paras 183-184, citing *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 70. By contrast, the provisions of common Article 3 of the Geneva Conventions apply to armed conflicts of a non-international character.

[751] This is an indispensable requirement of Common Article 2. *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 79; *Naletilić* Appeal Judgement, para. 117.

414. An armed conflict is indisputably international if it takes place between two or more States. An official recognition of a state of war is not required for the grave breaches provisions of the Geneva Conventions to apply. Rather, *de facto* hostilities between States may be sufficient to satisfy the internationality requirement, where these are conducted through the States' respective armed forces. As stated in the ICRC's Commentary to Geneva Convention IV:

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.
>
> The Convention only provides for the case of one of the Parties denying the existence of a state of war. What would the position be, it may be wondered, if both the Parties to an armed conflict were to deny the existence of a state of war. Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.[752]

415. The provisions of the Geneva Conventions indicate that their geographic and temporal application within an armed conflict extend beyond the vicinity of the actual hostilities and the cessation of fighting.[753] Once it is established that an international armed conflict existed at the place and time relevant to the charges against an accused, international humanitarian law will apply to the whole territory of the relevant States, whether or not actual combat takes place there, and will continue to apply beyond the cessation of hostilities until a general conclusion of peace is achieved.[754]

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[752] ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), specifically Article 2, pp. 20-21; *see also Kordić* Appeal Judgement, para. 373 ("[Common Article 2] cannot be interpreted to rule out the characterisation of the conflict as being international in a case when *none* of the parties to the armed conflict recognises the state of war. The purpose of Geneva Convention IV, *i.e*. safeguarding the protected persons, would be endangered if States were permitted to escape from their obligations by denying a state of armed conflict.")

[753] *See e.g.,* Geneva Convention III, Article 5 (providing for its application to prisoners of war from the time they fall into the power of the enemy until their final release and repatriation).

[754] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 70; *Čelebići* Trial Judgement, paras 208-211; *Kordić* Appeal Judgement, para. 321.

2.6.1.3 Nexus between the acts of the accused and the armed conflict

416. A sufficient nexus must exist between the acts of the accused and the armed conflict giving rise to the applicability of international humanitarian law. To satisfy this nexus, the acts of the accused must have been "closely related" to the armed conflict as a whole.[755] It is not necessary to establish that there were actual combat activities in the area where the acts are alleged to have occurred or that they were part of a policy or practice tolerated by one of the parties to the armed conflict. Where, however, acts occurred in a prisoner camp with the connivance or permission of the authorities running these camps and as part of an accepted policy towards prisoners, those acts will clearly be "closely related" to the armed conflict.[756]

2.6.1.4 Status as "protected persons" under the Geneva Conventions of 1949

417. Article 6 of ECCC Law grants the Chamber jurisdiction over "acts against persons or property protected under provisions" of the Geneva Conventions.[757] This reference covers "protected persons" as defined pursuant to Articles 4 of Geneva Convention III (as regards prisoners of war) and Geneva Convention IV (as regards civilian persons).[758]

418. Pursuant to Article 4 of Geneva Convention III, prisoners of war are persons, including "[m]embers of the armed forces of a Party to the conflict", who have "fallen into the power of the enemy." Article 4(1) of Geneva Convention IV defines protected persons as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

419. The ICTY Appeals Chamber has adopted a flexible interpretation of the nationality requirement expressed in Article 4 of Geneva Convention IV. Drawing on the object and

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[755] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 70.
[756] *Tadić* Trial Judgement, paras 572-575.
[757] Although property is also "protected" under the Geneva Conventions, the offences charged against the Accused pursuant to Article 6 of the ECCC Law concern only protected persons.
[758] Articles 13, 24, 25 and 26 of Geneva Convention I and Articles 13, 36, 37 of Geneva Convention II likewise define those protected under their provisions. In the instant case, however, the Chamber is primarily concerned with Geneva Conventions III and IV as they pertain to prisoners of war and civilians.

purpose of the Geneva Conventions, it has found that a person may be accorded protected status notwithstanding the fact that he or she is of the same nationality as a party to the conflict.[759] It has found that the protected status of an individual should not depend on formal bonds and purely legal relations, but on the substance of relations that exists between the individual and the State.[760] The crucial consideration when analysing these substantive relations is the allegiance — or lack thereof — that an individual has to a party to the conflict.[761] Civilians may thus be considered as "protected persons" for the purpose of Geneva Convention IV where they are viewed by the State whose hands they are in "as belonging to the opposing party in an armed conflict and as posing a threat to [that] State."[762]

2.6.1.5 Knowledge of the accused

420. The ICTY Appeals Chamber has reasoned that if certain conduct becomes a crime only in the context of an international armed conflict, the existence of such a conflict is not merely a jurisdictional pre-requisite but also a substantive element of the offences charged. Accordingly, it has found that an accused must know that his criminal conduct had a nexus to the international armed conflict, "or at least that he had knowledge of the factual circumstances later bringing the Judges to the conclusion that armed conflict was an international one."[763]

421. These two prongs of the accused's knowledge – as regards the international character of the armed conflict and the protected status of the victims – have been made explicit only in recent years by international tribunals. However, both prongs are distilled

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[759] *Tadić* Appeal Judgement, para. 166 ("[N]ot only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."); *Aleksovski* Appeal Judgement, para. 151; *Čelebići* Appeal Judgement, paras 58, 73.
[760] *Tadić* Appeal Judgement, paras 166, 168.
[761] *Tadić* Appeal Judgement, para. 166; *Kordić* Appeal Judgement, para. 331; *Aleksovski* Appeal Judgement, paras 151-152.
[762] *Čelebići* Appeal Judgement, para. 98.
[763] *Naletilić* Appeal Judgement, paras 110-120; *Kordić* Appeal Judgement, para. 311; *see also* Article 8 (War Crimes) of the ICC's "Elements of Crimes" (ICC-ASP/1/3 (part II-B), entry into force 9 September 2002).

from the field of application of the grave breaches of the Geneva Conventions and are thus equally applicable to the 17 April 1975 to 6 January 1979 period.

422. To be convicted of an offence pursuant to Article 6 of the ECCC Law, an accused must therefore have sufficient knowledge of the international character of the armed conflict and of the protected status of the victims under the Geneva Conventions. Awareness by the accused that a foreign state was involved in the armed conflict and that a victim belonged to an adverse party to that armed conflict will suffice to establish this knowledge.

2.6.2 Findings on chapeau requirements for Article 6 of the ECCC Law

2.6.2.1 Existence of an international armed conflict

423. The Chamber finds that armed hostilities existed between Cambodia and Vietnam from 17 April 1975 through 6 January 1979 (Section 2.1). Continuous clashes, whether border skirmishes or more serious incursions into both Cambodian and Vietnamese territory, continued throughout this period, despite DK and Vietnam's desire to keep them covert at the outset (Section 2.1.1). The Chamber concludes that an international armed conflict accordingly existed at all times relevant to the Amended Closing Order.

2.6.2.2 Nexus between the acts of the Accused and the armed conflict

424. There is ample evidence that the acts of the Accused against protected persons at S-21 as charged were closely related to the armed conflict between DK and Vietnam.[764] Vietnamese detainees constituted the largest group of foreign detainees at the S-21 complex and their numbers increased with the escalation of the conflict, particularly throughout 1978.[765] Vietnamese soldiers detained at the S-21 complex were forced to make confessions regarding Vietnam's intent to invade Cambodia, which from January

[764] *See* T., 9 June 2009 (Accused), p. 74 (acknowledging that individuals were sent to S-21 as a result of the armed conflict).
[765] T., 9 June 2009 (Accused), p. 96; T., 10 June 2009 (Accused), pp. 5-7; T., 1 April 2009 (Agreed Facts), p. 65; *see also* "Vietnamese arrested by month", E68.32.

1978 onwards were broadcast on DK radio for propaganda purposes, and interrogated on matters of military intelligence.[766]

2.6.2.3 Status as "protected persons" under the Geneva Conventions of 1949

425. No fewer than 345 Vietnamese prisoners of war and civilians were detained at S-21 and constituted protected persons under the Geneva Conventions of 1949.[767] Vietnamese detainees were registered as either soldiers (122 entries), Vietnamese civilians (79 entries) or spies (144 entries).[768] Vietnamese prisoners of war, many of whom were captured on the battlefield, entered the S-21 complex in their military uniforms.[769] Amongst the Vietnamese civilians were women, as well as children brought to the S-21 complex along with their parents.[770] The Accused stated that "spies" were classified as such on order of his superiors but were in fact either civilians or combatants.[771]

426. Further, due to their real or perceived allegiance with Vietnam, some Cambodians, originating primarily from the East Zone, were detained and executed as Vietnamese sympathisers.[772] Although Cambodian nationals, they were viewed by the CPK as having allegiances to Vietnam and as a threat to DK. Accordingly, the Chamber considers that these Cambodian detainees were also protected persons within the meaning of Article 4 of Geneva Convention IV.

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[766] T., 10 June 2009 (Accused), pp. 7-8; 45-46; T., 16 June 2009 (Accused), p. 38;.T., 14 July 2009 (MAM Nai), p. 28; T., 21 July 2009 (PRAK Khan), p. 31.

[767] *See* "Vietnamese Prisoners Entering S-21", E68.27; T., 9 June 2009 (Accused), p. 97; T., 10 June 2009 (Accused), pp. 3, 5-6; *see also* (Section 2.3.3.4.2.

[768] T., 10 June 2009 (Accused), p. 6; "S-21 Prisoners described as Vietnamese soldiers", E68.28; "S-21 Prisoners described as Vietnamese spies", E68.29; "S-21 prisoners identified as Vietnamese", E68.30; "S-21 Prisoners described as Vietnamese", E68.31; *see also* the Accused comments on the Revised S-21 Prisoner List: T., 10 June 2009 (Accused), pp. 3-7.

[769] T., 9 June 2009 (Accused), pp. 98-99; T., 10 June 2009 (Accused), pp. 7, 17-18; T., 16 July 2009 (HIM Huy), p. 38.

[770] T., 10 June 2009 (Accused), pp. 18-19, 47-48; T., 21 July 2009 (PRAK Khan), p. 15; T., 4 August 2009 (PES Matt statement read), p. 87. As per S-21 policy, the children were not registered in detainee logs. *See* T., 10 June 2009 (Accused), pp. 18-19.

[771] T., 10 June 2009 (Accused), pp. 10, 56.

[772] T., 25 May 2009 (Nayan CHANDA), p. 22; T., 6 August 2009 (David CHANDLER), pp. 16-17; T., 9 June 2009 (Accused), p. 91; T., 1 April 2009 (Agreed Facts), p. 65; *see also* "Arrest from East Zone by month", E68.46, showing a high amount of arrests in 1978; "S-21 Prisoners coming from the East Zone", E68.45, showing a total number of 1165 entries.

2.6.2.4 Knowledge of the Accused

427. Although acknowledging that the conflict between Vietnam and Cambodia commenced before this date, the Accused alleged that he learned of it only on 6 January 1978.[773]

428. It is undisputed that the first record of an S-21 detainee described as "Vietnamese" dates back to 7 February 1976. The Accused recalled that Vietnamese detainees, including civilians and soldiers, were taken to the S-21- complex as early as 1975, though they were then few in number.[774] In some instances, the Accused ordered S-21 trucks and personnel to transport Vietnamese detainees from combat zones to the S-21 complex, and sent the blood of S-21 detainees to the General Staff Hospital for transfusions for RAK soldiers wounded in battle in 1977 or 1978.[775] He knew of the ongoing purges of Cambodian nationals on account of their perceived allegiance with Vietnam, as well as SON Sen's battlefield deployment in August 1977.[776] The Accused also reviewed, summarised and amended the confessions of Vietnamese detainees as early as April 1976.[777]

429. The Chamber concludes that the Accused was aware of the armed conflict with Vietnam at least from 7 February 1976. Further, the Accused knew that S-21 detainees included protected persons, namely Vietnamese civilians and prisoners of war, as well as Cambodians considered to be Vietnamese sympathisers.

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[773] T., 9 June 2009 (Accused), pp. 70-71, 75-79, 85, 89-90.
[774] T., 1 April 2009 (Agreed Facts), p. 72; T., 9 June 2009 (Accused), pp. 96-97; T., 10 June 2009 (Accused), p. 2.
[775] T., 9 June 2009 (Accused), pp. 97-98; T., 10 June 2009 (Accused), pp. 42-43; T., 16 June 2009 (Accused), pp. 81-83; T., 17 June (Accused), p. 38; T., 22 June 2009 (Accused), pp. 113-114; T., 16 July 2009 (HIM Huy), pp. 16, 37-39; T., 20 July 2009 (HIM Huy), pp. 22-23, 66; T., 21 July 2009 (PRAK Khan), pp. 37-38.
[776] T., 9 June 2009 (Accused), p. 91; T., 10 June 2009 (Accused), pp. 31, 58-59, 63, 75.
[777] T., 10 June 2009 (Accused), pp. 8, 10, 12, 14-16, 48; "S-21 Confession of Vietnamese prisoner Troeng Yaing Lak", E5/2.13, ERN (English) 00284002.

2.6.3 Law and findings on offences as grave breaches of the Geneva Conventions of 1949

430. The Amended Closing Order charges the Accused with the following grave breaches of the Geneva Conventions of 1949: (i) wilful killing; (ii) torture or inhumane treatment; (iii) wilfully causing great suffering or serious injury to body or health; (iv) wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial; and (v) unlawful confinement of a civilian.[778]

2.6.3.1 Wilful killing

431. The elements of the offence of wilful killing under Article 6 of the ECCC Law are the same as those of murder under Article 5 of the ECCC Law (crimes against humanity) (Section 2.5.3.1).

2.6.3.2 Findings on wilful killing

432. The Amended Closing Order states:

> 151. S21 personnel wilfully caused the death of at least 400 protected persons both directly and indirectly, through a variety of means.[779]

433. The Accused confirmed that Vietnamese prisoners of war and civilians as well as Vietnamese sympathisers detained at S-21 were subjected to the same detention conditions as other detainees and were also destined for execution, with no more favourable conditions applying to them due to their nationality or protected status.[780]

434. Executions of protected persons were carried out in the same manner as those of other S-21 detainees.[781] In common with other detainees, protected persons were

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[778] Amended Closing Order, pp. 44-45. The Chamber notes that the Amended Closing Order uses the term "inhumane treatment" while the Geneva Conventions refer to "inhuman treatment". The Chamber considers the two terms synonymous.
[779] Amended Closing Order para. 151.
[780] T., 10 June 2009 (Accused), p. 54 ("those who were sent to S 21 were considered as enemies to be smashed and, therefore, among those victims there must be Vietnamese civilians, soldiers and spies. So there is no other choice but to smash."); *see also* T., 15 June 2009 (Accused), p. 49; T., 1 July 2009 (BOU Meng), pp. 54-55.
[781] T., 16 July 2009 (HIM Huy), p. 86-87; *see also* Section 2.4.1.1.

generally executed at Choeung Ek and within the S-21 complex[782] following the completion of their confessions, if any.[783] Vietnamese children were also either killed at the S-21 complex or Choeung Ek after being separated from their parents.[784]

435. In addition to the detainees who were executed, the detention conditions imposed at S-21 were such that many detainees also died during their detention (Section 2.4.5.1).

436. Due to the inaccuracy of the existing record, it is not possible to quantify the precise number of the protected persons who died or were executed at S-21. On the basis of the Revised S-21 Prisoner List, the Chamber finds that no fewer than 345 Vietnamese detainees died or were executed at S-21, in addition to the large but unquantifiable number of Cambodian nationals perceived as Vietnamese sympathisers.[785]

437. The Trial Chamber finds that protected persons were deliberately killed by S-21 personnel within the S-21 complex or at Choeung Ek. It also finds that detainees died at S-21 as the result of omissions known to be likely to lead to death and as a consequence of the conditions of detention imposed upon them.

2.6.3.3 Torture or inhumane treatment

438. The offence of torture or inhumane treatment is expressly prohibited as a grave breach in each of the four Geneva Conventions.[786] Torture and inhumane treatment constitute two separate offences.[787]

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[782] T., 17 June 2009 (Accused), p. 92; T., 16 July 2009 (HIM Huy), pp. 69, 85-87; *see also* T., 21 July 2009 (PRAK Khan) pp. 50-51.

[783] T., 10 June 2009 (Accused), pp. 9-10, 18. The majority of protected persons at the S-21 complex were executed after 6 January 1978, the day POL Pot called for the celebration of the RAK victory over the Vietnamese Army (T., 9 June 2009 (Accused), pp. 96-97; T., 10 June 2009 (Accused), pp. 2-19; *see also* T., 3 August 2009 (LACH Mean), pp. 68-69; T., 4 August 2009 (PES Matt statement read), p. 87). During the last mass execution of about 200 remaining S-21 detainees in January 1979, Vietnamese detainees kept alive in the complex until then for interrogation purposes were also executed upon order by the Accused's superiors. (T., 17 June 2009 (Accused), pp. 83-85; s*ee also* T., 28 July 2009 (SUOS Thy), p. 23.

[784] T., 21 July 2009 (PRAK Khan), p. 15; T., 10 June 2009 (Accused), pp. 18-19. Despite a lack of specific information regarding the execution of children, the Accused did not contest these facts.

[785] "Vietnamese Prisoners Entering S-21", E68.27; "S-21 Prisoners identified as Vietnamese", E68.30.

[786] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

[787] *See Čelebići* Trial Judgement, para. 442.

439. The elements of the offence of torture under Article 6 of the ECCC Law are the same as those of torture under Article 5 of the ECCC Law (Crimes Against Humanity).[788]

440. Inhumane treatment is defined by ICTY jurisprudence as an intentional act or omission against a person protected under the Geneva Conventions, which causes serious mental harm or physical suffering or injury, or constitutes a serious attack on human dignity.[789]

441. The ICRC *Commentary to Geneva Convention IV* provides assistance in interpreting the offence:

> [Inhuman treatment] could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them from being brought down to the level of animals. That leads to the conclusion that by 'inhuman treatment' the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might cut the civilians internees off completely from the outside world and in particular from their families, or which caused great injury to their human dignity, could conceivably be considered as inhuman treatment.[790]

442. Acts which constitute torture or wilfully causing great suffering or serious injury to body or health will simultaneously constitute inhumane treatment. The offence extends also to encompass other acts which violate the principle of humane treatment, in particular the respect for human dignity.[791] This assessment is a question of fact which must take into account all of the circumstances of the individual case.[792] Acts such as mutilation and other types of severe bodily harm, beatings and other acts of violence,[793] and serious physical and mental injury[794] have been considered as inhumane.

443. Inhumane treatment differs from torture in that it need not be undertaken for any particular purpose. The ICTY has found that inhumane treatment includes an act causing

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788 *Krnojelac* Trial Judgement, para. 178; *see also* Section 2.5.3.7.
789 *See Čelebići* Trial Judgement, para. 543; *Čelebići* Appeal Judgement, para. 426.
790 ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), p. 598.
791 *Čelebići* Trial Judgement, para. 544.
792 *Čelebići* Trial Judgement, para. 544; *Blaškić* Trial Judgement, para. 155.
793 *Tadić* Trial Judgement, para. 730.
794 *Blaškić* Trial Judgement, para. 239.

serious mental or physical suffering which does not reach the threshold of severity required for the offence of torture.[795]

444. The perpetrator must have committed the act or omission with the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or with recklessness as to whether suffering or an attack on human dignity would result.[796]

2.6.3.4 Findings on torture or inhumane treatment

445. The Amended Closing Order states:

> 149. S21 personnel wilfully caused severe pain or suffering, whether physical or mental, to protected persons during interrogation. The purpose of using such methods within the course of the interrogation was to extract confessions aimed at obtaining military information and supporting CPK propaganda.
>
> 150. S21 personnel wilfully caused serious mental harm or physical suffering or injury, or submitted them to conditions which amounted to a serious attack upon the human dignity of the prisoners at S21.[797]

2.6.3.4.1 Torture

446. Vietnamese detainees within the S-21 complex were interrogated by Witness MAM Nai, with the help of an interpreter, Pha Tha Chan.[798] According to the Accused, "[b]oth civilian and Vietnamese military were detained the same way as the Khmer detainees. They were interrogated and tortured. But the Vietnamese people were not as severely tortured as the tortures that were inflicted on the Cambodian prisoners because we only needed their confession."[799] He added that while torture was used on Vietnamese prisoners where "necessary" or "unavoidable", it took place on a "very minimal scale".[800]

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795 *Čelebići* Trial Judgement, para. 542.
796 *Čelebići* Trial Judgement, para. 543.
797 Amended Closing Order, paras 148-150.
798 T., 10 June 2009 (Accused), pp. 9, 10, 45-46; T., 16 June 2009 (Accused), p. 47; T., 14 July 2009 (MAM Nai), pp. 26-29; *see also* Section 2.3.3.4.3.2.
799 T., 15 June 2009 (Accused), p. 49; *see also* T., 4 August 2009 (PES Matt statement read), p. 87 (indicating that he saw Vietnamese detainees who he thought had been tortured*;* T., 1 July 2009 (BOU Meng), pp. 39, 55 (indicating that the detainee painted by VANN Nath was Vietnamese).
800 T., 10 June 2009 (Accused), pp. 9-11, 19; *see also* T., 16 June 2009 (Accused), pp. 85, 86; T., 9 June 2009 (Accused), p. 74.

This is corroborated by MAM Nai's notebook, which counsels interrogators not to beat Vietnamese when they appear not to know information.[801]

447. The purpose of interrogation of Vietnamese detainees evolved with the escalation of the armed conflict. Initially, they were questioned on their "spy missions" and networks in Cambodia, as well as on Vietnam's intent to invade Cambodia and incorporate it into an Indochinese federation.[802] From 6 January 1978, the confessions of Vietnamese prisoners of war were taped and broadcast on the radio for propaganda purposes.[803]

448. The Chamber accordingly finds that Vietnamese detainees were subjected to torture, albeit in lesser number and with less severity than other detainees. It further finds that Cambodian nationals perceived as Vietnamese sympathisers were interrogated in the same manner and for the same purpose as all other Cambodian detainees.[804]

2.6.3.4.2 Inhumane treatment

449. Some treatment inflicted on protected persons not reaching the severity threshold of torture or great suffering, nonetheless amounted to violations of human dignity, as evidenced by the general conditions of detention and the numerous methods used to obtain forced confessions of Vietnamese detainees.[805] The Chamber is satisfied that protected persons were subjected to a serious attack on their human dignity. The Chamber further finds that this treatment was intentional or recklessly inflicted by S-21 staff.

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[801] "S-21 Notebook by MAM Nai *alias* Chan", E3/231, ERN (English) 00184616.
[802] T., 10 June 2009 (Accused), pp. 3, 8, 12; T., 1 April 2009 (Agreed Facts), pp. 87-88.
[803] T., 9 June 2009 (Accused), p. 74; T., 10 June 2009 (Accused), pp. 3, 48; T., 16 June 2009 (Accused), p. 38; T., 20 July 2009 (HIM Huy), pp. 4-5; *see also* Section 2.1.2.
[804] T., 9 June 2009 (Accused), p. 91; *see also* Section 2.4.4.
[805] The Case File contains 82 confessions of Vietnamese detainees (documents E3/665 to E3/747).

2.6.3.5 Wilfully causing great suffering or serious injury to body or health

450. The offence of wilfully causing great suffering or serious injury to body or health is expressly prohibited as a grave breach in each of the four Geneva Conventions.[806] It represents a single offence whose elements are framed in the alternative.[807]

451. The ICTY jurisprudence has defined the offence as "an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven."[808]

452. The ICRC Commentary to Geneva Convention IV notes as follows:

> *Wilfully causing great suffering* - this refers to suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism. In view of the fact that suffering in this case does not seem, to judge by the phrase which follows, to imply injury to body or health, it may be wondered if this is not a special offence not dealt with by national legislation. Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.
>
> *Serious injury to body or health* – this is a concept quite normally encountered in penal codes, which usually use as a criterion of seriousness the length of time the victim is incapacitated for work.[809]

The Chamber adopts this early analysis of the offence of wilfully causing great suffering or serious injury to body or health.

453. This offence is distinguishable from torture primarily as the alleged act or omission need not be committed for any particular purpose.[810] The offence is also further distinguishable from that of inhumane treatment as requiring serious mental or physical

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[806] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147.
[807] *Čelebići* Trial Judgement, para. 506.
[808] *Kordić* Trial Judgement, para. 245.
[809] ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), specifically Article 147, p. 599.
[810] *See also Čelebići* Trial Judgement, paras 508, 511.

injury. Acts where the resultant harm relates solely to an individual's human dignity are not included within this offence.[811]

454. The physical or mental harm caused to the victim need not be irremediable or permanent, but must go beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.[812]

455. The jurisprudence of the ICTY has established that the requisite mental element for this offence includes both culpable intent and recklessness.[813]

2.6.3.6 Findings on wilfully causing great suffering or serious injury to body or health

456. The Amended Closing Order states:

> 148. These protected persons were wilfully subjected to serious mental and physical suffering due to inhumane acts which included deliberate deprivation of adequate food, sanitation and medical treatment. Prisoners were beaten and subjected to stringent restrictions during detention. These severe conditions individually or collectively depressed, degraded, and dehumanised detainees ensuring that they were always afraid.[814]

457. Protected persons suffered the same conditions of detention as other S-21 detainees,[815] resulting in serious bodily and mental injuries. The Chamber thus finds that S-21 staff wilfully caused Vietnamese and other protected persons great suffering by implementing conditions of detention at S-21 characterized by, amongst other things, a lack of access to adequate food and medical care (Section 2.4.5).

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811 *Kordić* Trial Judgement, para. 245.
812 *Krstić* Trial Judgement, paras 511-513.
813 *Blaškić* Trial Judgement, para. 152.
814 Amended Closing Order, para. 148.
815 T. 15 June 2009 (Accused), pp. 48-51; T., 16 July 2009 (HIM Huy), pp. 50, 51, 61; *see also* Sections 2.4.5.1-2.4.5.4.

2.6.3.7 Wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial

458. The offence of wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial is expressly prohibited as a grave breach in Geneva Convention IV and Geneva Convention III, respectively.[816]

459. The perpetrator must have deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in Geneva Convention IV and Geneva Convention III. These judicial guarantees include the right to be judged by an independent and impartial court,[817] to be promptly informed of the charges,[818] the protection against collective penalty,[819] protection under the principle of legality, [820] the right not to be punished more than once for the same act or on the same count,[821] to be informed of the right to appeal,[822] and the right not to be sentenced or executed without a previous judgement pronounced by a regularly constituted court.[823]

460. The jurisprudence of the ICTY has established that the requisite mental element for this offence includes both culpable intent and recklessness.[824]

2.6.3.8 Findings on wilful deprivation of fair trial rights

461. The Amended Closing Order states:

> 147. At least 400 protected persons were wilfully denied their right to be judged by an independent and impartial court as defined by the Geneva Conventions of 1949. In particular, the right to be promptly informed of their offences; to be protected from collective penalty; to be protected by the principle of legality; or to be sentenced by a competent court.[825]

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816 Geneva Convention III, Article 130; Geneva Convention IV, Article 147.
817 Geneva Convention III, Article 84(2).
818 Geneva Convention III Article 104; Geneva Convention IV, Article 71(2).
819 Geneva Convention III, Article 87; Geneva Convention IV, Article 33.
820 Geneva Convention III, Article 99(1); Geneva Convention IV, Article 67.
821 Geneva Convention III, Article 86; Geneva Convention IV, Article 117(3).
822 Geneva Convention III, Article 106; Geneva Convention IV, Article 73.
823 Geneva Convention III, Articles 100-105, 107; Geneva Convention IV, Articles 64-70, 74-75.
824 *Blaškić* Trial Judgement, para. 152.
825 Amended Closing Order, paras 146, 147.

462. All protected persons, including all Vietnamese and Cambodians perceived as Vietnamese sympathizers were deprived of their fair trial rights (Section 2.4.3). The Chamber observes that no arrangements were made to screen captured prisoners of war or civilians, nor were there any mechanisms to inform them of the reasons for their arrest or enable them to challenge its basis or to appeal. Further, the punishment meted out to them was clearly arbitrary. There were no trials, and extra-judicial executions were carried out on detainees as a matter of policy. While no judicial system existed during the DK period, S-21 functioned as a State institution with the power to detain, interrogate and execute persons. It was accordingly bound to exercise such powers in conformity with the fair trial rights guaranteed by the Geneva Conventions.

463. The Chamber finds that no fewer than 345 Vietnamese and a large number of other protected persons detained at S-21 were wilfully deprived of their right to a fair and regular trial.

2.6.3.9 Unlawful confinement of a civilian

464. The elements of the offence of unlawful confinement under Article 6 of the ECCC Law are in substance the same as those of imprisonment under Article 5 of the ECCC Law (crimes against humanity).[826]

465. Unlawful confinement of a civilian is expressly prohibited as a grave breach in Geneva Convention IV.[827] Although the confinement of civilians in an armed conflict may be permissible in limited cases, the relevant provisions of Geneva Convention IV clarify that deprivation of liberty is permissible only where there are reasonable grounds to believe that the security of the State is at risk.[828] Further, an initially lawful internment becomes unlawful if the detaining party fails to respect the detainee's basic procedural

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[826] *Kordić* Trial Judgement, para. 301; *see also Kordić* Appeal Judgement, paras 69-73; *see also* Section 2.5.3.5.

[827] Geneva Convention IV, Article 147; *see also* Geneva Convention IV, Article 5 (authorizing measures in relation to persons "definitely suspected of or engaged in activities hostile to the security of the State", but mandating humane treatment and respect of fair trial rights in relation to them.)

[828] Article 42 of Geneva Convention IV states: The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary. […]; *see also Čelebići* Appeal Judgement, paras 320-321; *Kordić* Appeal Judgement, para. 72.

rights or to establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[829]

466. The jurisprudence of the ICTY has established that the requisite mental element for this offence, in common with all grave breaches of the Geneva Conventions, includes both culpable intent and recklessness.[830]

2.6.3.10 Findings on unlawful confinement of a civilian

467. The Amended Closing Order states:

> 146. More than a hundred Vietnamese civilians were detained at S21. There was no difference in treatment between Vietnamese civilians and other individuals subjected to imprisonment at S21, all were arbitrarily deprived of their liberty.[831]

468. The Chamber has found that all S-21 detainees were intentionally and arbitrarily imprisoned without legal basis (Section 2.4.3). This was also true of no fewer than 79 Vietnamese civilians, as well as the large number of other protected civilians detained within the S-21 complex (Section 2.3.3.4.2). No reasonable grounds justifying the confinement of these civilians have been established. Nor were opportunities provided to detainees, including protected civilians held within the S-21 complex, to challenge their detention (Section 2.4.3.2).

469. The Chamber finds, in the absence of factors indicating that the security of Cambodia required their internment during the armed conflict between Cambodia and Vietnam, that protected civilians, including a number of Vietnamese nationals, were unlawfully confined at S-21.

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[829] *See* Article 43 of Geneva Convention IV (providing for periodic review of detention by an appropriate court or administrative board ,as well as notification requirements in relation to detainees).
[830] *Blaškić* Appeal Judgement, para. 152.
[831] Amended Closing Order, para. 146.

2.7 Individual criminal responsibility of the Accused

470. Article 29 (new) of the ECCC Law outlines the forms of responsibility pursuant to which accused persons can be held individually criminally responsible for the crimes within the jurisdiction of the ECCC. Article 29 (new) of the ECCC Law is modelled on the provisions on forms of responsibility in the Statutes of the *ad hoc* international criminal tribunals and derives from notions of international law.[832] Article 29 (new) of the ECCC Law provides:

> Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.
>
> The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.
>
> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.
>
> The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

471. The Amended Closing Order states that the Accused "through his acts or omissions in Phnom Penh and within the territory of Cambodia, between 17 April 1975 and 6 January 1979, as Deputy Secretary or Secretary of S21, planned, instigated, ordered, committed, or aided and abetted, or is responsible by virtue of superior responsibility" for offences charged as crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Penal Code.[833]

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[832] *See* Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute (all of which state "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [the relevant articles of the respective statutes], shall be individually responsible for the crime.")

[833] Amended Closing Order, p. 44-45 *as amended by* Decision on Appeal against the Closing Order, p. 41.

472. While the Amended Closing Order alleges multiple forms of responsibility in respect of each charge, the Chamber has the discretion to choose the form or forms of responsibility under which to assess the evidence in respect of the Accused.[834] A Chamber is not obliged to make exhaustive factual findings on each and every charged form of responsibility, and may opt to examine only those that describe the conduct of an accused most accurately.[835]

473. The principle of legality (Section 1.5) applies to the forms of responsibility, as well as to the substance of the crimes charged. The Chamber must thus establish that the forms of responsibility charged in the Amended Closing Order were recognised under national or international law during the 17 April 1975 to 6 January 1979 period.

474. The forms of responsibility mentioned in Article 29 (new) of the ECCC Law were also known under the 1956 Penal Code at the relevant time, except for planning and superior responsibility.[836] Planning was, however, criminalized by specific provisions,[837] making the criminalisation of such conduct foreseeable, whether as a form of responsibility or as a crime.

475. Further, the principle of individual criminal responsibility for the commission of violations of international humanitarian law was made explicit in the Nuremberg Charter and enforced by the Nuremberg-era judgements.[838] These Nuremberg-era judgements also confirmed that individual criminal responsibility extended beyond those who physically perpetrated crimes, including to those who ordered or assisted in their commission.[839] Subsequent jurisprudence and codifications at the international level have

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[834] *Krstić* Trial Judgement, para. 602; *Semanza* Trial Judgement, para. 397.
[835] *Prosecutor v. Milutinović*, Judgement, ICTY Trial Chamber (IT-05-87-T), 26 February 2009 ("*Milutinović* Trial Judgement"), Vol. I, para. 76.
[836] *See* Articles 76 and 82 to 87 of the 1956 Penal Code.
[837] *See* Articles 290, 223 and 239 of the 1956 Penal Code.
[838] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Article 6 of the Charter.
[839] *See e.g., Trial of Bruno Tesch and Two Others ('Zyklon B case')*, 1-8 March 1946, *Law Reports of Trials of War Criminals (1947)*, Vol. I, p. 93 (finding that supplying lethal gas to concentration camps with knowledge of its use entailed criminal responsibility); *Trial of Werner Rodhe and Eight Others*, 29 May-1 June 1946, *Law Reports of Trials of War Criminals (1948)*, Vol. V, p. 54 (accuseds who provided assistance to perpetrator convicted as "concerned in the killing"); *Trial of Wilhelm List and Others ('Hostages trial')*, 8 July 1947 – 19 February 1948, *Law Reports of Trials of War Criminals (1949)*, Vol.

reaffirmed the customary nature of each of the forms of responsibility included in the first paragraph of Article 29 (new) of the ECCC Law, as well as their applicability to a range of international crimes, including grave breaches of the Geneva Conventions of 1949 and crimes against humanity.[840]

476. Moreover, the Nuremberg-era tribunals found that the failure of a superior to carry out his duty to control his subordinates' criminal conduct could lead to individual criminal responsibility.[841] This principle was later codified in Articles 86 and 87 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict ("Additional Protocol I").[842] Though Additional Protocol I was adopted in 1977, the ICTY Appeals Chamber has found that "command responsibility was part of customary international law relating to

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VIII, p. 34 (finding of criminal responsibility based on the issuance of criminal orders); *Trial of Franz Schonfeld and Nine Others*, 11-26 June 1946, *Law Reports of Trials of War Criminals (1949)*, Vol. XI, p. 64 (accuseds who provided assistance to perpetrator convicted as "concerned in the killing"); *Ohlendorf and Others Case ('Einsatzgruppen case')*, Judgment of 8-9 April 1948, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950)*, Vol. IV, p. 411 (finding criminal responsibility where accused's acts had a substantial effect on those of the perpetrator); s*ee also* Control Council Law No. 10 (1945), reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. I, pp. XVI-XIX, Article 2(2).

[840] *See e.g., Tadić* Trial Judgement, para. 669 (stating that all of the forms of responsibility included in Article 7 of the ICTY Statute, which mirror those listed in Article 29 of the ECCC Law, have a customary basis); *Furundzija* Trial Judgement, paras 191-249 (as regards the customary basis of aiding and abetting); *see also* Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135, Article 129(1) (as regards penal sanctions for "persons committing, or ordering to be committed, any of the grave breaches of the present Convention"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287, Article 146(1) (same); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article III ("citing as criminally culpable those who "[c]ommit, participate in, directly incite or conspire in[, or] […] [d]irectly abet, encourage or co-operate in the commission of the crime of apartheid."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, 10 December 1984, Article 4(1) (as regards the criminal nature of an act "which constitutes complicity or participation in torture").

[841] *See e.g., Trial of General Tomoyuki Yamashita*, First Instance Judgement and US Supreme Court *Habeas* Decision of 4 February 1946, *Law Reports of Trials of War Criminals (1948)*, Vol. IV, p. 1; *Trial of Wilhelm von Leeb and Thirteen Others ('German High Command trial')*, 30 December 1947 – 28 October 1948, *Law Reports of Trials of War Criminals (1949)*, Vol. XII, p. 1; *Trial of Oswald Pohl and Others ('Pohl case'),* Judgment of 3 November 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950)*, Vol. V, p. 193.

[842] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, entry into force 7 December 1978, 1125 UNTS 3, Articles 86 (Failure to act) and 87 (Duty of commanders); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, entry into force 7 December 1978, 1125 UNTS 609, Article 1(1) (referring to "responsible command").

international armed conflicts before the adoption of [Additional] Protocol I."[843] The Chamber considers that this was also the case during the period relevant to the Amended Closing Order.

477. Jurisprudence from the Nuremberg-era tribunals and more recent international criminal tribunals also indicate that superior responsibility was not confined to military commanders under customary international law during the 1975 to 1979 period.[844] As detailed below, it is the degree of control that an individual exercises over others, rather than the nature of his or her function, that is fundamental to the notion of superior responsibility.

478. The Chamber finds that, at all times relevant to the Amended Closing Order, the forms of responsibility charged against the Accused had a basis in customary international law.

2.7.1 Committing

479. According to jurisprudence from international criminal tribunals, "committing" as a form of responsibility includes both commission through the physical perpetration or culpable omission of an act, and commission through the participation in a joint criminal enterprise.

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[843] *Prosecutor v. Hadžihasanović et al.,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber (IT-01-47-AR72), 16 July 2003, para. 29 (also concluding that customary international law provided for superior responsibility in non-international armed conflicts prior to 1991); *see also Prosecutor v. Hadžihasanović et al.,* Decision on Joint Challenge to Jurisdiction, ICTY Trial Chamber (IT-01-47-PT), 12 November 2002, para. 93(v) (as regards the applicability of superior responsibility in the absence of an armed conflict).

[844] *See e.g., Trial of Karl Brandt and Others ('Medical case')*, Judgment of 19 August 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950),* Vols I-II, pp. 1; *Trial of Friedrich Flick and Others Case ('Flick case')*, Judgment of 22 December 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950)*, Vol. VI, p. 1; *see also Čelebići* Appeal Judgement, para. 195; *Prosecutor v. Bagilishema*, Judgement, ICTR Appeals Chamber (ICTR-95-1A-A), 3 July 2002, para. 51; *Brima* Appeal Judgement, para. 257.

2.7.1.1 Committing through physical perpetration or culpable omission

480. Committing, as it is principally understood, consists in the physical perpetration of a criminal act or the culpable omission of an act that was mandated by a rule of criminal law.[845]

481. The accused must have acted with the intent to commit the crime, or with an awareness of the substantial likelihood that the crime would occur as a consequence of his or her conduct.[846]

2.7.1.2 Findings on committing through physical perpetration or culpable omission

482. The Amended Closing Order states:

> 153. DUCH personally tortured or mistreated detainees at S21 on a number of separate occasions and through a variety of means. Duch is not indicted for the mode of liability of "commission" for the domestic crime of torture.[847]

483. The Accused stated that he was personally involved in the interrogation of three detainees, KOY Thuon, CHHIT Iv and MA Mengkheang. He acknowledged having slapped CHHIT Iv to prevent him from being tortured by IN Lorn *alias* Nat. He also admitted to closely monitoring the interrogations of MEN Sann *alias* Ya, and SIET Chhe

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[845] *Tadić* Appeal Judgement, para. 188; *Prosecutor v. Kamuhanda*, Judgement and Sentence, ICTR Trial Chamber (ICTR-99-54A-T), 22 January 2004, para. 595; *Sesay* Trial Judgement, 2 March 2009, para. 249.

[846] *Prosecutor v. Limaj et al.*, Judgment, ICTY Trial Chamber (IT-03-66-T), 30 November 2005, para. 509; *Sesay* Trial Judgement, para. 250.

[847] Amended Closing Order, para. 153 *as amended* by Decision on Appeal against the Closing Order. The Chamber notes that the French version of the "Decision on Appeal Against Closing Order indicting Kaing Guek Eav *alias* 'Duch'" (which reads « Le paragraphe 153 de l'Ordonnance *est remplacé comme suit* : Duch n'a pas à répondre du crime de torture, tel que défini par le droit interne cambodgien, sur la base du mode de participation 'commission' ») does not match the English and Khmer versions (which read, respectively, "Paragraph 153 of the Closing Order is ordered to be amended *by adding the following*: Duch is not indicted for the mode of liability of 'commission' for the domestic crime of torture" and "កែប្រែវាក្យខណ្ឌ ១៥៣ នៃដីកាបញ្ជូនរឿងទៅជំនុំជម្រះ **ដោយបន្ថែមចំនុចដូចខាងក្រោម**៖ ឌុច មិនត្រូវបានចោទប្រកាន់ពីទម្រង់នៃការទទួលខុសត្រូវលើ "ការប្រព្រឹត្ត" បទទារុណកម្ម ក្រោមច្បាប់ជាតិឡើយ") (emphasis added). The Chamber considers this disparity to be the result of a naked translation error in the French version.

alias Tum, but denied interrogating them himself. The Accused otherwise denied having participated in interrogations or torturing detainees at S-21.[848]

484. Several witnesses stated that the Accused occasionally beat or kicked prisoners.[849] Witness VANN Nath testified that the Accused kicked Civil Party BOU Meng in the head, but the Civil Party himself denied this.[850] The Chamber notes that some of the Accused's statements at trial regarding his involvement in torture were unclear or contradictory.[851] The Chamber is not satisfied however, that kicking or beatings by the Accused have been proven to the required standard, nor that the slapping of CHHIT Iv caused pain or suffering of the severity required for a finding of torture or other inhumane acts.

485. Witness PRAK Khan initially stated that the Accused participated in the torture of a woman by administering electric shocks, beating her and removing her shirt.[852] However, at trial, he testified that it was DEK Bou who, in the presence of the Accused, tortured the detainee.[853] The Accused denied that any such incident took place at all.[854] Witness PRAK Khan's statements with respect to this incident are inconsistent and the Chamber is not satisfied that this fact has been proven to the required standard.

486. Accordingly, the Chamber finds that the Accused is not responsible for having committed torture or other inhumane acts through physical perpetration or culpable omission.

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[848] T., 16 June 2009 (Accused), pp. 29-30, 33-35; T., 22 June 2009 (Accused), pp. 24, 35; "Written Record of Confrontation", E3/396, ERN (English) 00166564.
[849] T., 10 August 2009 (SAOM Met), pp. 85-86; T., 11 August 2009 (SAOM Met), p. 9; T., 29 June 2009 (VANN Nath), p. 100; T., 4 August 2009 (NHEM En statement read), pp. 119-120; "Written Record of Interview of Witness Prak Khan", E3/413, ERN (English) 00161556-00161557; T., 21 July 2009 (PRAK Khan), pp. 34, 71; T., 22 July 2009 (PRAK Khan), p. 69.
[850] T., 29 June 2009 (VANN Nath), p. 96; T., 1 July 2009 (BOU Meng), pp. 37-38.
[851] *Cf.*, T., 11 August 2009 (Accused), pp. 29-33; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 213(d) (disagree); T., 4 August 2009 (Accused), pp. 128-129.
[852] "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161558.
[853] T., 21 July 2009 (PRAK Khan), pp. 23-24, 55-56; T., 22 July 2009 (Accused), pp. 57-58.
[854] T., 16 June 2009 (Accused), pp. 39-40.

2.7.1.3 Committing through participation in a joint criminal enterprise

2.7.1.3.1 Submissions and procedural history

487. The Co-Prosecutors have argued that the theory of criminal liability known as joint criminal enterprise is applicable before the ECCC and to the charges against the Accused. In particular, the Co-Prosecutors have drawn on the jurisprudence of the ICTY Appeals Chamber, and its Nuremberg-era antecedents, to argue that the Accused "committed" crimes charged in the Amended Closing Order through his participation in a joint criminal enterprise.[855] While not addressing the general applicability of joint criminal enterprise before the ECCC, the Accused has specifically contested that this theory may be applied to the charges against him.[856]

488. The Co-Investigating Judges did not include joint criminal enterprise as a mode of responsibility in the Closing Order.[857] The Pre-Trial Chamber denied the Co-Prosecutors' appeal against this exclusion in its 5 December 2008 decision.[858] The Pre-Trial Chamber reasoned that while facts relevant to a joint criminal enterprise were included in the Co-Prosecutors' Introductory Submission, these facts formed part of Case File 002-19-09-2007 and were not included in Case File 001/18-07-2007 (the present case) following the issuance of the Separation Order.[859] Further, while the Co-Prosecutors' Rule 66 Final Submission requested that the Co-Investigating Judges include joint criminal enterprise as a form of responsibility in the Closing Order,[860] no further relevant facts had been

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[855] "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73.

[856] "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2.

[857] The Chamber notes that the Co-Investigating Judges have since stated in a separate matter that joint criminal enterprise is an applicable form of liability before the ECCC and that it existed under customary international law during the 1975 to 1979 period. *See* Case File 002/19-09-2007-ECCC-OCIJ, "Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise", D97/13; *see also* Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6 (Pre-Trial Chamber decision finding that the basic and systemic forms of joint criminal enterprise are applicable before the ECCC, but that the extended form is not).

[858] Decision on Appeal against the Closing Order, paras 108-142.

[859] Decision on Appeal against the Closing Order, paras 117-123; *see also* Section 1.2.

[860] Specifically, the Co-Prosecutors' Rule 66 Final Submission stated as follows: "The JCE came into existence on 15 August 1975 when SON Sen instructed NATH and DUCH to set up S-21. The JCE existed through October 1975, when S-21 began its full-scale operations, to at least 7 January 1979 when the DK regime collapsed. The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of 'enemies' of the DK regime by committing the crimes described in this Final

included in the scope of the investigation following the separation order. The Pre-Trial Chamber held that, were the Accused to be indicted as "a participant in a joint criminal enterprise, the perception of the level and extent of his responsibility would differ from the description of his responsibility in the Closing Order". Thus, it concluded that the Accused was "not informed of the allegation related to his participation in the S-21 [joint criminal enterprise] prior to the [Co-Prosecutors'] Final Submission. The S-21 [joint criminal enterprise] did not form part of the factual basis for the investigation and for this reason the Pre-Trial Chamber will not add it to the Closing Order at this stage." The Pre-Trial Chamber consequently declined to consider whether joint criminal enterprise was implicitly included in Article 29 (new) of the ECCC Law or whether it formed part of national or international law during the 1975 to 1979 period.[861]

489. During the initial hearing on 17 February 2009, the Co-Prosecutors notified the Chamber and the Parties that they would request that the Chamber apply joint criminal enterprise as regards the charges against the Accused.[862] On 8 June 2009, the Co-Prosecutors filed a written submission ("OCP JCE Request") requesting that the Chamber declare joint criminal enterprise, in each of its three forms, to be generally applicable as a mode of criminal liability before the ECCC and that it find that the Accused committed

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Submission. An organized system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 and described in this Final Submission were within the purpose of this JCE. DUCH participated throughout the entire existence of the JCE, together with other participants in this JCE who themselves participated for various durations and who included the former Secretary of S-21 NATH, and the other members of the S-21 Committee, namely KHIM Vath *alias* HOR and HUY Sre as well as their subordinates." "Rule 66 Final Submission regarding Kaing Guek Eav *alias* 'Duch'", D96, paras 250-251.

[861] Decision on Appeal against the Closing Order, paras 123, 136, 141-142.

[862] T., 17 February 2009, pp. 9-10 ("[W]e would like to […] advise the Trial Chamber and the parties that at Trial, during the proceedings, the Co-Prosecutors intend to invite the Trial Chamber to consider the applicability of the concept of joint criminal enterprise to the proceedings against the [A]ccused. [… W]e want to advise in advance the Trial Chamber that we deem this concept to be applicable to the proceedings before this Chamber and indeed before this Court, that this concept represents and is supported by the facts as they are laid out in the Case File, that more specifically the so called category 1 [basic] and 2 [systemic] of the joint criminal enterprise will allow the Trial Chamber to consider the full breadth of the culpable liability of the [A]ccused. We further submit that the Trial Chamber is indeed [limited] by the factual basis within the case file, but is however, free to interpret the law to apply it and to legally characterize any legal fact therein. This [independence] and indeed this duty, means that the Trial Chamber is not bound by any decision of the pre-Trial Chamber on this issue. We will further argue, respectfully, that the Pre-Trial Chamber erred in its evaluation of the applicability of this concept to this file and these proceedings and […] invite the Trial Chamber and assist it in considering the applicability of this concept to the proceedings.")

crimes charged in the Amended Closing Order through his participation in a joint criminal enterprise.[863]

490. On 29 June 2009, the Chamber notified the Parties that the issue of the Accused's responsibility as a participant in a joint criminal enterprise was live before it and invited the Parties to respond to the OCP JCE Request. The Chamber further stated that it intended to rule on this Request in the Judgement.[864]

491. On 17 September 2009, co-counsel for the Accused filed a response to the OCP JCE Request ("Accused JCE Response"), claiming that the OCP JCE Request was inadmissible in light of the Pre-Trial Chamber's decision to exclude joint criminal enterprise from the Amended Closing Order. The Accused JCE Response further argued that the OCP JCE Request should be denied on grounds that there was an insufficient factual basis in the Amended Closing Order for a finding of joint criminal enterprise and that this mode of criminal liability had not been pleaded with sufficient specificity by the Co-Prosecutors. The Accused JCE Response added that, were the Chamber nevertheless to decide to apply joint criminal enterprise, the Accused must be invited to "make his submissions on the new legal characterisation contemplated before the case is adjourned for deliberation."[865]

2.7.1.3.2 Internal Rule 98(2)

492. As a preliminary matter, the Chamber notes that it is not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Amended Closing Order. Indeed, Internal Rule 98(2) states:

> [t]he judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.

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[863] "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73; *see also* "Group 3 Civil Parties – Brief in Support of the co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/3.
[864] T., 29 June 2009, pp. 8-9.
[865] "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, paras 7-10, 15-27, 38.

493. The Parties do not dispute that Internal Rule 98(2) permits changes to the legal characterisation of both the crimes *and* the forms of responsibility included in the Amended Closing Order.[866] While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).[867]

494. Internal Rule 98(2) mandates, however, that any legal re-characterisation made by the Chamber be limited to the facts set out in the Amended Closing Order. This approach accords with the powers conferred upon Trial Chambers in the Cambodian legal system,[868] as well as in French legal system upon which it was originally modelled.[869] The Chamber considers that the proviso of Internal Rule 98(2) that no new constitutive elements be introduced is a reiteration of this well-established limitation, namely that any re-characterisation must not go beyond the facts set out in the charging document.

495. The ICC's Regulations of the Court similarly permit its Trial Chambers to change the legal characterisation of facts following the start of the trial proceedings.[870] Before the international *ad hoc* tribunals, however, Trial Chambers have generally required a formal amendment to the charges against the accused where the facts establish that the accused has committed a different or more serious offence than that indicated in the indictment.[871] It follows from the many structural differences between the international *ad hoc* tribunals and the ECCC that certain of the common law-inspired procedural mechanisms of the former have no counterpart in the civil law-oriented framework of the latter. In contrast to the ICTY and ICTR, no comparable mechanism exists within the ECCC that would

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[866] *See e.g.,* "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, fn. 10.
[867] *See* Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004) (allowing for a change to the legal characterisation of facts to accord with a different form of participation).
[868] *See e.g.,* Article 348 of the 2007 Code of Criminal Procedure; Articles 10 and 175 of the 1993 (SOC) Code of Criminal Procedure.
[869] *See* Cour de Cassation, Cass. Crim., 22 April 1986, Bulletin Criminel, No. 136 (''[I]l appartient aux juridictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle à celle sous laquelle ils leur étaient déférés […] à la condition qu'il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tels qu'ils ont été retenus dans l'acte de saisine.'').
[870] *See* Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004).
[871] *See Kupreškić et al*. Trial Judgement, para. 748.

allow either the Parties or the Chamber to formally amend a Closing Order. The basis for the re-characterisation of facts before the ECCC is instead Internal Rule 98(2), which expressly envisages this eventuality, subject to fair trial safeguards.

496. The Chamber thus considers that Internal Rule 98(2) enables it to change the legal characterisation of facts contained in the Amended Closing Order to accord with a new form of responsibility provided that it does not go beyond those facts. In doing so, the Chamber must also ensure that (i) no violation of the fair trial rights of the Accused is entailed and (ii) the form of responsibility in question is applicable before the ECCC.

2.7.1.3.2.1 Fair trial rights of the Accused

497. Article 35 (new) of the ECCC Law states in relevant part:

> In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.
>
> a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
>
> b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;

498. The European Court of Human Rights, whose founding document contains similar fair trial provisions,[872] has stated that while a criminal court may change the legal characterisation of facts over which it has jurisdiction, it must afford the accused the possibility of exercising his or her defence rights "in a practical and effective manner and, in particular, in good time."[873] In practice, it has found that this entails ensuring that

[872] *See* Article 6(3) of the ECHR ("Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence […]").

[873] *Pélissier and Sassi v. France*, Judgment of 25 March 1999, ECtHR (no. 25444/94), 25 March 1999, para. 62; *see also I.H. and Others v. Austria*, Judgment of 20 April 2006, ECtHR (no. 42780/98), 20 April 2006, para. 34 ("in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterisation that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.")

the accused is aware of the possibility of the legal re-characterisation and provided with a sufficient opportunity to defend against it.[874]

499. Similarly, Regulation 55 adopted by the ICC allows that Court's Trial Chambers to change the legal characterisation of facts without a formal amendment of the charges in accordance with the following procedural safeguards:

> 1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
>
> 2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
>
> 3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
>
> (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
>
> (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).[875]

500. The Appeals Chamber of the ICC has confirmed that a change in the legal characterisation of facts pursuant to Regulation 55 is not inherently in breach of an accused's right to a fair trial.[876] It has further stated that the manner in which the

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[874] *See Abramyan v. Russia*, Judgment of 9 October 2008, ECtHR (no. 10709/02), 9 October 2008, paras 36-40; *see also Dallos v. Hungary*, Judgment of 1 March 2001, ECtHR (no. 29082/95), 1 March 2001, paras 47-53 (finding that a re-qualification of an offence did not impair the rights of the defence when the accused had sufficient opportunity to defend himself during the review proceedings); *Sipavičus v. Lithuania*, Judgement of 21 February 2002, ECtHR (no. 49093/99), 21 February 2002, paras 23-34.

[875] Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004).

[876] *Situation in the Democratic Republic of the Congo, the Prosecutor v. Lubanga*, Judgement on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts

procedural safeguards provided for in Regulation 55(2) and (3) are to be applied, and whether any additional safeguards may be required to fully protect the rights of the accused, will depend on the circumstances of the case.[877]

501. In the present case, the Co-Prosecutors reiterated throughout the trial their request that the Chamber apply joint criminal enterprise, including in its systemic form, to the charges against the Accused.[878] The Co-Prosecutors indicated the nature and purpose of the joint criminal enterprise, the period over which it existed, and the identity of those engaged in it.[879] On 29 June 2009, following the OCP JCE Request, the Chamber provided notice to the Accused that the issue of the applicability of joint criminal enterprise was before it and that it intended to rule on the issue in the Judgement.[880] The Accused was provided with an opportunity to respond to the OCP JCE Request and filed his Response on 17 September 2009.

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may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC Appeals Chamber (ICC-01/04-01/06 OA 15 OA 16), 8 December 2009, para. 87 (reversing the Trial Chamber's interpretation of Regulation 55 but finding that changes made to the legal characterisation pursuant to that Regulation would not otherwise be inherently in breach of the accused's fair trial rights).

[877] *Situation in the Democratic Republic of the Congo, the Prosecutor v. Lubanga*, Judgement on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC Appeals Chamber (ICC-01/04-01/06 OA 15 OA 16), 8 December 2009, paras. 85-87.

[878] T., 17 February 2009, pp. 9-10; *see also* T., 31 March 2009, p. 56 ("As we have outlined from the very beginning of this process, we urge this Court to consider and apply Joint Criminal Enterprise, or JCE to the facts of this case."); "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73; "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, paras 323-334; *see also* Section 2.7.1.3.1.

[879] As regards the nature, purpose and time period, *see* "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, para. 331 ("The evidence before the Chamber establishes that the Accused committed the crimes described as a participant in a JCE. The JCE came into existence on 15 August 1975 when Son Sen instructed In Lorn *alias* Nat, and the Accused to establish S-21. The JCE existed until at least 7 January 1979 when the DK regime collapsed and S-21 was abandoned. The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of "enemies" of the DK regime by committing the crimes described in this Submission. An organised system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 were within the purpose of this JCE."); *see also* "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, para. 24; "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, 18 July 2008, para. 250. As regards the identity of those engaged in the joint criminal enterprise, *see* "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, para. 332 ("The Accused took part in the JCE throughout its entire existence, together with others who participated for various durations, including Nat, the former Secretary of S-21, and the other members of the S-21 Committee, namely Hor and Huy Sre, as well as their subordinates"); *see also* "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, para. 25; "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, para. 251.

[880] T., 29 June 2009, pp. 8-9.

502. The Chamber considers that the OCP JCE request might have been presented in a more timely and coherent manner, and pleaded with greater specificity. The Chamber nevertheless rejects the Accused's contention in his JCE Response that the Chamber was obligated to determine the applicability of joint criminal enterprise prior to its deliberations and to provide him with still further opportunity to respond to that already accorded.[881] The Accused was repeatedly made aware of, and provided with a timely opportunity to address, the specific possibility that joint criminal enterprise, including its systemic form, might be held applicable to the charges against him. Co-counsel for the Accused also indicated their awareness that the Chamber might apply joint criminal enterprise in the current proceedings.[882]

503. Accordingly, the Chamber considers that no breach of the Accused's fair trial rights would be entailed by the legal re-characterisation envisioned.

2.7.1.3.3 Applicability of joint criminal enterprise before the ECCC

2.7.1.3.3.1 The notion of joint criminal enterprise

504. The notion of "joint criminal enterprise" came to prominence through jurisprudence of the ICTY Appeals Chamber, which found that an accused could be held criminally responsible for having "committed" a crime through his participation in a joint criminal enterprise.[883] Joint criminal enterprise is not, however, a novel creation of the ICTY.[884] As noted by ICTY Appeals Chamber, the underlying legal concepts upon which joint criminal enterprise is based can be traced back to the Nuremberg-era documents and judgements and exist in various forms in many national legal systems.[885]

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[881] *See* "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, paras 32-39.
[882] T., 31 March 2009 (Defence), p. 83 ("In addition, the international co-lawyer, Mr. Robert Petit said the theory of the joint criminal enterprise shall be implemented and exercised for the S-21 crimes. I do not deny to that, please go ahead, however it needs to be exercised for all those 195 prisons as well."); T., 20 July 2009 (Defence), p. 16 (arguing that witnesses should be warned by the Chamber that they might be held liable as participants with the Accused in a joint criminal enterprise) (closed session).
[883] *See generally Tadić* Appeal Judgement, paras 185-234.
[884] *See Prosecutor v. Krajišnik*, Judgement, ICTY Appeals Chamber (IT-00-39-A), 17 March 2009, Separate Opinion of Judge Shahabuddeen, para. 54.
[885] *See Tadić* Appeal Judgement, paras 195-220, 224-225.

505. Individual criminal responsibility for participation in a common criminal plan or purpose was included in Article 6 of the Nuremberg Charter and in Control Council Law No. 10.[886] The subsequent case law of Nuremberg-era tribunals, including that of national war crimes trials, confirmed that such participation could be the basis for individual criminal responsibility.[887] Notably, these cases based convictions upon individual participation in a common criminal plan or purpose carried out within concentration camps. As noted with respect to the *Dachau Concentration Camp* case:

> It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute 'acting in pursuance of a common design to violate the laws and usages of war'. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary.[888]

506. Based in large part on these Nuremberg-era pronouncements, the ICTY Appeals Chamber found that a common criminal plan or purpose doctrine was recognised as forming part of customary international law.[889] The jurisprudence of the ICTY, which has been followed by the other *ad hoc* international criminal tribunals, adopted the term

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[886] *See* Article 6 of the Nuremberg Charter (which states that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit [crimes against peace, war crimes, and/or crimes against humanity] are responsible for all acts performed by any persons in execution of such plan"); *see also* Article 2 of Control Council Law No. 10.

[887] *See e.g., Trial of Otto Sandrock and Three Other (Almelo Case)*, 24-26 November 1945, *Law Reports of Trials of War Criminals (1947)*, Vol. I, p. 35; *see also Trial of Franz Schonfeld and Nine Other*, 11-26 June 1946, *Law Reports of Trials of War Criminals (1949)*, Vol. XI, p. 64.

[888] *Trial of Martin Gottfried Weiss and thirty-nine others* (*Dachau Concentration Camp* case), 15 November-13 December 1945, *Law Reports of Trials of War Criminals (1949)*, Vol. XI, p. 14; *see also Trial of Josef Kramer and 44 others (Belsen case)*, 17 September-17 November 1945, *Law Reports of Trials of War Criminals (1947)*, Vol. II, p. 120 (in which the Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms: "The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened.")

[889] *Tadić* Appeal Judgement, paras 185-234 (finding that the notion of a common design existed under customary international law at least from 1992).

"joint criminal enterprise" to describe this particular form of criminal liability. Three distinct categories of joint criminal enterprise have been identified.[890]

507. In the first, or "basic" category of joint criminal enterprise, all members, acting pursuant to a common purpose, possess the same criminal intent. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill. The second category, "systemic" joint criminal enterprise, is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise. The third category, "extended" joint criminal enterprise, concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[891]

508. The jurisprudence has identified three broad objective elements shared by all three of these categories of joint criminal enterprise.[892] First, a plurality of persons is required, though they need not be organised in a military, political or administrative structure. While it is necessary to identify the plurality of persons belonging to the joint criminal enterprise, "it is not necessary to identify by name each of the persons involved".[893] Second, the existence of a common purpose that amounts to or involves the commission of a crime over which the Chamber has jurisdiction is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.[894] Third, the participation of the accused in the common purpose is required. This participation need not involve the

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[890] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 36; *see also Gacumbitsi* Appeal Judgement, para. 158; *Fofana* Trial Judgement, para. 206.
[891] *Vasiljević* Appeal Judgement, paras 97-99.
[892] *Prosecutor v. Brđanin*, Judgement, ICTY Appeals Chamber (IT-99-36-A), 3 April 2007, para. 364.
[893] *Prosecutor v. Brđanin*, Judgement, ICTY Appeals Chamber (IT-99-36-A), 3 April 2007, para. 430.
[894] *Tadić* Appeal Judgement, para. 227; *see also Kvočka* Appeal Judgement, para. 118 (stating that in regards to the systemic form of joint criminal enterprise, it is not necessary to establish an agreement in relation to each of the crimes committed with a common purpose).

commission of a specific crime but may take the form of assistance to, or contribution, to the execution of the common purpose.[895] The contribution of the accused need not be necessary or substantial, but it should at least be a significant contribution to the crimes for which he or she is found responsible.[896]

509. The three categories of joint criminal enterprise nonetheless vary with regard to their mental elements. Under the basic form of joint criminal enterprise, the accused must intend to perpetrate the crime and this intent must be shared by all co-perpetrators. The systemic form of joint criminal enterprise, which is a variant of the basic form but specifically concerns a common concerted system of ill-treatment (*e.g.*, an extermination or concentration camp), requires that the accused have knowledge of the nature of the system and intend to further the common system of ill-treatment.[897] For its part, the extended form concerns acts, which, although outside of the common plan for which the accused held a shared intent, are a natural and foreseeable consequence of the common plan. Here, the accused must be aware that the crimes outside of the common plan are a natural and foreseeable consequence of the plan and must have willingly taken this risk.[898]

510. In addition, a number of national legal systems uphold legal principles that are generally akin to those of joint criminal enterprise.[899] In particular, Article 82 of the 1956 Penal Code makes reference to co-perpetration as a form of responsibility deriving from direct participation. Article 82 of the 1956 Penal Code further states that any voluntary participant in a crime, whether a direct or indirect participant, may be equally liable with the principal of the crime.[900] While Cambodian jurisprudence on the 1956 Penal Code could not be located, French jurisprudence is instructive given that the 1956 Penal Code was modelled on the French criminal code. Relevant French jurisprudence reveals a broad understanding of co-authorship or co-perpetration that may also partially overlap

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[895] *Vasiljević* Appeal Judgement, para. 100.
[896] *Prosecutor v. Krajišnik*, Judgement, ICTY Appeals Chamber (IT-00-39-A), 17 March 2009, para. 215.
[897] *Vasiljević* Appeal Judgement, para. 101; *see also Kvočka* Appeal Judgement, para. 118 (stating that for specific intent crimes, like persecution, the accused must also share the discriminatory intent).
[898] *Vasiljević* Appeal Judgement, para. 101.
[899] *See Tadić* Appeal Judgement, paras 224-225 (surveying national legal systems for legal principles that overlap with joint criminal enterprise).
[900] Article 82 of the 1956 Penal Code; *see also* Article 26 of the 2009 Penal Code.

with the notion of joint criminal enterprise.[901] The Chamber notes that references to national legislation and case law only serve to illustrate that the notion of joint criminal enterprise (or common purpose) upheld in international criminal law has an underpinning in many national systems, including that of Cambodia. As correctly noted by the Pre-Trial Chamber in a decision on a separate matter, while similarities exist between participation in a joint criminal enterprise (in its basic and systemic forms) and co-perpetration under the 1956 Penal Code, the two notions are nevertheless not identical. While both require the shared intent by participants that the crime be committed, "participation in a JCE, even if it has to be significant, would appear to embrace situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than the direct participation required under domestic law."[902] Ultimately, joint criminal enterprise as applied by this Chamber follows from customary international law, not national law.

2.7.1.3.3.2 Applicability pursuant to Article 29 (new) of the ECCC Law

511. Article 29 (new) of the ECCC Law does not expressly refer to the notion of joint criminal enterprise as a form of responsibility. The language of Article 29 (new) of the ECCC Law does, however, mirror that of the Statute of the ICTY.[903] Notably, the jurisprudence of the ICTY has held that the word "committed" in Article 7(1) of its Statute implicitly includes participation in a joint criminal enterprise.[904] The Chambers of the ICTR and the SCSL have similarly reasoned that joint criminal enterprise is included as a form of responsibility within their own Statutes.[905] The Chamber considers that the

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[901] *See e.g.*, Cour de Cassation, Chambre Criminelle, 4 décembre 1974, Gaz. Pal. 1975, Somm. 93 ; Cour de Cassation, Chambre Criminelle, 13 Juin 1972, Bull. crim. no. 195.

[902] Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6, 20 May 2010, para. 41.

[903] *See* Article 7(1) of the ICTY Statute ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime."); *see also* Articles 6(1) of the ICTR and SCSL Statutes.

[904] *See Tadić* Appeal Judgement, para. 190 .

[905] *See Gacumbitsi* Appeal Judgement, para. 158; *Fofana* Trial Judgement, para. 208.

notion of commission through participation in a joint criminal enterprise is included in Article 29 (new) of the ECCC Law.[906]

512. The Chamber further considers that, in light of the Nuremberg Charter, Control Council Law No. 10 and the subsequent international jurisprudence discussed above, the systemic form of joint criminal enterprise, along with the basic form from which it derives, were part of customary international law during the 1975 to 1979 period.[907] Given the customary status of joint criminal enterprise (in its basic and systemic forms) since the Nuremberg-era, as well as its resonance with the Cambodian law concept of co-perpetration applicable at the time, the Chamber considers that the requirements of accessibility and foreseeability are satisfied (Section 1.5).

513. The Chamber notes that the Co-Prosecutors indicated that they would rely only on the basic and systemic forms of joint criminal enterprise during the initial hearing,[908] and sought to apply the extended form of joint criminal enterprise only in the alternative in both their Final Trial Submissions and their Rule 66 Final Submissions.[909] The Chamber consequently considers that it need not generally pronounce on the customary status of the third extended form of joint criminal enterprise during the 1975 to 1979 period.

2.7.1.4 Findings on committing through participation in a joint criminal enterprise

514. The Chamber has made extensive findings regarding the criminal nature of the S-21 system supervised by the Accused, which clearly resonate with the systemic form of joint criminal enterprise. It has found that, following the 15 August 1975 meeting with SON Sen, the Accused helped establish S-21, along with IN Lorn *alias* Nat, its initial

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[906] Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6, 20 May 2010, para. 49.
[907] Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6, 20 May 2010, para. 69; *see also* para. 71 (regarding the similarities between the basic and systemic forms).
[908] *See* T., 17 February 2009, pp. 9-10 (referring only to the first two forms of joint criminal enterprise); *see, however,* "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, 8 June 2009 (arguing for the applicability of all three forms of joint criminal enterprise).
[909] "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, 11 November 2009, para. 334; *see also* "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, 18 July 2008, para. 253.

Chairman (Section 2.3.3). As Chairman and Secretary of S-21, the Accused continued to refine and direct S-21's operations with the assistance of the junior members of the S-21 Committee, namely KHIM Vak *alias* Hor, and NUN Huy *alias* HUY Sre, until its abandonment on 7 January 1979 (Section 2.3.3.4). The Accused acted with these individuals, and through his subordinates, to operate the S-21 complex, a facility dedicated to the unlawful detention, interrogation and execution of perceived enemies of the CPK, both domestic and foreign. A concerted system of ill-treatment and torture was purposefully implemented in order to subjugate detainees and obtain their confessions during interrogations (Sections 2.3 and 2.4). S-24 was also used as an adjunct facility devoted to forced labour for detainees viewed as suspect by the CPK (Sections 2.3.3.7 and 2.4.2.1). As Deputy and then Chairman and Secretary of S-21, the Accused was deeply enmeshed in this criminal system, and contributed substantially to its implementation and development, including by ensuring the arrest and detention of some S-21 staff, and by being physically present during the arrest of certain notable detainees (Section 2.3.3.5.3).

515. The Chamber finds that the Accused knew of the criminal nature of the S-21 system and that he acted with the intent to further its criminal purpose. Further, the Chamber has found, by majority, the Accused's specific intent to discriminate against S-21 detainees on the basis of their perceived opposition to the CPK (Section 2.5.3.14.4).

516. Accordingly, the Chamber finds that, as a result of his participation in the systemic joint criminal enterprise at S-21, the Accused bears individual criminal responsibility for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts; as well as for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of a fair and regular trial, and unlawful confinement of a civilian.

517. Concurrent convictions for additional forms of responsibility listed in Article 29 (new) of the ECCC Law do not amount to additional convictions for the same crime.

Establishing the Accused's responsibility pursuant to additional forms may assist the Chamber at sentencing in determining the full extent of his participation in the crimes for which he is responsible.[910]

2.7.2 Planning

518. Planning requires that one or more persons design the criminal conduct that constitutes one or more crimes that are later perpetrated.[911] It must be demonstrated that the planning was a substantially contributing factor to the criminal conduct.[912]

519. The accused must have acted with the intent that the crime be committed, or have been aware of the substantial likelihood that the crime would be committed in the execution or implementation of that plan.[913]

2.7.3 Findings on planning

520. The Amended Closing Order states:

> 159. DUCH was substantially involved in formulating or endorsing the plan to establish S21 with the knowledge that its function would be criminal in nature. Further, following S21's formation, DUCH planned the specific crimes committed therein, with the intention that they be carried out.[914]

521. The Accused helped design the functioning of S-21 from its inception. He then continually strove to make S-21 a more efficient operation, including by choosing to relocate S-21 to the Pohnea Yat Lycée location and selecting Choeung Ek as an execution site (Sections 2.3.3.1, 2.3.3.4.1 and 2.3.3.6). The Chamber finds that the Accused's planning substantially contributed to the crimes later perpetrated at S-21. The Chamber further finds that the Accused intended these crimes to be committed, or at the very least

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910 *Cf.*, *Prosecutor v. Kamuhanda*, Judgement, ICTR Appeals Chamber (ICTR-99-54A-A), 19 September 2005, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, paras 405-416.
911 *Kordić* Appeal Judgement, para. 26.
912 *Kordić* Appeal Judgement, para. 26; *Sesay* Appeal Judgement, paras 687, 1170.
913 *Kordić* Appeal Judgement, para. 31; *Sesay* Trial Judgement, para. 268.
914 Amended Closing Order, para. 159.

was aware of the substantial likelihood that they would be committed in the execution or implementation of his planning.

2.7.4 Instigating

522. Instigating requires that one person, through either an act or omission, prompts another person to commit a crime.[915] Liability for instigating may ensue through implicit, written, or other non-verbal prompting by the accused. In contrast to ordering and superior responsibility, instigating does not require that the accused have any authority over the perpetrator. Instigating also requires more than merely facilitating the commission of crime, which may otherwise suffice for its aiding and abetting.[916] The instigation must be a substantially contributing factor to the criminal conduct that was later perpetrated.[917]

523. A superior's consistent failure to prevent or punish a perpetrator's crimes may, in some instances, amount to instigating the perpetrator to commit further crimes.[918]

524. The accused must have intended to provoke or induce the commission of the crime, or have been aware of the substantial likelihood that a crime would be committed in the execution of the instigation.[919]

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[915] *Kordić* Appeal Judgement, para. 27.
[916] *Prosecutor v. Orić*, Judgement, ICTY Trial Chamber (IT-03-68-T), 30 June 2006, para. 271.
[917] *Prosecutor v. Karera*, Judgement, ICTR Appeals Chamber (ICTR-01-74-A), 2 February 2009, para. 317; *Kordić* Appeal Judgement, para. 27.
[918] *Prosecutor v. Hazihasanovic et al.,* Judgment, ICTY Appeals Chamber (IT-01-47-A), 22 April 2008, para. 30 ("[T]he Appeals Chamber stresses that a superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed"); *Prosecutor v. Bagilishema*, Judgment, ICTR Trial Chamber I (ICTR-95-IA-T), 7 June 2001, para. 50; *see also Sesay* Trial Judgement), para. 311; *Prosecutor v. Halilovic*, Judgement, ICTY Trial Chamber (IT-01-48-T), 16 November 2005, paras 95-96.
[919] *Kordić* Appeal Judgement, para. 32; *Sesay* Trial Judgement, para. 271.

2.7.5 Findings on instigating

525. The Amended Closing Order states:

> 160. As Deputy Chairman and Chairman of S21, and also as an active CPK Party member, DUCH induced, encouraged and prompted the staff at S21 to commit the crimes described in this Closing Order by instructing and teaching Party doctrine and practice, assigning tasks, and through his presence and participation in all aspects of the security complex. His leadership and participation were clear contributing factors to the overall functioning of S21 and demonstrated an intention that the staff of S21 carry out these crimes.[920]

526. The Accused indoctrinated S-21 staff, including the impressionable youths he specifically sought out as subordinates, to be cruel and to treat all S-21 detainees as enemies of the CPK. He also provided practical training to the S-21 interrogators on the use of physical and psychological violence against the detainees (Section 2.3.3.5.2). The Chamber considers that the indoctrination and training carried out by the Accused contributed substantially to the crimes later perpetrated at S-21. The Chamber further finds that the Accused intended to provoke these crimes, or at the very least was aware of the substantial likelihood that they would be committed in the execution of his instigation.

2.7.6 Ordering

527. Ordering requires that a person in a position of authority instructs another person to commit a crime.[921] No formal superior-subordinate relationship between the two persons is required.[922] The person giving the order need only possess the authority, be it in law or in fact, to order the commission of the crime.[923] Liability for ordering a crime may ensue where an accused issues, passes down, or otherwise transmits the order, including

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[920] Amended Closing Order, para. 160.
[921] *Kordić* Appeal Judgement, para. 28; *Prosecutor v. Kajelijeli*, Judgment and Sentence, ICTR Trial Chamber (ICTR-98-44A-T), 1 December 2003, para. 763; *Sesay* Appeal Judgement, para. 164.
[922] *Kordić* Appeal Judgement, para. 28; *Semanza v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-97-20-A), 20 May 2005 ("*Semanza* Appeal Judgement"), para. 361; *Sesay* Trial Judgement, para. 273.
[923] *Semanza* Appeal Judgement, para. 361; *Gacumbitsi* Appeal Judgement, paras 181-182; *Prosecutor v. Limaj et al.*, Judgment, ICTY Trial Chamber (IT-03-66-T), 30 November 2005, para. 515; *Sesay* Trial Judgement, para. 273.

through intermediaries.[924] There is no requirement that an order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence.[925] It must be established that the issuance of the order was a substantially contributing factor to the criminal conduct that was later perpetrated.[926]

528. The accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.[927]

2.7.7 Findings on ordering

529. The Amended Closing Order states:

> 154. DUCH held a position of authority at S21 throughout the temporal jurisdiction of the court. From this position of authority, DUCH had the ability to direct, instruct or order his subordinates to perform any task associated with the functioning of the S21 complex. The chain of command at S21 was clearly delineated and the roles of its staff members were rigorously defined and enforced.
>
> 155. Orders and instructions, whether originating from DUCH or his alleged superiors, were given or passed with the intent and awareness that they would be achieved and institutionalised. Orders at S21 could be implicit, explicit, broad or specific, and could be received directly or indirectly by the perpetrator.
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> 156. The direction provided by DUCH contributed substantially to the events which took place at S21, and much of the conduct which was attempted or occurred can be described as criminal under the ECCC Law and Agreement.[928]

530. As Deputy of S-21 from October 1975 to March 1976, the Accused exercised authority over the members of the S-21 interrogation unit (Section 2.3.3.3). As Chairman of S-21 from March 1976 to its abandonment on 7 January 1979, the Accused was the undisputed head of S-21 and exercised authority over its entire staff (Section 2.3.3.4).

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924 *Milutinović* Trial Judgement, Vol. I, para. 87.
925 *Prosecutor v. Kamuhanda*, Judgement, ICTR Appeals Chamber (ICTR-99-54A-A), 19 September 2005, para. 76.
926 *Milutinović* Trial Judgement, Vol. I, para. 88.
927 *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 41-42.
928 Amended Closing Order, paras 154-156.

531. The Chamber has found that the Accused issued, passed down or transmitted orders to his S-21 staff to arrest, torture and execute detainees (Sections 2.3.3.5.3-2.3.3.5.5). The Chamber considers that these orders were factors which substantially contributed to the crimes later perpetrated at S-21. The Chamber further finds that the Accused intended to bring about the commission of these crimes, or at the very least was aware of the substantial likelihood that they would be committed as a consequence of the execution or implementation of his orders.

2.7.8 Aiding and abetting

532. As a preliminary matter, the Chamber notes that the French version of Article 29 (new) of the ECCC Law equates "aiding and abetting" to the notion of "complicité". In contrast, the French versions of the Statutes of both the ICTY and ICTR have equated the phrase "aiding and abetting" to "aidé et encouragé".[929] Given that Article 29 (new) of the ECCC Law is modelled on the provision of the *ad hoc* international criminal tribunals and that it derives from notions of international law, the Chamber finds that the phrase "aidé et encouragé" more clearly reflects the nature of this form of responsibility than does the notion of "complicité", which may encompass broader conduct.[930] The Khmer version of Article 29 (new) of the ECCC Law further supports this interpretation.[931]

533. Aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the commission of the crime by the perpetrator.[932] Though often considered jointly in the jurisprudence of international tribunals, "aiding" and "abetting" are not synonymous: "aiding" involves the provision of

[929] *See* Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute. French is not an official language of the SCSL.
[930] *Cf.,* Article 83 of the 1956 Penal Code (in which aiding and abetting, instigating and ordering are, amongst others, considered as forms of complicity).
[931] The literal translation of the Khmer version of the relevant portion of Article 29 of the ECCC Law refers to those "who planned, instigated, ordered or committed a crime, or *aided and abetted* in the preparation of the plan or in the commission of the crime" (emphasis added) (ECCC translation).
[932] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 45-46, 48; *Gacumbitsi* Appeal Judgement, para. 140.

assistance, while "abetting" involves "facilitating the commission of an act by being sympathetic thereto."[933]

534. No evidence of a plan or agreement between the aider and abettor and the perpetrator is required.[934] An accused may not be convicted of aiding and abetting a crime that was never carried out. The perpetrator of the crime need not have been tried or even identified.[935]

535. Liability for aiding and abetting a crime requires proof that the accused knew that a crime would probably be committed, that the crime was in fact committed, and that the accused was aware that his conduct assisted the commission of that crime.[936] This knowledge can be inferred from the circumstances.[937] Further, the requirement that the accused be aware of, though need not share, the perpetrator's intent applies equally to specific-intent crimes, like persecution as a crime against humanity.[938]

2.7.9 Findings on aiding and abetting

536. The Amended Closing Order states:

> 161. DUCH's subordinates respected his authority, and that at nearly every level of S21's operation, he gave them practical assistance, encouragement or moral support. This substantially contributed to the crimes described in this Closing Order. Further, DUCH appreciated his behaviour would assist in the commission of these crimes; knew their essential elements; and was aware of the intention of the perpetrators.[939]

537. In light of the Chamber's previous findings, it is clear that the practical assistance, encouragement and moral support provided by the Accused to his staff had a substantial

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933 *Milutinović* Trial Judgement, Vol. I, para. 89, fn. 107.
934 *Tadić* Appeal Judgement, para. 229.
935 *Milutinović* Trial Judgement, Vol. I, para. 92.
936 *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 49-50; *Brima* Appeal Judgement, para. 243.
937 *Milutinović* Trial Judgement, Vol. I, para. 94; *Sesay* Trial Judgement, para. 280.
938 *Prosecutor v. Blagojević et al.*, Judgement, ICTY Appeals Chamber (IT-02-60-A), 9 May 2007, para. 127 ("The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator. In cases of specific intent crimes such as persecutions or genocide, the aider and abettor must know of the principal perpetrator's specific intent.") (footnotes omitted).
939 Amended Closing Order, para. 161.

effect on their perpetration of crimes at S-21 (Section 2.3.3.5). The Chamber further finds that the Accused was aware that his conduct assisted in the commission of these crimes. Moreover, having trained his staff to consider all detainees as enemies of the CPK (Section 2.3.3.5.2), the Accused was aware of the discriminatory intent of the perpetrators in committing these crimes.

2.7.10 Superior responsibility

538. For an accused to be held responsible for the criminal conduct of his or her subordinates pursuant to superior responsibility, three elements must be fulfilled: (a) there must have been a superior-subordinate relationship between the accused and the person who committed the crime; (b) the accused must have known, or had reason to know, that the crime was about to be or had been committed; and (c) the accused must have failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator. Each of these elements is discussed in turn below.

539. The Chamber agrees with the international jurisprudence that has found that an accused may not be concurrently convicted pursuant to a "direct" form of responsibility (as listed in the first paragraph of Article 29 (new) of the ECCC Law) on the one hand, and superior responsibility on the other.[940] Instead, where both a form of "direct" responsibility and superior responsibility are established in relation to the same conduct, the Chamber will enter a conviction on the basis of the "direct" form of responsibility only, and consider the accused's superior position as an aggravating factor in sentencing.[941]

[940] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 91-92 (finding that concurrent conviction for individual and superior responsibility in relation to the same count based on the same facts constituted legal error invalidating the trial judgement); *Prosecutor v. Kajelijeli*, Judgment, ICTR Appeals Chamber (ICTR-98-44A-A), 23 May 2005, para. 81 ("*Kajelijeli* Appeal Judgement"); *Brima* Trial Judgement, para. 800.

[941] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, para. 91; *Kajelijeli* Appeal Judgement, para. 82.

2.7.10.1 Superior-subordinate relationship

540. Formal designation as a commander or a superior is not required in order to trigger superior responsibility: such responsibility can arise by virtue of a superior's power, whether in law or in fact, over those who committed the crime.[942] In order to demonstrate the existence of a superior-subordinate relationship, it must be established that the accused exercised effective control over the subordinate.[943] In other words, the accused must have had the material ability to prevent or punish the subordinate's commission of the crime.[944]

541. Factors that would demonstrate that an accused exercised effective control over a subordinate include: the nature of the accused's position, including his or her position within the military or political structure; the procedure for appointment and the actual tasks performed;[945] the accused's capacity to issue orders and whether or not such orders are actually executed;[946] the fact that subordinates show greater discipline in the presence of the accused;[947] the authority to invoke disciplinary measures;[948] and the authority to release or transfer prisoners.[949]

542. Further, superior responsibility may ensue on the basis of both direct and indirect relationships of subordination. Every person in the chain of command who exercises effective control over subordinates is responsible for the crimes of those subordinates, provided that the other requirements of superior responsibility are met.[950]

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[942] *Čelebići* Appeal Judgement, paras 191–192; *Kajelijeli* Appeal Judgement, para. 85.

[943] *See* Article 29 of the ECCC Law; *see also Prosecutor v. Bagilishema*, Judgement, ICTR Appeals Chamber (ICTR-95-1A-A), 3 July 2002 ("*Bagilishema* Appeal Judgement"), para. 61 ("The Appeals Chamber reiterates that the test in all cases is whether the accused exercised effective control over his or her subordinates."); *Prosecutor v. Delalić et al.,* Judgement, ICTY Trial Chamber (IT-96-21-T), 16 November 1998, paras 364-378 (regarding the requirement of "effective control").

[944] *Bagilishema* Appeal Judgement, para. 61 *citing Čelebići* Appeal Judgement, para. 198; *Brima* Appeal Judgement, para. 257.

[945] *Prosecutor v. Halilović*, Judgement, ICTY Appeals Chamber (IT-01-48-A), 16 October 2007, para. 66.

[946] *Strugar* Appeal Judgement, paras 253-254.

[947] *Čelebići* AppealJudgement, para. 206.

[948] *Strugar* Appeal Judgement, paras 260-262.

[949] *Čelebići* Appeal Judgement, para. 206.

[950] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, para. 67; *Čelebići* Appeal Judgement, para. 252.

2.7.10.2 Superior knew or had reason to know

543. In order to hold a superior responsible under Article 29 (new) of the ECCC Law for crimes committed by a subordinate, the superior must know, or have reason to know, that the subordinate was about to commit or had committed such crimes. The knowledge of the superior may not be presumed but must be established by direct or circumstantial evidence.[951] The superior must have knowledge of the alleged criminal conduct of his or her subordinates and not simply knowledge of the occurrence of the crimes themselves.[952]

544. A superior will be considered to have reason to know that crimes had been or were about to be committed where, in the circumstances of the case, he or she possessed information sufficiently alarming to justify further inquiry.[953] This information may be general in nature and does not need to contain specific details on the crimes which have been or are about to be committed.[954] The superior cannot be held liable for having failed to seek out such information in the first place. A superior may not, however, deliberately refrain from obtaining the relevant information when it is otherwise available to him or her.[955]

2.7.10.3 Failure to prevent or punish

545. An accused may be held liable pursuant to superior responsibility if he or she failed to take necessary and reasonable measures to prevent the commission of a crime or punish its perpetrators. Necessary measures are those appropriate for the superior to discharge his or her obligation, showing a genuine effort to prevent or punish. Reasonable measures are those reasonably falling within the material powers of the

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[951] *Kordić* Trial Judgement, para. 427; *Sesay* Trial Judgement, para. 309.
[952] *Prosecutor v. Orić,* Judgement, ICTY Appeals Chamber (IT-03-68-A), 3 July 2008, paras 57-59.
[953] *Prosecutor v. Hadžihasanović et al.,* Judgement, ICTY Appeals Chamber (IT-01-47-A), 22 April 2008 ("*Hadžihasanović* Appeal Judgement"), para. 28.
[954] *Čelebići* Trial Judgement, para. 393; *Sesay* Trial Judgement, para. 310.
[955] *Čelebići* Appeal Judgement, para. 226; *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 62-64, 406; *Sesay* Trial Judgement, para. 312.

superior. The determination of what constitutes necessary and reasonable measures must be made on a case-by-case basis and is not a matter of substantive law, but of evidence.[956]

546. The failure to punish and the failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates. They represent two distinct legal obligations, the failure of either one of which entails responsibility under Article 29 (new) of the ECCC Law.[957]

547. The failure to prevent and the failure to punish are not only legally distinct, but are also factually distinct in terms of the type of knowledge that is involved for each basis of superior responsibility. The duty to prevent arises for a superior from the moment he or she knows or has reason to know that a crime is about to be committed, while the duty to punish only arises after the commission of the crime.[958]

2.7.10.4 Findings on superior responsibility

548. The Chamber has found the Accused individually criminally responsible on the basis of "direct" forms of responsibility as listed in Article 29 (new) of the ECCC Law for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts; as well as the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

549. The Chamber is satisfied that the Accused's criminal liability for these crimes could also be established on the basis of his superior responsibility. Indeed, the Accused exercised effective control over the rest of the S-21 staff, knew that his subordinates were committing crimes, and failed to take necessary or reasonable measures to prevent their commission or punish their perpetrators (Section 2.3.3). However, in line with

[956] *Prosecutor v. Halilović*, Judgement, ICTY Appeals Chamber (IT-01-48-A), 16 October 2007, para. 63.
[957] *See Hadžihasanović* Appeal Judgement, para. 259.
[958] *Hadžihasanović* Appeal Judgement, para. 260.

established jurisprudence, the Chamber will take into account the Accused's superior position only at sentencing.

2.7.11 Defences raised that may exclude criminal responsibility

550. Throughout the trial, the Accused claimed that, as Deputy and then Chairman and Secretary of S-21, he acted pursuant to the orders of his superiors.[959] The Accused further alleged that he acted under duress in that he would have been killed had he not followed these orders.[960] The Defence argues that acting pursuant to superior orders or duress should exclude the Accused's criminal responsibility and result in his acquittal. Alternatively, the Defence submits that both are mitigating factors for the purposes of sentencing.[961]

2.7.11.1 Superior Orders

551. Article 29(4) of the ECCC Law provides:

> The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.[962]

552. Other international legal instruments, such as the Nuremberg Charter and the *ad hoc* Tribunal Statutes, also provide that acting pursuant to superior orders does not constitute a legitimate defence to charges of crimes against humanity and war crimes.[963] However, Article 33 of the Rome Statute excludes individual criminal responsibility for war crimes

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[959] T., 30 April 2009 (Accused), p. 66; T., 6 April 2009 (Accused), p. 36, 74-75; T., 22 June 2009 (Accused), p. 79.

[960] T., 6 April 2009 (Accused), pp. 20, 65; T., 2 September 2009 (Accused), p. 79; T., 16 September 2009 (Accused), pp. 7, 36; T., 22 June 2009 (Accused), pp. 79-81; T., 27 November 2009, p. 44.

[961] T., 25 November 2009 (Defence Closing Statement), p. 112; T., 27 November 2009 (Defence Closing statement), pp. 44-46 and 62 and T., 17 February 2009 (Defence), pp. 111-112.

[962] *See also* Article 100 of the 1956 Penal Code, the relevant national law during the 1975 to 1979 period, which states: "In the case of illegal orders given by a lawful authority, the judge shall determine, on a case-by-case basis, the criminal responsibility of those executing the orders." (Unofficial translation).

[963] Statute of the International Military Tribunal, Article 8: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determined that justice so requires." Article 7(4) of the ICTY Statute reads: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."; *see also* similar wording in Article 6(4) of the ICTR Statute and Article 6(4) of the SCSL Statute.

where the Accused did not know that the order was unlawful and the order was not manifestly unlawful.[964] In the present case, the Chamber has found that the Accused knew that the orders to kill, torture and arbitrarily detain persons protected under the Geneva Conventions were unlawful (Section 2.7.1.4). The Chamber also infers that the Accused knew that the acts constituting grave breaches of the Geneva Conventions were criminal in nature. It therefore finds that he also knew that orders of the Government of DK to commit these offences were unlawful.

2.7.11.2 Duress

553. No ECCC provision specifically addresses whether duress may exclude individual criminal responsibility, although Article 97(2) of the 1956 Penal Code states:

> Absolute necessity exists where the perpetrator of the offence, faced with an inevitable and imminent danger could only avoid it by committing the offence and, in addition, the danger did not arise from an act within his or her control, committed in order to create the danger.[965]

554. Other international tribunals, including the ICTY Appeals Chamber, have found that duress does not afford a complete defence to charges of crimes against humanity or war crimes involving the killing of innocent human beings, though it is admissible in mitigation of sentence.[966]

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[964] Article 33(1) of the Rome Statute provides: "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful: and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

[965] Unofficial translation.

[966] *See Prosecutor v. Erdemovic*, Judgement, ICTY Appeals Chamber (IT-96-22-A), 7 October 1997 (reversing a finding of the Trial Chamber that duress was not ruled out entirely as a complete defense, albeit one with strict requirements (*ibid.,* Judgement, ICTY Trial Chamber (IT-96-22-T), 29 November 1996) and remitting the matter to the Trial Chamber). In finding that duress could never amount to a complete defence to the killing of innocent civilians, the majority evaluated the status of the victims, the nature of the offence, the status of the Accused (a soldier carrying out combat operations), and the distinction between civil law systems (which generally allow duress to serve as a complete defence) and common law systems (which generally do not). The majority left open the possibility that duress could be a complete defence in relation to less serious crimes (ICTY Appeals Chamber Judgement, *ibid*., Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 66, 70, 88). By contrast, Judge Cassese found that duress may amount to a complete defence, including in relation to the killing of innocent civilians (*ibid.,* Separate and dissenting opinion of Judge Cassese, paras. 16 and 33)). In 1998, the Trial

555. At trial the Accused described the hierarchical structure of the Party Centre, the impossibility of disobeying the system, and the fact that even high-ranking party members could be categorized as enemies and killed.[967] Although the Accused described several situations in which he felt personally fearful,[968] he did not cite disobedience to an order.[969] The Chamber has elsewhere found that the Accused possessed and exercised significant authority at S-21 and that his conduct in carrying out these functions evidenced a high degree of efficiency and zeal.[970] The Chamber has also found that the Accused not only implemented but actively contributed to the development of CPK policies at S-21, for instance by producing confessions that were untrue (Section 2.3.3.5.4).

556. Although saying these appointments were against his will, the Chamber finds that the Accused's acceptance of appointment as deputy and then chairman of S-21 reflected his sense of duty to the CPK. His personal belief in the Party and commitment to its goals apparently subsisted even after he left S-21 on 7 January 1979.[971]

557. The Chamber accepts that towards the end of the existence of S-21, the Accused may have feared that he or his close relatives would be killed if his superiors found his conduct unsatisfactory. Duress cannot however be invoked when the perceived threat

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Chamber took up the remit and applied the Appeal Chamber's finding that duress could not constitute, as a matter of law, a complete defence in that case, although it used duress in mitigation of sentence (*ibid.,*Sentencing Judgement, ICTY Trial Chamber (IT-96-22-T*bis*), 5 March 1998); *see further* Article 31(1)(d) of the Rome Statute; *see also Trial of Otto Ohlendorf et al.* (*Einsatzgruppen* case), Trials of War Criminals, vol. IV, p. 480 and *US v. Alfred Krupp, et al.,* US Military Tribunal at Nuremberg, 1949 (X) LRTWC, p. 149 ("[…] if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the original conduct"); *see also Attorney-General of Israel v Eichmann* (1961) 36 ILR 5, p. 340.

[967] T., 25 November 2009 (Accused), pp. 64-64, 67; T., 14 September 2009 (Raoul JENNAR), pp. 68-70, 73.

[968] T., 6 April 2009 (Accused), pp. 20, 65; T., 2 September 2009 (Accused), p. 79; T., 16 September 2009 (Accused), pp. 7, 36; T., 22 June 2009 (Accused), pp. 79-81; T., 27 November 2009, p. 44.

[969] *See Prosecutor v. Erdemovic*, ICTY Appeals Chamber (IT-96-22-T), 7 October 1997, Separate and dissenting opinion of Judge Cassese, para. 15 (suggesting that disobedience to an order is a prerequisite for establishing duress).

[970] "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 154, ERN (English) 00192847; *see also* T., 28 May 2009 (Craig ETCHESON), pp. 20, 28-29, 91-92; T., 6 August 2009 (David CHANDLER), pp. 50, 61-63, 69-70.

[971] *See* Amended Closing Order, para. 166; T., 27 August 2009 (Accused), pp. 98-101; T., 2 September 2009 (Accused), pp 41-46 (describing his continuing allegiance to the Khmer Rouge (albeit with diminishing enthusiasm) until his arrest).

results from the implementation of a policy of terror in which he himself has willingly and actively participated.

558. The Chamber accordingly finds that the Accused did not act under duress as a Deputy and later Chairman of S-21. Duress as such is therefore irrelevant both in relation to the Accused's criminal responsibility and in mitigation of sentence. The Chamber has, however, considered factors such as the coercive climate in DK and the Accused's hierarchical position within the CPK in its determination of sentence (Section 3.3.3).

2.7.12 Cumulative convictions

559. The Chamber has found the Accused individually criminally responsible pursuant to Article 29 (new) of the ECCC Law for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture (including one instance of rape), persecution on political grounds, and other inhumane acts, as well as for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

560. Where the Accused's conduct fulfils the elements of different offences, the Chamber will evaluate the impact of multiple convictions. The *ad hoc* tribunal jurisprudence has acknowledged that multiple convictions serve to "describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[972] Since cumulative convictions create a risk of prejudice to the Accused,[973] the ICTY Appeals Chamber has formulated the following test in this area:

> 417. Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

[972] *Kunarac* Appeal Judgement, para. 169.
[973] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 2.

> 418. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[974]

561. Whether the same conduct violates two distinct statutory provisions is a question of law. The *Čelebići* test, and subsequent jurisprudence which has applied it, has emphasized the legal elements of each crime that may be the subject of a cumulative conviction rather than the underlying conduct of the Accused.[975]

2.7.12.1 Crimes against humanity and grave breaches

562. According to the case law of the *ad hoc* tribunals, cumulative convictions have been entered for analogous crimes as both crimes against humanity and grave breaches of the Geneva Conventions, in view of the distinctive character of both categories of offences.[976] The Chamber accordingly convicts the Accused for the following specific offences of crimes against humanity: extermination, enslavement, imprisonment, torture, persecution and other inhumane acts cumulatively with the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

2.7.12.2 Persecution and other underlying offences as crimes against humanity

563. The additional element of persecution when compared to all other offences as crimes against humanity is the specific discriminatory intent required by the perpetrator (Section 2.5.3.13).

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974 *Čelebići* Appeal Judgement, paras. 412, 413.
975 *See e.g., Kordić* Appeal Judgement, para. 387; *Sesay* Appeal Judgement, para. 1191.
976 *See e.g., Kordić* Trial Judgement (noting the different threshold requirements of both crimes and entering cumulative convictions for the crimes against humanity and grave breaches of murder and willful killing (para. 820), inhumane acts and willfully causing great suffering (para. 821), as well as imprisonment and unlawful confinement (para. 824)); *Kordić* Appeal Judgement, para. 1037.

564. The jurisprudence of the *ad hoc* tribunals has given detailed consideration to the relationship between persecution and other component offences that may comprise a charge of persecution. While prior jurisprudence adopted another point of view,[977] the ICTY Appeals Chamber has recently entered cumulative convictions for both persecution and other underlying crimes against humanity, on grounds that the offence of persecution contains materially distinct elements not contained in other crimes against humanity.[978]

565. Two of five members of the Appeals Chamber in the *Kordić et al.* Appeal Judgement, reflecting the previously-settled jurisprudence of that Chamber, disagreed that a conviction for persecution can be cumulated with other convictions as crimes against humanity if both convictions are based on the same criminal conduct.[979] While the ingredients of persecution and underlying offences may appear distinct when considered in the abstract, the question, according to the *Čelebići* test, is whether they are *materially* distinct; that is, whether each offence contains elements that require proof of a fact not required by the other offences.[980] Where, for example, the charge of persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure a conviction for murder or inhumane acts as well. The proof that the accused committed persecution through murder or inhumane acts *necessarily* includes proof of murder or inhumane acts. These offences become subsumed within the offence of persecution.[981] The Chamber endorses this application of

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[977] *See Prosecutor v. Krstić*, ICTY Appeals Chamber, Judgement, 19 April 2004, paras 231-233; *Krnojelac* Appeal Judgement, para. 188 and Disposition; *Vasiljević* Appeal Judgement, paras 146-147 and Disposition. Subsequent *ad hoc* tribunals have, however, confirmed the approach adopted by the *Kordić et al.,* Appeal Judgement (*see e.g., Nahimana* Appeal Judgement, paras 1024-1026).

[978] *Kordić* Appeal Judgement, paras 1039-1043 (considering, for example, persecution to require proof that an act or omission discriminates in fact and proof of a specific intent to discriminate. Murder, by contrast, requires merely proof that the accused caused the death of one or more persons, regardless of whether the act or omission in question discriminates in fact or was specifically intended as discriminatory).

[979] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, paras 1, 13 (finding the previous decisions of the Appeals Chamber in *Krnojelac, Vasiljević* and *Krstić* to represent the correct application of the *Čelebići* test and considering that no cogent reasons existed to depart from this jurisprudence).

[980] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions*,* para. 5.

[981] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions*,* paras 10, 12 (noting that where persecution requires the materially distinct elements of a discriminatory act and a discriminatory intent, it is therefore more specific than murder or other inhumane acts as a crime against humanity (citations omitted)); *see also ibid.,* para. 11 (further noting

the *Čelebići* test, but concurs that there is need for a precise description of the convicted person's full culpability in the disposition, and hence express identification of the underlying conduct upon which the conviction for persecution has been based.[982]

2.7.12.3 Murder and Extermination

566. The Accused's responsibility in relation to the crimes against humanity of murder and extermination is based on the same underlying conduct (Section 2.4.1). Murder and extermination as crimes against humanity share a number of elements. The ingredient that distinguishes these two offences is that the crime of extermination requires an element of mass killing (Section 2.5.3.1). Murder as a crime against humanity is therefore subsidiary to extermination as a crime against humanity.[983]

2.7.12.4 Conclusions on the criminal responsibility of the Accused

567. The Chamber has found the Accused individually criminally responsible pursuant to Article 29 (new) of the ECCC Law for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture (including one instance of rape), persecution on political grounds, and other inhumane acts; as well as for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

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that convictions for imprisonment and persecution are impermissibly cumulative. Where persecution takes the form of imprisonment, the former subsumes the latter (citations omitted)).

[982] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 2; *see also ibid.,* para. 6 (describing the crime of persecution as an 'empty hull'; a residual category designed to cover all possible underlying offences of persecution. It is therefore necessary to describe what breaches of which fundamental rights are encapsulated by this charge in order to avoid impermissible vagueness).

[983] The Chamber notes that the Amended Closing Order has specified murder as a component offence of persecution but makes no reference to extermination (Amended Closing Order, para. 141 (alleging that the Accused committed persecution by subjecting detainees to "arbitrary and unlawful detention, torture, enslavement, murder, and other inhumane acts.")) In view of its finding that all component crimes against humanity were in this case subsumed within the umbrella offence of persecution, the Chamber considers this to be of little consequence.

568. In light of the jurisprudence regarding cumulative convictions, the Chamber therefore convicts the Accused of persecution on political grounds as a crime against humanity (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts). It further enters convictions for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

3 SENTENCING

3.1 Submissions

569. In view of the gravity of the crimes committed by the Accused and numerous aggravating factors, the Co-Prosecutors request a sentence of life imprisonment. They add, however, that a conversion of this life sentence to 45 years of imprisonment would provide an adequate remedy for the Accused's unlawful detention by the military authorities of the Kingdom of Cambodia. A further reduction of five years would also be appropriate in light of applicable mitigating factors. Accordingly, the Co-Prosecutors request that the Chamber impose a sentence of 40 years of imprisonment.[984]

570. During the closing statements, the Accused acknowledged his "legal and moral" responsibility for the crimes committed at S-21,[985] but nevertheless requested that the Chamber release him, and sought an acquittal on all crimes charged against him.[986] The Accused's international defence counsel, who appeared to distance himself from those comments, noted that the Chamber should instead consider a number of mitigating factors in determining a sentence.[987] In addition, the Accused's Final Written Submissions requested that the Chamber deduct from any sentence imposed the time spent by him in provisional detention since 10 May 1999, as well as an additional period as a remedy for the violation of his right to be tried within a reasonable time.[988]

3.2 Applicable law

3.2.1 ECCC provisions and sentencing framework

571. Rule 98(5) of the Internal Rules provides that "[i]f the accused is found guilty, the Chamber shall sentence him or her in accordance with the Agreement, the ECCC Law

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984 "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 357-486.
985 T., 25 November 2009 (Accused), p. 69.
986 T., 25 November 2009 (Defence), pp. 80-113; T., 27 November 2009 (Accused), pp. 59-60; T., 27 November 2009 (Defence), p. 62.
987 T., 26 November 2009 (Defence), pp. 75-82; T., 27 November 2009 (Defence), p. 52.
988 "Final Defence Written Submissions", E159/8, 11 November 2009, p. 15.

and these [Internal Rules]."[989] No distinction is drawn in any of these ECCC documents between national or international crimes as regards sentencing.

572. Article 10 of the ECCC Agreement provides that "[t]he maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment." Article 39 (new) of the ECCC Law supplements this provision as follows:

> Those who committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 [of the ECCC Law] shall be sentenced to a prison term from five years to life imprisonment.
>
> In addition to imprisonment, the [Trial Chamber] may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.
>
> The confiscated property shall be returned to the State.[990]

573. The ECCC Law and Agreement also provide that the Chamber shall exercise its jurisdiction in accordance with the provisions of Articles 14 and 15 of the ICCPR.[991] Article 15(1) of the ICCPR states that a heavier penalty than the one that was applicable at the time the criminal offence was committed cannot be imposed and that "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby".[992] A review of relevant international sentencing guidelines for crimes against humanity and grave breaches of the Geneva Conventions of 1949 indicates that the penalties applicable before the ECCC for these crimes do not contravene Article 15(1) of the ICCPR.[993]

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[989] Unlike the procedure applicable before other international criminal tribunals, the ECCC legal framework envisages neither the possibility of a plea of guilty nor a specifically-designated sentencing hearing. Under Cambodian law, questions relating to guilt and sentencing are dealt with at the same hearing and are determined in a single decision.

[990] *See also* Article 38 of the ECCC Law.

[991] *See* Article 33 new of the ECCC Law and Article 12(2) of the ECCC Agreement.

[992] *See also* Article 6(2) of the 1956 Penal Code and Article 10(1) of the 2009 Penal Code (providing for the immediate application of provisions which prescribe lighter penalties).

[993] *See e.g.*, Nuremberg Charter, Article 27 (which provided for the possibility of "impos[ing] upon a Defendant, on conviction, death or such other punishment as shall be determined by [the Tribunal] to be just") and Article 28 (allowing the Tribunal to deprive the convicted person of "any stolen property"); *see also* the penalties provided for in Article 77 of the ICC Statute, Article 24 of the ICTY Statute, Article 23 of the ICTR Statute and Article 19 of the SCSL Statute.

574. Nor do the relevant sentencing provisions within Cambodian law appear to contravene Article 15(1) of the ICCPR. The 1956 Penal Code, the applicable law at the time these offences were committed, suggests that the death penalty may have been applicable in relation to many offences akin to crimes against humanity and grave breaches of the Geneva Conventions.[994] In relation to subsequent Cambodian provisions, the Chamber is unable to undertake a comparison between the sentencing regime contained in the 2009 Penal Code and that applicable before the ECCC, as the former is not yet fully in force.[995] Article 33 (new) of the ECCC Law, which implements the Agreement, obligates the Chamber to exercise its jurisdiction in conformity with Articles 14 and 15 of the ICCPR. The Agreement creates a *sui generis* sentencing regime. It is therefore doubtful whether, on the basis of Article 33 (new), the Chamber could follow a subsequent national legislative provision in preference to provisions of the Agreement. Such an interpretation could mean that future acts of the national legislature concerning sentence might frustrate the Agreement.

575. The ECCC Agreement, the ECCC Law and the Internal Rules are otherwise silent as regards the principles and factors to be considered at sentencing. In particular, they do not indicate whether sentencing before the ECCC is governed by international or Cambodian legal rules, or some combination of each.[996]

576. International tribunals have developed sentencing guidelines in relation to the same or similar types of crimes to those punishable before the ECCC. There is, however, no uniform approach to sentencing before these tribunals. Further, the sentencing regime applicable before the ICTY, ICTR and SCSL diverges from that applicable before the ICC. As a result, there is no single international sentencing regime directly applicable before the ECCC.

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[994] *See* Article 21, 1956 Penal Code (imposing the death penalty in relation to crimes of the third degree, which include torture (Article 500, 1956 Penal Code) and more serious categories of homicide (*see e.g.* Article 506, 1956 Penal Code)).

[995] Only one portion (Part I) of the 2009 Penal Code is currently in force. The remainder of the 2009 Penal Code has yet to be promulgated and is accordingly not in force. It envisages, for crimes analogous to these, a mandatory term of life imprisonment.

[996] *Cf.*, Article 24 of the ICTY Statute (indicating that"[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.")

577. The Chamber considers that the international nature of the crimes for which the Accused has been convicted, and the uncertainties and complexities evident in the evolution of Cambodian criminal law from the 1956 Penal Code onwards,[997] rules out the direct application of Cambodian sentencing provisions.

578. The Chamber consequently considers that it must exercise its own discretion in determining the sentence it considers justified. In so doing, the Chamber will seek guidance from a number of relevant international and Cambodian sentencing principles and factors.[998]

3.2.2 Relevant sentencing principles and factors

579. The ECCC, like other internationalised tribunals, is entrusted with reducing crimes of considerable enormity and scope into individualised sentences. In doing so, it also seeks to reassure the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally-accepted laws and rules have to be obeyed by all, irrespective of status or rank.[999]

580. While an obvious function of a sentence is to punish, its goal is not revenge.[1000] The sentence must be proportionate and individualised such that it reflects the culpability of the accused based on an objective, reasoned and measured analysis both of his or her conduct and its consequential harm.[1001]

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[997] The Parties were provided with an opportunity to make submissions following the promulgation of the 2009 Penal Code of Cambodia but none chose to do so; *see* "Order Relevant to the 2009 Penal Code of Cambodia", E180/1, 4 February 2010.

[998] Judge LAVERGNE departs from the majority in relation solely to the legal approach to sentencing (*see* Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, E188.1).

[999] *Prosecutor v. Nikolić*, Sentencing Judgement, ICTY Trial Chamber (IT-94-2-S), 18 December 2003, para. 139; *Prosecutor v. Brima et al.*, Sentencing Judgement, SCSL Trial Chamber, (SCSL-04-16-T), 19 July 2007 ("*Brima* Sentencing Judgement"), para 16.

[1000] *See e.g.*, *Aleksovski* Appeal Judgement, para. 185.

[1001] *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber, (SCSL-04-15-T), 8 April 2008, para. 16; *Furundzija* Appeal Judgement, para. 249.

581. The principles of equality before the law, proportionality and individualisation of penalties are amongst the international principles that have been incorporated in Cambodian law.[1002]

582. International jurisprudence has established that the gravity of the crime committed is the "litmus test for the appropriate sentence",[1003] and requires "consideration of the particular circumstances of the case, as well as the form and degree of the participation of the [a]ccused in the crime."[1004] Rule 145(1)(c) of the ICC's Rules of Procedure and Evidence similarly emphasises:

> the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.[1005]

583. Moreover, the Chamber will consider all relevant aggravating and mitigating factors in determining a sentence. Aggravating factors should be proved by the Co-Prosecutors to the same standard as that required for a conviction and only circumstances directly related to the commission of the offence charged, and for which the accused has been convicted, will be considered to be aggravating. Hence, when a particular factor is an element of the underlying offence, it cannot be taken into account as an aggravating factor.[1006] Further, the same fact cannot be used both to demonstrate the gravity of the crime and as an aggravating factor.[1007] Rule 145(2)(b) of the ICC's Rules of Procedure and Evidence provides the following useful guidelines as regards aggravating factors, which the Chamber adopts, where relevant, to the sentencing of Kaing Guek Eav:

[1002] *See, e.g.,* Article 31(2) of the 1993 Constitution of the Kingdom of Cambodia; Article 96 of the 2009 Penal Code.
[1003] *See Aleksovski* Appeal Judgement, para. 182.
[1004] *See Stakić* Appeal Judgement, para. 380.
[1005] ICC RPE, Rule 145(1)(c). Similarly, Article 96 of the 2009 Penal Code of Cambodia provides that in imposing a penalty, account must be taken of the seriousness and circumstances of the offence and the character of the accused.
[1006] *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber (SCSL-04-15-T), 8 April 2009, para. 24.
[1007] *Prosecutor v. Deronjić,* Judgement on Sentencing Appeal, ICTY Appeals Chamber (IT-02-61-A), 20 July 2005, paras 106-107; *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber, (SCSL-04-15-T), 8 April 2008, para. 16.

> (i) [a]ny relevant prior criminal convictions for crimes under the jurisdiction of the [ICC] or of a similar nature; (ii) Abuse of power or official capacity; (iii) Commission of the crime where the victim is particularly defenceless; (iv) Commission of the crime with particular cruelty or where there were multiple victims; (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3 [i.e., gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status]; (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.[1008]

584. The jurisprudence of other international tribunals has established that the burden of proof on an accused with regard to mitigating factors is lower than it is on the prosecution for aggravating factors.[1009] Unlike aggravating factors, mitigating factors may be taken into account regardless of whether they are directly related to the alleged offence.[1010] Rule 145(2)(a) of the ICC's Rules of Procedure and Evidence identifies the following mitigating factors, which the Chamber also adopts:

> (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
>
> (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.[1011]

585. Mitigating factors also play a role in sentencing under Cambodian law.[1012]

3.2.3 The effect of multiple convictions upon sentence

586. There are no provisions in the ECCC Agreement, the ECCC Law or the Internal Rules indicating whether the Chamber may impose a single sentence following conviction for multiple offences, where each conviction is based on distinct criminal conduct.

[1008] ICC RPE, Rule 145(2)(b)**.**
[1009] *Blaškić* Appeal Judgement, para. 697.
[1010] *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber (SCSL-04-15-T), 8 April 2009, para. 28.
[1011] ICC RPE, Rule 145(2)(a).
[1012] *See* Article 93 of the 2009 Penal Code.

587. The practice at the Nuremberg and Tokyo Tribunals was to impose a single global sentence, even upon conviction for several offences. Before the ICTY, ICTR and SCSL, the matter has been left to the discretion of individual Trial Chambers, although the imposition of a single sentence will usually be appropriate in cases where the offences may be considered to belong to a single criminal transaction.[1013]

588. Article 78(3) of the Rome Statute instead provides that

> [w]hen a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment […].[1014]

589. The Chamber notes that while Cambodian practice has also varied on the matter, the 2009 Penal Code states:

> [i]f, in the course of a single prosecution, the accused is found guilty of several concurrent offences, each of the penalties incurred may be imposed. However, if several penalties of a similar nature are incurred, only one such penalty not exceeding the highest maximum penalty allowed by law may be imposed.[1015]

590. The Chamber therefore considers that it may impose a single sentence that reflects the totality of the criminal conduct where an accused is convicted of multiple offences.

3.2.4 Applicable sentence where the maximum sentence of life imprisonment is not imposed

591. The ECCC legal framework does not indicate any maximum sentence in instances where life imprisonment is not imposed. The ICTY, the ICTR and the SCSL consider the matter to be wholly within the discretion of the judges, who have considerable (though

[1013] *Prosecutor v. Ntakirutimana*, Judgement and Sentence, ICTR Trial Chamber (ICTR-96-10 & 96-17-T), 21 February 2003, para. 917; *see also Kambanda v. Prosecutor,* Judgement, ICTR Appeals Chamber (ICTR 97-23-A), 19 October 2000, paras 109-10; *Čelebići* Appeal Judgement; *Brima* Sentencing Judgement, para 12.
[1014] Rome Statute, Art. 78(3).
[1015] Article 137 of the 2009 Penal Code.

not unfettered) discretion to tailor the length of the sentence to best reflect the totality of the accused's individual culpability.

592. By contrast, Article 77(1) of the Rome Statute provides:

> […] the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.[1016]

593. Accordingly, the ICC envisages no intermediate term of imprisonment between 30 years imprisonment and life.

594. Similarly, Article 95 of the 2009 Penal Code does not provide for any intermediate penalty between 30 years imprisonment and a life sentence.[1017]

595. By a majority (Judge LAVERGNE dissenting), the Chamber after considering the sentencing range of five years to life imprisonment provided in the ECCC Law, and noting that there are no binding international guidelines in relation to sentencing, decides in applying ECCC Law that it has the discretion to impose a term of imprisonment other than a life sentence.

3.3 Findings

3.3.1 Gravity of the crimes

596. The Co-Prosecutors contend that in evaluating the gravity of the crimes, the Chamber should consider the role of the Accused in their commission, their impact on the

[1016] Rome Statute, Art. 77(1).
[1017] Article 95 of the 2009 Penal Code ("[i]f the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances may impose a sentence of between fifteen and thirty years imprisonment"); *see also* Articles 15 and 128(2) of the 1956 Penal Code.

victims and their families, and the Accused's individual circumstances.[1018] The Chamber agrees that these factors are relevant to determining the gravity of the crimes.

597. The Chamber has found the Accused criminally responsible for crimes of a particularly shocking and heinous character. As Deputy and then Chairman of S-21, the Accused managed and refined a system over the course of more than three years that resulted in the execution of no fewer than 12,272 victims, the majority of whom were also systematically tortured. Victims who were not executed died as a result of the conditions of detention, which led to widespread disease, malnourishment and physical and psychological pain, as well as extreme fear. The Accused worked tirelessly to ensure that S-21 ran as efficiently as possible and did so out of unquestioning loyalty to his superiors and CPK ideology, without regard to the humanity of the detainees he oversaw. Under his tutelage, S-21 became a highly efficient instrument of persecution in furtherance of a politically-motivated policy of discrimination.

598. Only a very small number of those detained at S-21 survived. S-21 survivors who appeared before the Chamber testified to the lasting physical and psychological impact of their ordeal.[1019] The relatives of S-21 detainees also testified to the devastating consequences of the Accused's crimes on these detainees' families.[1020]

599. Further, the Accused was an intelligent and educated man serving as Deputy and then Chairman and Secretary of S-21, and hence fully understood the nature of his acts at the time.

600. In light of the foregoing, the Chamber considers that the Accused's crimes are extremely grave.

[1018] "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 368-386.
[1019] *See e.g.* Sections 2.4.4.1.2, 2.4.5.1, 2.4.5.2 and 2.4.5.3.
[1020] *See e.g.,* T., 17 August 2009 (Robert HAMILL), pp. 92-101; T., 18 August 2009 (HAV Sophea), pp. 50-53; T., 18 August 2009 (NETH Phally), p. 106; T., 18 August 2009 (Antonya TIOULONG), pp. 15-17; T., 17 August 2009 (Martine LEFEUVRE), pp. 22-23, 30, 38-41; T., 20 August 2009 (OU Savrith), pp. 60-66.

3.3.2 Aggravating factors

601. The Co-Prosecutors contend that the Chamber should consider the following aggravating factors in rendering a sentence: the Accused's abuse of power or official capacity, the cruelty of the crimes committed, the defencelessness of the victims, and the discriminatory intent with which the crimes were committed.[1021] The Chamber agrees that these are relevant aggravating factors that may be considered in its determination of a sentence.

602. As Deputy and then Chairman of S-21, the Chamber has found that the Accused exercised his authority by indoctrinating, training and supervising staff in their commission of crimes against the S-21 detainees. Moreover, many of the S-21 staff members were very young and were corrupted by the requirement to treat the detainees with great cruelty. Although the Chamber has convicted the Accused solely on the basis of direct form[s] of responsibility for most crimes, the Accused's superior position constitutes an aggravating factor in relation to these crimes.[1022]

603. Many of the crimes committed at S-21 were also carried out in a particularly cruel manner. Detainees were subject to a host of brutal torture techniques and were, in some instances, literally beaten to death. Further, the Chamber considers that the sheer number of victims of these crimes, no fewer than 12,273, serves as an additional aggravating factor.

604. S-21 detainees, who included the children, spouses and family members of other detainees, were clearly defenceless and vulnerable. Throughout their detention, every facet of these detainees' lives was under the control of their captors, including the date and manner of their execution.

605. With the exception of persecution as a crime against humanity (for which a discriminatory intent is a legal ingredient of the offence), a discriminatory intent, where proved, may be considered as an aggravating factor in sentencing. Such intent may be

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[1021] "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 388-408.
[1022] *See* Section 2.7.10.4..

inferred from the circumstances of the crime where the accused knowingly participated in a system that discriminated on political grounds.[1023] The Chamber has found by majority that the Accused carried out his crimes with a specific discriminatory intent based on the victims' perceived political opposition and status as enemies of the CPK (Section 2.5.3.14.4). In finding the Accused guilty of the crime of persecution, the Chamber has considered that the crime of persecution encompasses all other crimes against humanity with which the Accused was charged (Section 2.5.3.14). It follows that in determining the applicable sentence, discriminatory intent, as a legal ingredient of the crime of persecution, can be considered as an aggravating circumstance neither in relation to the commission of the offence of persecution nor in relation to the commission of the crimes it encompasses. It is, however, an aggravating factor in relation to all other crimes for which the Accused is convicted, where a discriminatory intent is not a legal ingredient of those offences.

3.3.3 Mitigating factors

606. During his closing statement, the international defence counsel argued that the Chamber should consider the following mitigating circumstances: the fact that the Accused acted pursuant to superior orders and under duress, his cooperation with the ECCC, his remorse for the crimes committed, and his propensity for rehabilitation.[1024] In their Final Written Submissions, the Co-Prosecutors disputed that superior orders or duress were mitigating factors in the present case but agreed that allowances should be made for the Accused's general cooperation, limited acceptance of responsibility, remorse and the potential impact of these factors on national reconciliation.[1025] During their closing statements, the Co-Prosecutors amended their submissions to the extent that as the Accused was now arguing for an acquittal, no mitigating factors should be considered.[1026]

[1023] *Prosecutor v. Simić et al.,* Judgement, ICTY Trial Chamber (IT-95-9-T), 17 October 2003 ("*Simić et al.* Trial Judgement"), para. 51; *see also Blaškić* Appeal Judgement, para. 164.
[1024] T., 26 November 2009 (Defence), pp. 75-80.
[1025] *See* "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 409-452.
[1026] T., 27 November 2009 (Prosecution), p. 4.

607. The Statutes of the ICTY, ICTR and SCSL specifically permit superior orders to be considered in mitigation of punishment.[1027] A subordinate who establishes the existence of superior orders "may be subject to a less severe sentence only in cases where the order of the superior effectively reduces the degree of his guilt. If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist."[1028] In view of the extended period of time over which these crimes were committed, the large number of victims and the Accused's dedication to refining the operations of S-21, the Chamber considers that the Accused has failed to establish that superior orders should be considered as a mitigating factor in the circumstances of this case (Section 2.7.11.1).

608. Though often pleaded in conjunction with superior orders, duress may also serve as an independent mitigating factor.[1029] Similarly, however, the Chamber finds that the Accused has failed to establish that duress should be considered as a mitigating factor in the circumstances of this case (Section 2.7.11.2). Nonetheless, the Chamber places limited weight on the coercive climate in DK and his subordinate position within the CPK.

609. Notwithstanding his belated request for acquittal, the Chamber considers that the Accused's cooperation with the ECCC may serve as a mitigating factor.[1030] The Accused demonstrated a willingness to cooperate with the ECCC throughout the investigation and the trial proceedings. He provided substantial information regarding his role in the functioning of S-21 and of the crimes committed therein. The Accused's cooperation with the ECCC undoubtedly facilitated the proceedings before the Chamber. Further, the

[1027] *See* Article 7(4) of the ICTY Statute, Articles 6(4) of the ICTR and SCSL Statutes.
[1028] *Prosecutor v. Erdemović,* Sentencing Judgement, ICTY Trial Chamber (IT-96-22-T), 29 November 1996, para. 53.
[1029] *See* e.g. *Prosecutor v. Martić,* Judgement, ICTY Trial Chamber (IT-95-11-T), 12 June 2007, para. 501; *see also* Rule 145(2)(a)(i) of the ICC RPE.
[1030] *See* Rule 145(2)(a)(ii) of the ICC RPE; *see also* Rules 101(B)(ii) of the ICTY, ICTR and SCSL RPE.

Chamber considers that his cooperation assisted in the pursuit of national reconciliation, one of the goals of the ECCC.[1031]

610. Expressions of remorse have been held to be a mitigating factor in sentencing before the international tribunals.[1032] The Accused repeatedly made public apologies and expressed remorse for his crimes when given the opportunity. The Chamber finds, however, that the mitigating impact of his remorse is undermined by his failure to offer a full and unequivocal admission of his responsibility. In particular, the Accused's request during the closing statements for acquittal, despite earlier apparent admissions of responsibility, diminishes the extent to which his remorse would otherwise mitigate his sentence.

611. The propensity for rehabilitation of an accused has also been taken into account at sentencing.[1033] The ICTY Appeals Chamber has counselled, however, that rehabilitation is not a factor "which should be given undue weight."[1034] Experts Françoise SIRONI-GUILBAUD and KA Sunbaunat, who were tasked with providing a psychological assessment of the Accused, stated that they believed that the Accused could be rehabilitated and reintegrated into society based on his past experiences and his present condition.[1035] The Chamber concurs with this opinion. The Chamber has thus accorded limited consideration to the Accused's propensity for rehabilitation in its determination of sentence.

3.3.4 Psychiatric and psychological assessment of the Accused

612. An expert report evaluating the Accused's personal and psychological characteristics concluded that he presented no indication of mental or psychological

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[1031] *See* Preamble of the ECCC Agreement (citing the importance of national reconciliation); *see also* T., 14 September 2009 (Richard GOLDSTONE), pp. 25-26, and T., 15 September 2009 (Stéphane HESSEL), pp. 49-75 (regarding national reconciliation).
[1032] *Blaškić* Appeal Judgement, para. 705.
[1033] *Furundzija* Trial Judgement, para. 291; *Kayishema et al.* Trial Judgement, para. 26.
[1034] *Čelebići* Appeal Judgement, para. 806.
[1035] *See* "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509, pp. 66-67, ERN (English) 00211147-00211148; T., 31 August 2009 (Françoise SIRONI-GUILBAUD and KA Sunbaunat), pp. 35, 101; T., 1 September 2009 (Françoise SIRONI-GUILBAUD and KA Sunbaunat), p. 23.

disorder.[1036] In its detailed discussion of the Accused's personality, the experts drew on their clinical experience and scientific research, as well as on cultural, religious and social factors relevant to the Accused, considered by them to be vital for a comprehensive assessment of him.

613. They described him as a "dutiful person, readily influenced by [and] responding well to strong leadership," with a "need for affiliation, and for recognition and acknowledgement by his superiors."[1037] They further noted the Accused's experiences of successive and major assimilation of different cultural systems, concluding in a radical and abrupt affiliation with communism, which he described "as a single, tangible [and] complete social order."[1038] Marxist ideology satisfied his need for certainty and was subsequently replaced with an equally strong commitment to Christianity, described as a "pragmatic and safe choice."[1039] In identifying with Marxism, the Accused showed zeal and "extreme allegiance"[1040]; surpassing his superiors' expectations in order to suppress his increasing doubts regarding Angkar's plans for "smashing" enemies, and his own fears of imminent death.[1041]

614. The experts described the Accused as lacking in empathy, which they attributed in part to the "fabrication" or conditioning process developed by the Khmer Rouge to eliminate emotions and to enhance self-control.[1042] They also noted that the Accused was able to construct powerful defence mechanisms insulating him from emotional reactions

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[1036] "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509. This report was prepared on the request of the Co-Investigating Judges and supplemented by the testimony of both experts on 31 August 2009 (T., 31 August 2009) and further assessments of the Accused during trial. The Accused cooperated fully during these assessments (*ibid.,* p. 16).
[1037] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 24.
[1038] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 24.
[1039] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 26.
[1040] T., 15 September 2009 (Accused), pp. 40, 42 (recounting the influence of his commitment to the Revoluion on his view of his own family, and noting that in consequence, he had to consider his parents as "individual[s] or a family which belonged to the Party" and his children as "children of Angkar" who "were raised to serve the Revolution.")
[1041] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 25 (noting that dehumanizing the victims also required dehumanizing the executioners by divesting them of their individual or personal emotions, and replacing them with political emotions, which Angkar could exploit and control).
[1042] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), pp. 32, 46; *see also* "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509, pp. 27, 36, 49 ERN (English) 00211108, 00211117, 00211130.

and inner conflicts created by his external reality: mechanisms which they described as ultimately enabling him to nurture his own family whilst overseeing the deaths of children at S-21.[1043]

615. The Accused was further depicted as highly intelligent, with an excellent memory, as well as meticulous, rigid, detail-oriented and obsessional: features that were also apparent to the Chamber during trial. The experts also perceived, and appeared to assess positively, the Accused's greater capacity for self-reflection regarding his life and actions as the investigation and trial progressed.[1044]

616. The Chamber accepts the conclusions reached by the experts and finds that the Accused has no psychological or psychiatric impairment relevant to his criminal responsibility. It accepts their assessment of his capacity for rehabilitation and reintegration into society.[1045] It concurs with their evaluation of him as an intelligent, well-educated and methodical individual, who appeared anxious to please the Chamber, as well as to appease the victims of his acts. Notwithstanding his last-minute request for acquittal, the Chamber finds the Accused to be fully aware of his responsibility for the suffering and death of thousands of innocent people at S-21, and of the extreme gravity of his participation and leadership at S-21.

3.3.5 Character witnesses

617. At trial, a number of witnesses testified regarding their knowledge of the character of the Accused and his conduct before and after the period of the crimes with which he is charged.

618. According to Witness SOU Sath, who was a classmate of the Accused at Siem Reap High School during his 1959-1961 school years, the Accused was a humble, kind, loyal

[1043] "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509, pp. 35-36, ERN (English) 00211116-0021117.
[1044] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 16 (noting the Accused's assessment of his choices as having been correct at the time, but noting an "endeavour to distance himself from his past actions").
[1045] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 35 (noting also his ability to adapt to changing life experiences).

and generous boy, as well as being a good student who was respectful towards his teachers, eager to share his knowledge and to help others. The Witness also testified that the Accused showed no particular interest in politics at the time.[1046]

619. In 1965, after graduating from the National Teachers' Institute, the Accused was posted to teach mathematics at Skoun Junior High School. Two of the students he taught from 1965 to 1968, TEP Sem and TEP Sok, described him as a remarkable teacher who was meticulous, sincere, dedicated and always willing to help the less fortunate, as well as well-liked and respected by his students. He gave free individual lessons to disadvantaged students and school supplies to the needy.[1047]

620. Witnesses CHOU Vin, HUN Smirn and PENG Poan – who met the Accused while he taught in Phkoâm, and later in Svay Chek in the 1990s, when the Accused went by the name HANG Pin – testified that they remembered him as someone they liked; a dedicated and competent teacher, who worked hard and selflessly, and who was gentle, humble and solitary. They all testified that after his arrest, they were surprised to learn about his activities as head of S-21.[1048]

621. The Accused said that his conversion to the Protestant faith was a third phase of his life. The first was the training period, including his career as a teacher and was characterized by his "love for knowledge"; the second was his involvement in politics ("love for mankind") and, last, his Christian faith and the "love of God".[1049] Pastor Christopher LAPEL testified as to the significance and sincerity of the Accused's religious faith. When he first met the Accused in Battambang in December 1995, the Accused went by the name HANG Pin. The Accused was baptised on 6 January 1996 and after a two-week course, returned to his home area and served as a lay pastor of a community comprising 14 families. According to Pastor LAPEL, the Accused converted of his own free will, testifying that the Accused was "a man with a serving heart", who

[1046] T. 1 September 2009 (SOU Sath), pp. 34-47.
[1047] T. 1 September 2009 (TEP Sem), pp. 50-60, 62-65; T. 1 September 2009 (TEP Sok), pp. 67-84.
[1048] T. 1 September 2009 (CHOU Vin), pp. 86-108, 110-111; T. 2 September 2009 (HUN Smirn), p. 5-19; T. 2 September 2009 (PENG Poan), pp. 20-38.
[1049] "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat," E3/509, pp. 41-42, ERN (English) 00211122-00211123.

cared about "shar[ing] the word of God". He expressed pride that the Accused admitted to the crimes he committed and accepted his punishment.[1050]

622. The Chamber concludes that in his life before he became Chairman of M-13 and later of S-21, the Accused was a well-respected student and teacher, who readily assisted his fellow students and his pupils. It finds that the Accused has shown a constant and unusually strong level of commitment to his studies, to his teaching and in his political and religious beliefs. It is also satisfied that there were no factors in his professional or family life that in any way excuse his criminal conduct.

3.3.6 Impact of prior violations of the Accused's rights upon sentence

623. The Accused was held in continuous detention since 10 May 1999 when he was arrested and detained by the Cambodian Military Court on various charges pursuant to Cambodian law. On 31 July 2007, he was transferred to the ECCC Detention Facility pursuant to orders of the Co-Investigating Judges, where he has remained in detention.[1051]

624. On 15 June 2009, the Chamber issued a written decision in which it ruled that, in the event of a conviction, the Accused was entitled to full credit for the entirety of his time spent in detention since 10 May 1999. The Chamber further found the Accused's detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007 to have been unlawful and in violation of his rights to a trial within a reasonable time and detention in accordance with the law. Accordingly, the Chamber stated that, should the Accused be convicted, he would be entitled to a further reduction in his sentence, to be decided at the sentencing stage, for the violation of these rights.[1052]

625. There is no established formula for quantifying such a reduction in an accused's sentence. The Chamber notes that the jurisprudence of the ICTR nevertheless offers some

[1050] T.15 September 2009 (Christopher LAPEL), pp. 2-27.
[1051] *See* Decision on Request for Release, E39/5, 15 June 2009, paras 2-5 (procedural history).
[1052] Decision on Request for Release, E39/5, 15 June 2009.

helpful guidance in the matter.[1053] Further, the Chamber considers that the reduction must be express and measurable[1054] and based on the totality of the circumstances of the case.

626. In the instant case, the Accused was unlawfully detained by the Cambodian Military Court for more than eight years; far longer than the allowable provisional detention period. There appears to have been no substantial and systematic investigation of the allegations against him throughout this period of detention, and the legal basis for his continued detention was poorly elaborated. In some instances, extensions of the Accused's detention were ordered by the Prosecutor, rather than the competent judicial authorities.[1055]

627. Neither the gravity of the crimes of which he was suspected nor the constraints under which the Cambodian legal system was operating at the time can justify these breaches of the Accused's rights. In light of the foregoing (Judge LAVERGNE dissenting solely on the approach to sentence adopted by the majority), the Chamber decides that a reduction of **5 years** from the Accused's sentence constitutes an appropriate remedy.

3.3.7 Sentence

3.3.7.1 Imprisonment

628. In deciding on an appropriate sentence, the Chamber has taken into account the entirety of the circumstances of this case, including all relevant sentencing principles and factors previously discussed.

629. The Chamber has concluded unanimously that there are significant mitigating factors which mandate the imposition of a finite term of imprisonment rather than a life sentence. These factors include the Accused's cooperation with the Chamber, admission of responsibility, expressions of remorse (although undermined by his request for

[1053] *See Prosecutor v. Barayagwiza et al.*, Judgement and Sentence, ICTR Trial Chamber (ICTR-99-52-T), 3 December 2003, paras 1106-1107; *Semanza* Appeal Judgement, paras 323-329; *Kajelijeli* Appeal Judgement, para. 324.
[1054] *See Beck v. Norway,* Judgement, ECtHR (no. 26390/95), 26 June 2001, para. 27; *Chraidi v. Germany*, Judgement, ECtHR (no. 65655/01), 26 October 2006, paras 24-25; *Dzelili v. Germany*, Judgement, ECtHR (no. 65745/01), 10 November 2005, paras 83-85.
[1055] *See* Decision on Request for Release, E39/5, 15 June 2009, paras 18-21.

acquittal during closing statements), the coercive environment in DK in which he operated, and his potential for rehabilitation.

630. The Chamber has further noted a number of aggravating features, including the shocking and heinous character of the offences, which were perpetrated against at least 12,273 victims over a prolonged period. Such factors, when considered cumulatively, warrant a substantial term of imprisonment.

631. On the basis of the foregoing, the majority of the Chamber (Judge LAVERGNE dissenting) considers the appropriate sentence to be **35 years** of imprisonment.[1056]

632. The Chamber considers that a reduction in the above sentence of **5 years** is appropriate given the violation of the Accused's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007.

633. The Accused is entitled to credit for the time spent in detention,[1057] for the following periods:

a. 10 May 1999 until 30 July 2007; *i.e.*, the time spent in detention under the authority of the Cambodian Military Court;

b. 31 July 2007 until the Judgment becomes final, *i.e.*, the time spent in detention under the authority of the ECCC.

3.3.7.2 Confiscation of personal property, money and real property

634. The Chamber has identified no personal property, money or real property acquired unlawfully or by criminal conduct by the Accused. There are accordingly no identified assets which could form the subject of confiscation pursuant to Article 39 (new) of the ECCC Law.[1058]

[1056] *See* Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, E188.1.
[1057] *See* Decision on Request for Release, E39/5, 15 June 2009.
[1058] "Inquiry into income and assets of the Accused", E175, 15 October 2009.

4 CIVIL PARTY REPARATIONS

635. Internal Rule 100(1) provides that "[t]he Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused." The provisions of the Internal Rules pertaining to Civil Party participation have, since the commencement of trial, undergone significant modification.[1059] These amendments are aimed at ensuring, amongst other things, that ECCC proceedings allow effective victim participation in relation to mass crimes and the specific Cambodian context.[1060] Due to the advanced stage of proceedings in Case 001 at the time these reforms were commenced, these revised provisions have not been applied to the present case.[1061]

4.1 Procedural history

636. Initial decisions on the admissibility of Civil Party applications ascertained that the criteria for participation as a Civil Party were satisfied.[1062] In common with the practice before comparable international tribunals, the Chamber undertook a *prima facie* assessment of the credibility of the information provided by the applicants.[1063] This

[1059] ECCC Internal Rules (Revision 4), promulgated on 11 September 2009 and ECCC Internal Rules (Revision 5), promulgaged on 9 February 2010 (http://www.eccc.gov.kh/english/internal_rules.aspx).
[1060] *See* ECCC Press Release dated 11 September 2009, issued at the conclusion of the 6th ECCC Plenary Session (http://www.eccc.gov.kh/english/cabinet/press/131/ECCC_Plenary_11_Sep_2009_Eng.pdf).
[1061] Internal Rule 114(3), adopted on 9 February 2010, provides that "[a]mendments concerning Civil Party participation adopted at the 7th Plenary Session shall be applicable to those ECCC cases for which, at the date of adoption, a closing order has not been issued". Unless the context otherwise requires, all references to the Internal Rules in this Section therefore pertain to Internal Rules (Revision 3), promulgated on 6 March 2009.
[1062] *See, however,* Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applicants, E2/94, 26 February 2009 (finding that proof of identity must be unequivocal and is not satisfied where the information provided merely appeared to be true in view of the significant rights enjoyed by Civil Parties at trial). Pursuant to Internal Rule 23(4), the Trial Chamber may at this stage declare a Civil Party application inadmissible: a decision that is subject to appeal (Internal Rule 104(4)(e)).
[1063] *See, e.g.,* Rule 86 of the RPE of the Special Tribunal for Lebanon ("In deciding whether a victim may participate in the proceedings, the Pre-Trial Judge shall consider […] whether the applicant has provided *prima facie* evidence that he is a victim as defined in Rule 2. ["A natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction"]); *see also Prosecutor v. Lubanga,* "Decision on victims' participation", ICC Trial Chamber I (ICC-01/04-01/06-1119), 18 January 2008, para. 99: "It would be untenable for the Chamber to engage in a substantive assessment of the credibility or the reliability of a victim's application before the commencement of the trial. Accordingly, the Chamber will merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of

process is distinct from the Chamber's determination of the merits of all applications in the verdict, on the basis of all evidence submitted in the course of proceedings.[1064]

637. During the initial hearing, the Chamber confirmed the Civil Party status of the 28 individuals who joined the proceedings during the investigative phase.[1065] The Chamber received 66 additional Civil Party applications before the expiry of the 2 February 2009 deadline, 65 of which were declared admissible either at the initial hearing or by decisions of 26 February 2009 and 4 March 2009, respectively.[1066] Consequently, 93 Civil Parties were permitted to take part in the proceedings. All were represented by lawyers, and organized into four groups. 22 Civil Parties were heard before the Chamber during the course of trial.

638. On 17 August 2009, the Defence indicated its intent to challenge, on specified grounds, a number of Civil Party applications.[1067] Adversarial argument concerning these challenges took place on 26 and 27 August 2009.[1068] In the course of the hearing, the lawyers for Civil Parties KEANG Vannary (E2/77) and ENG Sitha (E2/49) informed the Chamber of the withdrawal of their applications.[1069] On 15 September 2009, Civil Party

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the Court. The Trial Chamber will assess the information included in a victim's application form and his or her statements (if available) to ensure that the necessary link is established".

[1064] Internal Rule 100 provides that the Trial Chamber "shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused"; *cf.* "Co-Lawyers for Civil Parties (Group 2) – Final Submission", E159/6, 12 November 2009, paras 6-8 (requesting the Chamber to instead treat all Civil Parties accorded interim recognition as recognized Civil Parties).

[1065] T., 17 February 2009, p. 34.

[1066] *See* T., 17 February 2009, pp. 46, 50; *see also* Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applications, E2/94, 26 February 2009; Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, E2/94/2, 4 March 2009; *see further* Decision on Request to reconsider decision on proof of identity for Civil Party application (E2/36), E2/94/4, 10 August 2009; Decision on Motion Regarding Deceased Civil Party, E2/5/3, 13 March 2009.

[1067] T., 17 August 2009, pp. 2-7; *see also* T., 17 February 2009, pp. 41-42; T., 10 August 2009, pp. 8-9.

[1068] The Defence contested Civil Party applications E2/22, E2/37, E2/66, D25/15, E2/30, E2/38, E2/41, E2/49, E2/63, E2/64, E2/65, E2/69, E2/70, E2/71, E2/73, E2/74, E2/75, E2/76, E2/77, E2/81, E2/82, E2/83, E2/35 and E2/62. It withdrew its challenge to Civil Party applications E2/57 and D25/20 ("Written Record of Proceedings", E1/69, 26 August 2009; "Written Record of Proceedings", E1/70, 27 August 2009); *see,* in response, "Civil Party Group 1 - Request to establish the status of Ly Hor as a survivor of S-21 and authenticity of documents as a matter of record", E137, 7 August 2009; "Civil Party Group 1 - Motion to establish nature of relationship between four Civil Parties of Group 1 and direct victims of S-21" (E140), 13 August 2009; "Civil Party Group 1 - Motion to provide exhibits in support of five Civil Parties of Group 1", E165, 3 September 2009; "Co-Lawyers Group 2 - Request for Submission of Evidence in Support of Civil Parties Group 2: E2/22, E2/35, E2/64, E2/66 and E2/83", E163/3, 10 September 2009.

[1069] T., 27 August 2009, pp. 7-8, 10.

BUN Srey (E2/65) also abandoned the civil action.[1070] In their final written submissions and closing statements, the four Civil Party Groups requested the Chamber to declare the reparation claims of the remaining 90 Civil Parties admissible and to recognize their right to reparation.[1071]

4.2 Assessment of the Civil Party applications

639. Once declared admissible in the early stages of the proceedings, Civil Parties must satisfy the Chamber of the existence of wrongdoing attributable to the Accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.

4.2.1 Existence of injury

640. Internal Rule 23(2) provides that in order for Civil Party action to be admissible, the injury must be "physical, material or psychological", and the "direct consequence of the offence, personal and have actually come into being".[1072]

641. In addition to physical suffering, the injury in question may also be psychological and include mental disorders or psychiatric trauma, such as post-traumatic stress disorder, or material injury pertaining to loss of property or income.[1073] The injury suffered must

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[1070] "CPG3: Lettre d'abandon de Droit de la Constitution de la Partie Civile au près des Chambres Extraordinaires au sein des Tribunaux Cambodgiens", E2/65/5, 15 September 2009.

[1071] "Civil Party Group 1 – Final Submission", E159/7, 10 November 2009; "Co-Lawyers' for Civil Parties (Group 2) – Final Submission", E159/6, 10 November 2009; "Civil Parties (Group 4) – Final Written Submission", E159/4, 10 November 2009; "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009; *see also*, T., 23 November 2009.

[1072] Although no change in substance was entailed, these admissibility criteria and standard of proof were clarified in the amendments adopted at the 7th Plenary Session. Rule 23*bis* (1) now provides:
"In order for a Civil Party action to be admissible, the Civil Party applicant shall:
a) be clearly identified; and
b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.
When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true."

[1073] *See* e.g. T., 25 August 2009 (CHHIM Sotheara), pp. 41-42, 44-46 (detailing the consequences for the mental and physical condition of family members of direct victims of S-21 and the nature of the traumatisation resulting from knowledge of a relative's death there as including, amongst other things, identification with the suffering of victim, guilt, helplessness and psychiatric conditions such as post-traumatic stress disorder). Although only the English version of Rule 23(2)(a) refers to psychological injury, the Khmer and French versions refer to *préjudice moral* and "ការខូចខាតខាងផ្លូវចិត្ត", respectively.

be personal. The Chamber has previously ruled that a civil action may, under certain conditions, be pursued on behalf of deceased Civil Party applicants by their successors.[1074]

4.2.2 Existence of a causal link between the victim's injury and the Accused's offending

642. The injury suffered must result directly from the criminal conduct of the Accused. The notion of "direct consequence" is expressly mentioned in Article 13 of the 2007 Code of Criminal Procedure and emphasizes the link between the crime and the injury suffered, rather than the intended target of the criminal act. Responsibility is thus not limited to persons against whom the crimes were committed, but may also be the direct cause of injury to a larger group of victims.[1075]

643. Although the immediate family members of a victim fall within the scope of Internal Rule 23(2)(b), direct harm may be more difficult to substantiate in relation to

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See further Situation in Uganda, "Decision on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation […]' of Pre-Trial Chamber II", ICC Appeals Chamber, 25 February 2009 (ICC-02/04-179), para. 34.

[1074] Civil Party SUOS Sarin (D25/24) died before the start of trial; *see* "Certificate of Death - Suos Sarin", E2/5/1.2. The Chamber determined that her husband, UM Pyseth, was authorized as a successor to continue her civil action; *see* Decision on Motion Regarding Deceased Civil Party, E2/5/3, 13 March 2009, paras. 10-12 (finding that the successors of a deceased Civil Party must demonstrate that the Civil Party had filed a Civil Party application. Absent such proof, successors can act only seek reparation in their own right).

[1075] Under French law, which contains a similar prerequisite, close family members of a direct victim qualify as Civil Parties in their own right, on the basis of Article 2 of the French Code of Criminal Procedure: "Civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanour or a petty offence is open to all those who have personally suffered damage *directly* caused by the offence" (emphasis added). *See further* Article 13 of the 1964 Cambodian Code of Criminal Procedure, which notes: "Il ne suffit pas qu'il y ait tout à la fois une infraction à la loi pénale et un domage causé, il faut de plus qu'entre ces deux éléments, il y ait un rapport de cause à effet ou en d'autres termes, *que ce dommage soit le résultat direct de l'infraction* et qu'il soit né et actuel." (emphasis added). The extension of the notion of injury to all those who have suffered harm as a direct consequence of the crime is also reflected in at least one other international legal instrument; *see e.g.* "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the United Nations General Assembly", GA UN Resolution 60/147, UN Doc. A/RES/60/147, para. 8: "For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate […], the term "victim" also includes *the immediate family or dependants of the direct victim* and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" (emphasis added).

more attenuated familial relationships.[1076] The Chamber nevertheless considers that harm alleged by members of a victim's extended family may, in exceptional circumstances, amount to a direct and demonstrable consequence of the crime where the applicants are able to prove both the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the deceased. In this regard, the Chamber accepts the view of expert CHHIM Sotheara regarding the nature of familial relationships within Cambodian culture[1077] and has therefore evaluated the claims of extended family members who have sought to demonstrate a particular bond with immediate victims of S-21 and S-24.

4.3 Responsibility of KAING Guek Eav vis-à-vis the Civil Parties

644. KAING Guek Eav has been convicted, in relation to offences committed at S-21 and S-24, of crimes against humanity of persecution (extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape) and other inhumane acts) and of the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian. The Chamber now considers whether he can also be found responsible for the particular harm alleged by two categories of Civil Parties, namely those who claim to be survivors of S-21 or S-24, and

[1076] *See e.g.* Inter-American Court on Human Rights, *Garrido and Baigorria v. Argentina*, Reparations and Costs Judgment, 27 August 1998, para. 64; *Castillo-Páez v. Peru*, Reparations and Costs Judgment, 27 November 1998, para. 88-89; *Loayza-Tamayo v. Peru*, Reparations decision, 27 November 1998, paras 88-90, 142-143, *Case of the "White Van"(Paniagua Morales a.o.) v. Guatemala*, Reparations decision, 25 May 2001, paras 106, 108 (using a broad notion of a "family" and applying a presumption of proof of psychological harm suffered by parents and children of the person killed); *see also Prosecutor v. Lubanga,* "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation' of 18 January 2008", ICC Appeals Chamber, 11 July 2008 (ICC-01/04-01/06-1432), para. 32: "Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child."

[1077] T., 25 August 2009 (CHHIM Sotheara), pp. 36-37, 48 (noting the historical tendency of Cambodian families to live together with other family members, such as aging parents or with siblings and their families and hence, the likelihood of strong bonds also to grandparents, cousins, uncles and aunts. While such bonds were common, their closeness nevertheless depends on the particular case).

those whose claims were instead based on alleged kinship or special bonds of affection or dependency in relation to immediate victims of S-21 or S-24.[1078]

4.3.1 Civil Parties claiming to be survivors of S-21 or S-24

645. Of the eight Civil Parties who claimed to be survivors of S-21 or S-24, the Chamber considers the following four Civil Parties to have substantiated this claim and hence, to have established that KAING Guek Eav is directly responsible for their harm suffered:[1079]

- BOU Meng (D 25/1);
- CHUM Mey (D 25/3);
- CHUM Neou (D 25/16); and
- CHIN Met (E2/80).

646. It is beyond doubt that the few survivors of S-21 or S-24 suffered serious psychological and physical harm, in addition to loss of close family members, as a direct consequence of the criminal conduct for which KAING Guek Eav was convicted.[1080]

[1078] *See* Internal Rule 23(6)(b), which provides: "The Chambers shall not hand down judgment on a Civil Party action that is in contradiction with their judgment on public prosecution of the same case". Although it follows that acquittal of the Accused would end a claim for reparation, responsibility in relation to each individual Civil Party does not automatically follow from a criminal conviction of the Accused. Further, and while the Chamber was not required to precisely identify every victim in convicting KAING Guek Eav of the crimes for which he was charged, it has considered the particular circumstances of many Civil Parties in its assessment of the evidence.

[1079] The Chamber in the course of trial accepted evidence tendered in support of Civil Party claims such as detainee lists, official lists or registers, confessions, photographs and other evidence from S-21 that identified detainees. Where the Accused himself acknowledged the truthfulness of Civil Party statements and the documentary evidence provided, the Chamber has also tended to accept its veracity. The Chamber, however, is unable to determine a Civil Party application based on uncorroborated Civil Party statements alone; *see e.g Prosecutor v. Kony et al*, "Judgement on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation […]' of Pre-Trial Chamber II", ICC Appeals Chamber, (ICC-02/04-01/05-371), 23 February 2009, paras. 36, 38 ("[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings [….] What evidence (be it documentary or otherwise) may be sufficient cannot be determined in the abstract, but must be assessed on a case-by-case basis and taking into account all relevant circumstances, including the context in which this Court operates").

[1080] All survivors have given credible accounts of their past and present suffering as a consequence of their internment; *see e.g.* T., 20 August 2009 (CHUM Neou), pp. 83-85, 88-89 (recounting the loss of her baby while detained at S-24 and husband NOU Samouen at S-21); T., 1 July 2009 (BOU Meng), pp. 11-32, 43-45 (detailing detention and torture, in addition to the loss of his wife MA Yoeun *alias* Thy, at S-21); T., 30 June 2009 (CHUM Mey), pp. 10-14, 22-27 (recounting severe torture at the S-21 complex, during which his toenails were ripped out); T., 8 July 2009 (CHIN Met), pp. 54-79 (detailing internment at S-24 and suffering, amongst other things, malnutrition and forced labour over a sustained period).

647. Despite the undoubted physical and psychological harm suffered by the remaining four Civil Parties claiming to be survivors of S-21, the Chamber is not satisfied to the required standard that the following Civil Parties were victims of crimes committed by KAING Guek Eav at S-21 or S-24:

- Although the Chamber does not doubt that LAY Chan (E2/23) suffered severe harm as a result of detention, interrogation and torture during the DK period, no evidence was provided to show that this occurred at S-21. No objective proof from official registers, photographs or confessions corroborates his claim to have been detained there, and his description of detention conditions is at odds with the bulk of the evidence before the Chamber regarding established practices at S-21.[1081] The Chamber is accordingly not satisfied to the required standard that LAY Chan (E2/32) was detained either at S-21 or S-24. Absent sufficient proof of a causal link between the events described and the crimes for which KAING Guek Eav was convicted, his Civil Party application is rejected;

- NAM Mon (E2/32) stated that she was initially a member of the S-21 medical staff, and was later detained there following the arrest of some of her brothers, who were S-21 guards. From there, she was allegedly transferred to S-24 and then to another detention centre.[1082] There are, however, inconsistencies between the information contained in her Civil Party application and her in-court statements and subsequent submissions.[1083] She was unable to provide any particulars concerning either S-21 or S-24 and the evidence produced by her purporting to show kinship to persons photographed and executed at S-

[1081] T., 07 July 2009 (LAY Chan), pp. 8, 11-2, 17-19 (stating that he was unable to recall being officially registered or photographed or having to provide a biography, providing a description of his cell that does not correspond to others provided of the cells at S-21 and claiming, contrary to established policies, to have been released from S-21 without explanation. During a site visit to S-21, he was also unable to recognize any part of S-21 as the place where he was incarcerated).
[1082] T., 9 July 2009 (NAM Mon), pp. 58-61.
[1083] Based on the date of birth provided in Civil Party Application E2/32, which is 2 July 1968, the Civil Party would have joined the S-21 medical staff at the age of 6 or 7 years. Further, her in-court statements diverged in significant respects from those provided by other witnesses and experts heard in the course of proceedings: *see* T., 09 July 2009 (NAM Mon), pp. 81-85; *see also* Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), E176, 28 October 2009, para. 14 (rejecting a request that a further written submission be accepted as evidence); *see also* T. 27 August 2009, pp. 37-38; "Co-Lawyers Group 2 – Request for Submission of Additional Statement of Civil Parties E2/32 of the Case File 001/18-07-2007-ECCC/TC", E2/32/5, 2 September 2009.

21 do not clearly establish that these persons are her relatives.[1084] Even allowing for the impact of trauma and the passage of time, the Chamber is unable to conclude that NAM Mon (E2/32) was detained either at the S-21 complex or at S-24. Although the Chamber acknowledges her tremendous suffering, NAM Mon's Civil Party application is also rejected;

- PHAOK Khan (E2/33) recounted being tortured and interrogated at a prison in the vicinity of Phnom Penh during the DK period.[1085] While it is plausible that the Civil Party may have been detained and tortured by Khmer Rouge soldiers, there is no objective evidence that this occurred at the S-21 complex.[1086] The description provided of his place of detention does not match that of S-21 and, contrary to standard S-21 procedures, the Civil Party was neither photographed nor compelled to provide a biography.[1087] In addition, the Civil Party's account of his escape from the place of execution and the geographical indicia provided are inconsistent with Choeung Ek, where he claims to have been left for dead.[1088] PHAOK Khan further alleged that his wife and a cousin were also killed at S-21. However, no evidence was furnished to show that his wife was detained there. While it is undisputed that an individual named CHOEUNG Phoam was detained and executed at S-21, the applicant himself admitted that he could not provide proof of his relationship to him.[1089] His Civil Party application is therefore also rejected;

- LY Hor (E2/61) avers that he was detained first at the S-21 complex and later transferred to S-24, from where he escaped.[1090] While the existence of a detainee named

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[1084] T., 13 July 2009 (NAM Mon), pp. 19-26 (revealing inconsistencies regarding the names or time of death of the direct victims alleged to be the Civil Party's relatives). Neither the name nor any of the aliases used by her alleged relatives appear on any of the staff lists or detainee lists of S-21.
[1085] T., 7 and 8 July 2009 (PHAOK Khan).
[1086] The only S-21 document alleged to include the Civil Party's name is an analysis of the confession of a detainee named Sok Nann, who named Phok Sakhon as an enemy; *see* "Annex 3: Biography of Phok Sakhon", E5/7/1.3. However, there is no indication that this name was one used by the Civil Party. Further, admissibility of this document is questionable, since the confessions in question may have been obtained under torture; *see* "Order on use of statements which were or may have been obtained by torture", D130/8, 28 July 2009 (in relation to Case File 002).
[1087] T., 7 July 2009 (PHAOK Khan), pp. 70-71, 82-83. The Civil Party further admitted during a group visit to the Tuol Sleng Museum in 2008 that he was unable to recognize this location as the place where he was detained. *See* T., 7 July 2009 (PHAOK Khan), p. 12.
[1088] T., 7 July 2009 (PHAOK Khan), pp. 67-69, 77-78; T., 8 July 2009 (PHAOK Khan), pp. 10-11.
[1089] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, para. 93.
[1090] T., 6 July 2009 (LY Hor), p. 9.

EAR Hor at S-21 may be accepted on the basis of the documents and explanations provided, there is doubt as to whether this detainee was the Civil Party.[1091] Further, there is no indication in the S-21 archives of the detainee having been transferred from S-21 to S-24 and no explanation was given for this alleged transfer, which was contrary to the norm.[1092] The Chamber accordingly also finds LY Hor's Civil Party application not to have been established to the required standard.

4.3.2 Other Civil Parties

648. As noted, Civil Parties claiming to be victims due to the loss of a close relative at S-21 and S-24 must prove that at least one of their family members was the immediate victim of the crimes for which KAING Guek Eav was convicted. The Chamber finds that the following Civil Parties have been unable to establish the existence of immediate victims to the required standard:

- SO Saung (E2/34) alleges that her brother-in-law MEAS Sun *alias* TENG Sun was detained and executed at S-21. In support of her claim, she provided a photograph from the archives of the Tuol Sleng Museum.[1093] However, the photograph provides no attestation of identity and on its own does not establish that the person in the photograph is actually MEAS Sun. Further, no proof was provided of any dependency or special bonds of affection between the Civil Party and her brother-in-law;[1094]

- CHHAY Kan (E2/35) *alias* LEANG Kan, alleges that one of her nephews, NHEM Chheuy, was detained at S-21, having seen his photograph when visiting the Tuol Sleng Museum.[1095] While it is established that, as a child, LEANG Kan lived with this nephew,

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[1091] The Chamber is uncertain that LY Hor was also known by the name EAR Hor during the DK period. *cf.* "Civil Party Group 1 - Request to Establish the Status of LY Hor as a Survivor of S-21 and Authenticity of Documents as a Matter of Record", E137, 28 July 2009.
[1092] Although a handwritten annotation on the biography of detainee EAR Hor indicates that he was "released on 8 March 76" ("Biography of EAR Hor", E2/61.2,ERN 00361722), KAING Guek Eav and numerous witnesses, including several former S-21 staff members, all testified that apart from very few exceptions not involving ordinary prisoners, all S-21 detainees were executed (*see e.g.*, T., 27 July 2009 (SUOS Thy), pp. 102-103.)
[1093] *See* "Photograph of Teng Sun", E5/7/1.4; "Attestation", E161.2.
[1094] Although kinship by marriage was established by attestation ("Lettre de confirmation", E2/34/5.2), such kinship alone is insufficient (Section 4.2.2).
[1095] *See* "Photograph of LEANG Kan at S-21", E2/35.2.

who was an orphan,[1096] it has not been established that the photograph of the detainee provided in support of her application is in fact that of NHEM Chheuy;[1097]

- HIET Tey Chov (E2/38) reports the loss of several family members during the DK period and alleges that his uncle SOSS El *alias* TEU El was arrested in April 1975 and detained at S-21.[1098] However, no evidence was provided in support of this claim;

- Civil Party E2/62 claims that her brother was allegedly detained and executed at S-21. In support of her claim, she provided a photograph from the Tuol Sleng Museum archives.[1099] However, the photograph is unidentified and therefore does not establish whom the photograph depicts. Further, and as the Civil Party has acknowledged, no document exists to substantiate the nature of her alleged kinship to the victim;[1100]

- PANN Pech (E2/63) claims that her brother-in-law PLAING Hauy was allegedly detained and executed at S-21 but provides no evidence in support of this claim;[1101]

- LIM Yon (E2/69), in addition to reporting the arrest and execution of several relatives during the DK period, claims that one of her brothers was allegedly imprisoned at S-21.[1102] However, no evidence was provided to corroborate this claim;

- CHAN Yoeurng (E2/70) claims that her uncle SOK Bun was detained and executed at S-21. While an attestation of this kinship was provided,[1103] the applicant admits that no substantiation of her uncle's alleged detention at S-21 was provided.[1104]

[1096] *See* "Letter of certification of CHHAY Kaen by commune chief", E163/3.5.
[1097] T., 23 November 2009 (Civil Party lawyer), p. 49 (noting that the search for further information proved fruitless).
[1098] "Victim Information Form - HIET Tey Chov", E2/38.
[1099] *See* "Photograph at S-21", E165/1/1.2; "Letter of certification by Chief of Tuol Sleng genocide museum", E165/1/1.3.
[1100] T., 23 November 2009 (Civil Party lawyer), p. 21.
[1101] Further, alleged kinship by marriage alone is an insufficient basis for a Civil Party application (Section 4.2.2).
[1102] "Victim Information Form – LIM Yon", E2/69.
[1103] *See* "Letter of certification of CHAN Yoeurng by commune chief", E161.5 (available in Khmer only).
[1104] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, paras 115-118.

- NORNG Sarath *alias* Por (E2/73) claims that his cousin NORNG Saruoth and his uncle NORNG Soang were detained and executed at S-21.[1105] However, the applicant provided neither documentary proof in support of this alleged detention nor any attestation establishing the alleged kinship;

- NGET Uy (E2/74) alleges that her husband PRAK Pat, a former Khmer Rouge military cadre, was imprisoned, tortured and executed at S-21. In support of her claim, she referred to the testimony of a nephew of her husband, who allegedly worked at S-21.[1106] However, the precise identity of this potential witness was not disclosed. Further, no attestation or document corroborates either this claim or the alleged marital bond;[1107]

- THIEV Neab *alias* KHIEV Neab (E2/75), claims that her husband Heng CHOEUN *alias* CHOEUN, was arrested in late 1978 while he was a civil servant at Office 870 and taken to Prey Sar (S-24). She claims to have witnessed his arrest and alleges that a soldier named Reth informed her of her husband's death at S-24.[1108] However, the exact identity of this witness is unknown, and no attestation or document corroborates her claims. Further, no proof of this kinship is provided;

- MORN Sothea (E2/82) claims that his mother, a former diplomat, and many other family members disappeared during the evacuation of Phnom-Penh in April 1975.[1109] Although his statement appears credible, it is unsupported by proof of any demonstrable link to the crimes for which KAING Guek Eav has been convicted;

- HONG Savath (E2/83) alleges that her uncle LOEK Sreng was detained and executed at S-21.[1110] She claims to have recognised him in a photograph she saw in 2008 during a visit to the Tuol Sleng Museum. However, neither this photograph nor any documentary evidence was provided as proof of her uncle's detention at S-21. The Civil

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[1105] *See* "Victim Information Form – NORNG Sarath", E2/73.
[1106] "Claiming letter by Nget Uy", E2/74.1.
[1107] "Claiming letter by Nget Uy", E2/74.1; T., 23 November 2009 (Civil Party Group 1 Closing Statement), p. 21.
[1108] "Claiming letter by THIEV Neab", E2/75.1.
[1109] "Victim Information Form – MORN Sothea", E2/82; T., 26 August 2009 (Civil Party lawyer), p. 57.
[1110] *See* "Confirmation letter of YOU Hong by the commune chief", E163/3.11 (establishing proof of kinship).

Party, who was 11 years of age when her uncle disappeared, has also not provided evidence of any special bonds of affection or dependency in relation to her uncle.

649. The following Civil Parties have also not provided proof of kinship or special bonds of affection or dependency in relation to immediate victims of S-21 or S-24:

- KHUON Sarin (D25/11), whose claim is based on the arrest and execution of KHIEV Sakhor, a staff member of the Cambodian embassy in Japan. While KHIEV Sakour's detention at S-21 has been proven,[1111] there is no document showing the exact nature of his alleged kinship to the Civil Party or proof of any special bonds of affection. Although KAING Guek Eav did not dispute this Civil Party application, the Chamber nevertheless cannot uphold it;

- SUON Seang (D25/15) was allegedly told by friends that three of his younger brothers had been detained at S-21. However, no proof of their detention was provided. He further claims that one of his cousins PEIN Um *alias* Rith, was also detained and executed at S-21. While the detention of an individual named PEIN Um at S-21 has been established,[1112] the Civil Party provided no proof of kinship to him;[1113]

- CHHOEM Sitha (E2/22) described the arrest, mistreatment and execution of soldiers from Division 310, of which he was a member. Although many soldiers from this Division were detained at S-21, none of these immediate victims were identified save for an individual named KAUV Phalla.[1114] A certificate from his village chief and commune chief states that CHHOEM Sitha was allegedly the uncle of a KAUV Phalla. However, a special bond of affection has not been proved;[1115]

- KLAN Fit (E2/37) claims that he was arrested along with 10 other friends, six of whom were ultimately imprisoned at S-21. Bonds of friendship, however, do not fall within the scope of the criteria in Internal Rule 23(2)(b) (Section 4.4.4);

[1111] *See* e.g., "Confession of KHIEV Sakuor at S-21", E2/12.1 (available in Khmer only).
[1112] *See* "Biography of PEN Um from S-21", E165/1/2.6; "Biography – PEN Um", E165/1/2.4.
[1113] *See* "Family Record Book of SUON Seang", E165/1/2.1.
[1114] *See* "Biography of prisoner in detention – KAUV Phalla", E163/3.4.
[1115] *See* "Confirmation letter of CHHOEM Phom by commune chief", E163/3.2.

- NHEB Kimsrea (E2/64) claims that her uncle CHEAB Baro *alias* Pen, the latter's wife KHUT Phorn and five of her cousins were detained and executed at S-21. There is evidence to show that an individual named CHEAB Parou *alias* Pen, was detained at S-21.[1116] However, the applicant, who was born in 1978, acknowledges that she could not have known her uncle, her aunt and her cousins.[1117] Accordingly, special bonds of affection have not been established between the applicant and these relatives;

- SOEM Pov (E2/71) alleges that her brother-in-law NGUY Sreng was detained and executed at S-21.[1118] In support of these claims, she provided a biography from the archives of S-21.[1119] Although the detention of NGUY Sreng at S-21 is thus established, kinship by marriage alone is an insufficient foundation absent proof of any special bonds of affection or dependency (Section 4.2.2);

- Jeffrey JAMES (E2/86) and Joshua ROTHSCHILD (E2/88) allege that their uncle James W. CLARK was detained and executed at S-21. The detention of James W. CLARK at S-21 is undisputed.[1120] However, the applicants' kinship to the victim was not established to the required standard.[1121] Although describing their distress at discovering his fate, the applicants, aged 5 and 8 years respectively when James W. CLARK was arrested, have also not substantiated any special bond of affection or dependency in relation to the victim.

650. The Chamber finds the following Civil Parties to have proved the existence of immediate victims of S-21 or S-24 and either close kinship or particular bonds of affection or dependency in relation to these victims.[1122] They have further shown that the

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[1116] *See* "Biography of prisoner in detention", E163/3.8; "Confession of CHEAP Parou *alias* Pen", E163/3.9.
[1117] *See* T., 23 November 2009 (Civil Party Group 2 Closing Statement), p. 48.
[1118] *See* "Letter of certification of SOEM Pov by commune chief", E161.6 (available in Khmer only) (establishing kinship by marriage).
[1119] *See* "Biography – NGUY Sreng", E2/71.2.
[1120] Confessions by James W. Clark from the Tuol Sleng Museum were provided; *see* "Confession of James William Clark", E2/86.3 and E2/88.3; "Declaration of James William Clark", E2/86.5 and E2/88.5.
[1121] *See* "Passport of Jeffrey James", E2/86.1; "Passport of Joshua Rothschild", E2/88.1; "Certificate of live birth - Jeffrey James", E140.10 (establishing that the applicants are the sons of Sherry Alice Clark, but not that Sherry Alice Clark is the sister of James W. Clark).
[1122] In many instances, the Chamber considered that proof of kinship alleged could be inferred from the personal and family data contained in the detainee's confessions or biography, especially where this was

death of these victims caused demonstrable injury within the scope of Internal Rule 23(2) and that this harm was a direct consequence of the crimes for which KAING Guek EAV was convicted:[1123]

- BOU Meng (D25/1) for the loss of his wife MA Yoeun *alias* Thy;
- CHUM Neou (D25/16) for the loss of her husband NOU Samouen and her child;
- CHHIN Navy (D25/2) for the loss of her husband TEA Havtek;
- HAV Sophea (D25/4) for the loss of her father CHIN Sea *alias* HAV Han;
- PHUNG Guth Sunthary (D25/5) and IM Sunthy (D25/7) for the loss of their father and husband PHUNG Ton, respectively;
- CHUM Sirath (D25/6) for the loss of his two brothers CHUM Narith and CHUM Sinareth;
- MEASKETH Samphotre (D25/8), TIOULONG Antonya (D25/27), TIOULONG-ROHMER Neva (D25/28), KIMARI Nevinka (D25/26) and KIMARI Visaka (E2/29) for the loss of their daughter, sister, and mother TIOULONG Raingsy and son-in-law, brother-in-law and father LIM Kimari, respectively;
- ROS Men (D25/9) for the loss of her brother ROS Thim;
- CHE Heap (D25/10) for the loss of his brother CHE Heng;
- CHRAING Sam-Ean (D25/12) for the loss of his brother CHRAING Sam On *alias* SOAM Sam On;
- SEANG Vanndi (D25/13) for the loss of his brother SEANG Phon[1124];
- TOCH Monin (D25/14) for the loss of his cousin CHEA Khan with whom he was raised and of whom he is the only surviving relative;
- KAUN Sunthara (D25/17) for the loss of her brother CHIM Lang and sister-in-law AOM Kin Daunny;
- MAN Saut (D25/18) for the loss of his son MAN Sim *alias* Riem;

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consistent with the information provided by the applicant. The Chamber accepted this information where it recorded the detainee's identity and was contained in a preliminary part of the document that could not reasonably be presumed to have been obtained under torture. *See* e.g., "Confession of Michael Scott DEEDS", E3/472/3 (regarding kinship to Timothy Scott DEEDS).

[1123] As some Civil Party applications are accepted on the basis of victims who were immediate family members, other victims who were instead extended family members are listed merely for information purposes. It is only where applications were based exclusively on alleged links to extended family members that the Chamber has considered whether sufficient evidence was provided to show the existence of special bonds of affection or dependency. Reference to the evidence accepted by the Chamber is made only in relation to applications that were contested at trial.

[1124] "Written Record of Response of Sieng Phon *alias* Pha", E141.1.

- KONG Teis (D25/19) for the loss of her husband SEK Chhiek;
- NGETH Sok (D25/20) for the loss of her brother NOB Sar *alias* NOB Ngan *alias* Chareun *alias* NGETH Ngem[1125];
- TATH Lorn (D25/21) for the loss of his father SOK Sort *alias* SOK Pon;
- Timothy Scott DEEDS (D25/22) for the loss of his brother Michael DEEDS;
- YIM Leng (D25/23) for the loss of his father THLORK Luon *alias* Yorn;
- UM Pyseth as successor of his late wife SUOS Sarin (D25/24) for the loss of the latter's sister SUOS Sovann;
- KE Khon (D25/25) and KE Samaut (E2/46) for the loss of their brother KE Kengsy;
- IEM Soy (E2/21) for the loss of her brother CHUH Choy *alias* Cheiv;
- UL Say *alias* Riem (E2/24) for the loss of her husband ENG Mak *alias* Venn;
- SIN Lim Sea (E2/25) for the loss of his elder sister SIN Chhun Lim;
- OU Savrith (E2/26), NHEK OU Davy (E2/31) and OU Kamela (E2/27) for the loss of their brother, husband and father OU Vindy, respectively;
- ROS CHUOR Siy (E2/28) for the loss of her husband ROS Sarin;
- NHOEM Kim Hoeurn (E2/30) for the loss of her two brothers NHOEM Kuy and NHOEM Chan;[1126]
- SUON Sokhomaly (E2/39) for the loss of her husband SUON Kaset;
- SIN Sinet *alias* Srun (E2/41) for the loss of her grandfather PHEACH Kim *alias* Sin, in whose house she had lived since the age of 7;[1127]
- ROUN Sreynob (E2/42) for the loss of her brother ROUN Math *alias* Savy;
- EL Li Mah (E2/43) for the loss of her brother ISMAEL Asmat *alias* Sokh;

[1125] *See* "Birth certificate of Ngeth Sok", E165/1/5; "National Identity Card of NGETH Sok", E165/1/5.1 (attesting to the alleged kinship); "Biography – Sar *alias* Chareun", E3/467/2 and E165/1/5.2; "Attestation", E165/1/5.3 (available in Khmer only) (attesting to the detention of NOB Sar *alias* NOB Ngan *alias* Chareun, at S 21).

[1126] *See* "Claiming letter of CHEA Im", E2/30.10; "Statement of KIM Kuch and HEM Sakou", E164/1.1 (certified by the commune chief and attesting to the alleged kinship); "Photo of NHOEM Kuy", E2/30.2; "Photo of NHOEM Kuy taken at S-21", E2/30.8; "Photo of NHOEM Chan", E2/30.3; "Photo of NHOEM Chan taken at S-21", E2/30.9; "Affirmation letter of KIM Kuch and HEM Sakou", E164/1.2 (certifying that the persons appearing in the photographs are NHOEM Kuy, NHOEM Chan and DUONG Rum); "Biography of prisoner in detention – NHOEM Chan", E2/30.6.

[1127] *See* "Birth Certificate of SIN Sinet", E165/1/3; "Family Record Book of SIN Sinet", E165/1/3.1; "Biography of prisoner in detention – PHEACH Kim", E165/1/3.2; "Victim's picture at S-21", E165/1/.3.4; "Picture of Civil Parties identifying victim's picture at S-21", E165/1/3.5.

- SMAN Sar (E2/45) and SMAN Nob (E2/44) for the loss of their brother SMAN Sles *alias* LENG Sokha and for the loss of their son and nephew, SA Math *alias* Saroeun, respectively;
- MEN Lay (E2/47) for the loss of her son MIN Kan;
- NHEM Sophan (E2/48) for the loss of her sister NHEM Thol *alias* Ra;
- NETH Phally (E2/50) for the loss of his brother NETH Bunthy;
- MAN Mas *alias* MAN Malymas (E2/51) for the loss of her son TA Losmath *alias* Man Math;
- KOM Men *alias* KUM Men (E2/52) for the loss of her husband SREI Yeng;
- TRY Ngech Leang (E2/53) for the loss of her brother KHOEUNG Muoysoa;
- HENG Ngech Hong (E2/54) for the loss of her father SOK Heng;
- BENG Chanthorn (E2/55) for the loss of his brother BENG Pum;
- YUN Chhoeun E2/56) for the loss of a nephew YUN Loeun, who lived in his house until aged 15, when he was conscripted into the army;
- LY Khiek (E2/57) for the loss of his sister AUY Mao *alias* Ren;[1128]
- PUOL Punloek *alias* Nget (E2/58) for the loss of his father POUL Toeun *alias* Chaing;
- CHANN Krouch (E2/59) for the loss of his brother CHANN Noun *alias* Sinoun;
- NORNG Kim Leang (E2/60) for the loss of her sister NORNG Kim Guek *alias* NORNG Kimvet;[1129]
- PENH Sokkhun (E2/66) for the loss of her sister PENH Sopheap;[1130]
- KAN San (E2/72) for the loss of her brother KAN Kan;
- UNG Voeurn *alias* HUL Voeurn (E2/76) for the loss of her brother UNG Koam *alias* Phoan;[1131]
- MEAS Saroeurn (E2/78) for the loss of her father OUK Tob;

[1128] *See* "Birth Certificate of LY Khiek", E165/1/4; "Book of residence of LY Khiek", E165/1/4.1; *see also* "S-21 Daily name list of prisoners", E165/1/4.2 (attesting to the alleged kinship and detention at S-21 of AUY Ren *alias* Mao, whose name appears on the prisoner list with an annotation indicating that she died of illness).
[1129] *See* "Victim Information Form – NORNG Kim Leang", E2/60; "Biography of prisoner in detention – NORNG Kimvet", E2/60.1.
[1130] *See* "Biography – PENH Sopheap", E2/66.3; "Attestation from KID (Khmer Institute of Democracy)", E2/66/3 (available in Khmer only); *see also* "Identity Card of PENH Sokhen", E2/66/5; "Confirmation letter of YIN Sam An by commune chief", E163/3.10 (attesting to the alleged kinship).
[1131] *See* "Certificate letter by the mayor of the commune", E164/1.9 (attesting to the alleged kinship); "Biography - UNG Koam", E2/76.4.

- SEK Siek (E2/79) for the loss of her cousin and fiancé MORK Chhoeun, who was living in the family's house;
- CHHAT Kim Chhun (E2/81) for the loss of his father AM Thoat and a relative called POT Mouy alias SA Phal;[1132]
- UK Vasorthin (E2/84) for the loss of his father OUK Chy;
- Martine LEFEUVRE (E2/85) and OUK Neary (E2/89) for the loss respectively of their husband and father OUK Ket; and
- Robert HAMILL (E2/87) for the loss of his brother Kerry HAMILL.

4.4 Claims for reparations

651. Requests for reparations by Civil Parties whose harm was recognized by the Chamber to have been directly caused by the crimes committed by KAING Guek Eav shall be granted where the awards sought:

a) qualify as collective and moral reparations within the meaning of Internal Rule 23(1)(b), and
b) are sufficiently certain or ascertainable to give rise to an enforceable order against the Accused.

4.4.1 Civil Party requests

652. On 27 August 2009, the Chamber directed the Civil Party groups to file written submissions outlining the forms of collective and moral reparations sought against the Accused, if convicted.[1133] In response, the Civil Parties filed a joint submission which stressed the right of victims of mass violence and gross human rights violations to reparation, and requested that reparations awarded against the Accused should include as a minimum:[1134]

[1132] *See* "Letter of certification of CHHAT Kim Chhun by commune chief". E161.10 (available in Khmer only), "Photo OM Thon", E161.12 (available in Khmer only), "Letter of certification of CHHAT Kim Chhun by commune chief", E161.11 (available in Khmer only), "S-21 biography of Detainee POT Moy", E2/81.3 (available in Khmer only); "Biography – POT Moy", E2/81.4.
[1133] Direction on Proceedings relevant to Reparations and on the Filing of Final Written Submissions, E159, 27 August 2009.
[1134] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3, 14 September 2009, paras 43-44 (requesting "meaningful reparations […] of a collective and moral nature", which the ECCC "should try to maximize […] by working with the Government of Cambodia and established NGOs").

- the compilation and dissemination of statements of apology made by KAING Guek Eav throughout the trial acknowledging the suffering of victims, including comments by the Civil Parties;
- access to free medical care (both physical and psychological), including free transportation to and from medical facilities;
- funding of educational programs which inform Cambodians of the crimes committed under the Khmer Rouge regime and at S-21 in particular;
- erection of memorials and pagoda fences at S-21 (Choeung Ek and Prey Sar) as well as in the local communities of the Civil Parties; and
- inclusion of the names of the Civil Parties in Case 001 in the final judgment, along with a description of their connection to S-21.[1135]

653. In the event the Accused is found to be indigent, the Civil Parties requested the Chamber to declare the ECCC competent to ensure that reparation awards are implemented by the Royal Government of Cambodia in accordance with its international obligations, or by the Victims Unit through a voluntary trust fund.[1136]

654. In their final submissions, the Civil Party groups reiterated the requests set out in their Joint Submission, with Groups 1, 2 and 3 providing further particulars or supplementary claims. In particular, Civil Party Group 1 requested:

- express recognition in the final judgment of the right to reparation;
- distribution of the findings of the Chamber at trial through various media outlets;
- access for victims in general and S-21 victims in particular to free medical care, including psychological assistance, and that assistance provided in this regard by TPO be supported and reinforced through a reparations award;
- initiatives to educate Cambodian society concerning gross human rights abuses, genocide and crimes against humanity. Specific measures requested in this regard include salaries and training of teachers, provision of facilities, curriculum design, publication of educational materials, and ongoing training for local participants in a rights education program;
- assistance in the form of a fund for the Civil Parties, vocational training, micro-enterprise loans and business skills training;

[1135] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3, 14 September 2009, paras 16, 21, 24, 26-30, 45.
[1136] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3,14 September 2009, paras 2-41, 47.

- erection of memorials, particularly at Choeung Ek and Prey Sar, including a commemorative plaque listing the names of all known victims, information boards listing the names of the Civil Parties, as well as pagodas and pagoda fences in the local communities of the Civil Parties;
- proclamation of a national commemoration day to memorialize the victims who died and suffered at the hands of the Khmer Rouge, distinct from the 7 January Victory Day; and
- full and frank disclosure of the assets in the name of the Accused.[1137]

655. Finally, Civil Party Group 1 requested the Chamber to clearly delineate its framework for the enforcement and implementation of any reparations awards, and to further mandate the Victims Unit to undertake wider consultation on how reparations are to be approached in the Cambodian context.[1138]

656. Civil Party Group 2 requested that the Accused, regardless of his current income or property, take the following actions or bear the cost of the following reparations:

- writing and sending a letter to the Royal Government of Cambodia requesting the Government to offer a genuine, truthful and sincere apology to the Civil Parties;
- installation of memorial stones for the Civil Parties and their relatives and the production of information tablets about the victims, including the translation of this information into the other two working languages of the ECCC;
- construction of a memorial on the site of the former re-education centre at Prey Sar and the organization of an associated international architectural competition;
- visits for at least 13 Civil Parties who are not from Phnom Penh to Tuol Sleng, Prey Sar and Choeung Ek three times a year for four days per visit;
- medical treatment, medication and psychological services for all survivors of Tuol Sleng, Prey Sar and Cheung Ek, if any, and for indirect victims if their illness is related to the crimes committed;
- production of at least 100 hours of audio-visual material of the trial, including its distribution in the provinces for regular showing;
- production of at least 10 written and audio documents summarising and explaining the final judgment against the Accused for display in one pagoda in each commune;
- organisation of 17 ceremonies for the naming of a public building after a victim and the production and installation of information tablets; and

[1137] "Civil Party Group 1 - Final Submission", E159/7, 10 November 2009, para. 121.
[1138] "Civil Party Group 1 - Final Submission", E159/7, 10 November 2009, paras 119-124.

- writing and sending an open letter to the Royal Government of Cambodia requesting that one third of the entrance fees to S-21 and Choeung Ek be utilized for these reparations, and that the rest be divided among the Civil Parties as a monetary award.[1139]

657. Civil Party Group 3 requests the following reparations:

- dissemination of information about the trial in each Cambodian province by setting up exhibits in a public location;
- compilation and publication of the statements of apology made by KAING Guek Eav during the trial, acknowledging the suffering caused to the victims, together with comments of the Civil Parties;
- access to free medical care, including physical and psychological therapy, and payment of transportation costs to and from appropriate health facilities;
- funding of educational programs, both in schools and museums, that inform Cambodians of the crimes committed under the Khmer Rouge regime at S-21, S-24 and Choeung Ek in particular;
- erection of memorials both at Choeung Ek and Prey Sar;
- engraving the names of all Tuol Sleng detainees on the external wall of S-21;
- erection of a plaque memorialising all the victims that have not been identified;
- construction of a walkway along the external wall of S-21;
- preservation of the buildings and cells at S-21 in their current state and preservation of the instruments of torture that were found there;
- preservation of the existing archives at S-21, including those that are on display and those that are in storage and not accessible to the public;
- conservation of the Vann Nath paintings displayed at S-21;
- protection of the Choeung Ek site;
- inclusion of the names of all the Civil Parties in the final judgment, including a specification as to their connection with S-21; and
- publication of the parts of the judgment recounting the facts and the responsibility of the Accused, as well as the disposition, within six months to one year following its notification in the official gazette and other national newspapers and ensuring their regular broadcast on national radio and television networks.[1140]

658. In the event the Accused is determined to be indigent, Civil Party Group 3 further request the Chamber to request the Royal Government of Cambodia to implement these

[1139] "Co-Lawyers' for Civil Parties (Group 2) – Final Submission", E159/6, 5 October 2009, paras 14-21.
[1140] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, *see also* "CGP3 - Mémoire Additionnel Concernant la Reparation", E159/3/1, 17 September 2009.

measures, in compliance with its international obligations, or order the establishment of a voluntary trust fund to be managed by Victims Unit. Finally, it requests the Chambers to establish processes for the implementation of reparations and a mechanism for Civil Parties to seek redress in case of non-compliance with reparations awards.[1141]

659. In response, the Defence in its final submissions indicated that it did not object to the grant of the Civil Party requests for reparation, and took particular note of the request for reparation in the form of a compilation and dissemination of statements of apology made by KAING Guek Eav throughout the trial acknowledging the suffering of victims. However, it pointed out that the Accused appeared to be indigent at the time of his transfer to the ECCC.[1142]

4.4.2 Legal framework

660. Civil Party participation before the ECCC includes both a right for victims to participate as parties in the criminal trial of an Accused in support of the Prosecution and to pursue a related civil action for collective and moral reparations against an Accused for harm that is directly attributable to the crimes for which the Accused is convicted.[1143]

661. Although the Internal Rules depart from Cambodian national law in significant respects, the notion of Civil Party participation before the ECCC is derived from analogous forms of participation recognized before some national jurisdictions, including in the Kingdom of Cambodia.[1144] The key features of Civil Party participation are that awards are directed against and borne exclusively the Accused following a determination

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[1141] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009.
[1142] "Final Defence Written Submissions", E159/8, 11 November 2009, paras 49-50.
[1143] Internal Rule 23(1) provides that "[t]he purpose of Civil Party action before the ECCC is to: a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the Prosecution; and b) Allow Victims to seek collective and moral reparations, as provided in this Rule".
[1144] For instance, and unlike ordinary Cambodian courts, the ECCC lacks the competence to award individual monetary compensation to Civil Parties, Reparations awards in the ECCC context are instead "collective and moral" (Internal Rule 23(1)(b)). Such departures from national law were considered necessary in view of the large number of Civil Parties expected before the ECCC and the inevitable difficulties of quantifying the full extent of losses suffered by an indeterminate class of victims**.** Reparations before the ECCC were therefore intended to be essentially symbolic (aimed at conferring official recognition upon victims, and assisting to restore dignity and preserve the collective memory) rather than compensatory.

of responsibility for the harm established by Civil Parties as resulting from the criminal offending. The ECCC lacks the competence to enforce reparations awards.[1145] Reparations awarded by the ECCC against an Accused can therefore only be enforced, where necessary, within the ordinary Cambodian court system.

662. The Chamber acknowledges the principles expressing the right of victims of gross violations of international human rights law to redress, reflected in a number of international treaties and other instruments,[1146] declarations of United Nation bodies[1147] and decisions of regional courts.[1148] The Chamber is nonetheless constrained in its task by the requests before it and type of reparations permitted under its Internal Rules. Limitations of this nature cannot be circumvented through jurisprudence but instead require Rule amendments.[1149]

[1145] *See* Article 1 of the ECCC Law and of the ECCC Agreement (conferring competence to prosecute individuals who were "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia […] committed during the period from 17 April 1975 to 6 January 1979").

[1146] *See e.g.,* Articles 2(3), 9(5) and 14(6) of the ICCPR; Article 14 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984; Article 75 of the ICC Statute; Article 24 of the United Nations Convention for the Protection of All Persons from Enforced Disappearance, GA Res. 61/177, 20 December 2006, A/RES/61/177, not yet in force; this right is also enshrined in a series of regional treaties, such as Articles 5(5), 13 and 41 of the ECHR, Articles 25, 63(1) and 68 of the American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 and Article 21(2) of the African Charter on Human and Peoples' Rights, 1520 UNTS 217, 27 June 1981*; see also* Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147, UN Doc. A/RES/60/147, 16 December 2005 and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res. 40/34, 29 November 1985.

[1147] *See e.g.,* UN Human Rights Committee General Comment No. 31 [80]*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras 15-17; UN Committee Against Torture General Comment No. 2, *Implementation of article 2 by States Parties,* UN Doc. CAT/C/GC/2, 24 January 2008, para. 15.

[1148] *See e.g., Velasquez Rodriguez case*, Judgement, Inter-American Court on Human Rights (Ser. C No. 4), 29 July 1988, para. 174; *see also Papamichalopoulos v. Greece*, Judgement, ECtHR (no. 14556/89), 31 October 1995, para. 36.

[1149] The need to adapt Civil Party participation to the particular needs of trials of mass crimes and the specific Cambodian context is a major impetus behind the ongoing reforms to victim participation before the ECCC; *see* ECCC Press Release dated 9 February 2010, issued at the conclusion of the **7**th ECCC Plenary Session: http://www.eccc.gov.kh/english/cabinet/press/147/Press_Release_Conclusion_7th_Plenary_Session_(ENG.pdf) (notifying decision to empower the Victims Support Section, in the broader interests of victms, to develop and implement new programs and measures occurring outside of formalized court proceedings, encompassing a broader range of services, as well as a more inclusive cross-section of victims than those who are admitted as Civil Parties in cases before the ECCC. The amended rules, applicable to future ECCC trials, further clarify that these measures may be developed in collaboration with

663. Further, the competence of the ECCC is distinct from that of certain regional human rights courts,[1150] which are instead empowered to adjudicate questions of State responsibility and to order States to make reparation to their citizens where found responsible for gross violations of international human rights law. The Chamber has no jurisdiction over Cambodian or other national authorities or international bodies. Nor can it properly impose obligations on or grant rights to persons or entities that were not parties to the proceedings before it. At most, the Chamber can merely encourage national authorities, the international community and other potential donors to show solidarity with the victims by providing financial and other forms of support that contributes to their rehabilitation, reintegration, and restoration of dignity.

664. Where an Accused appear to be indigent, there is currently no mechanism allowing the ECCC to substitute or supplement awards made against them with funds provided by national authorities or other third parties.

665. The Chamber is, additionally, unable to issue orders where the object of the claim is uncertain or unascertainable, and which are incapable of enforcement. Accordingly, a prerequisite to the grant of an award is the clear specification of the nature of the relief sought, its link to the harm caused by the Accused that it seeks to remedy, and the quantum of the indemnity or amount of reparation sought from the Accused to give effect to it. Placing the burden on the Chamber to substitute its own decision in these areas is inconsistent with a mechanism that is claimant-driven, and is also irreconcilable with the need for a fair and expeditous trial, the envisaged duration of the ECCC and the resources at its disposal.

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governmental and non-governmental agencies external to the ECCC. This creates the possibility to develop more ambitious programs than would otherwise be achievable within the ECCC's existing capacities and resources.)

[1150] *See* Articles 5(5), 13 and 41 of the ECHR, Articles 25, 63(1) and 68 of the American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 and Article 21(2) of the African Charter on Human and Peoples' Rights, 1520 UNTS 217, 27 June 1981.

666. In the present context, constraints also stem from the overwhelming losses suffered by the Civil Parties and the unlikelihood of recovery from KAING Guek Eav, who appears to be indigent.[1151]

4.4.3 Analysis of the various categories of reparations requested

4.4.3.1 Requests pertaining to the content of the judgment

667. The Civil Parties request that their names and those of the immediate victims be included in the final judgment, including a specification as to their connection with the crimes committed at S-21. Although reparations before the ECCC are, strictly speaking, limited to measures ordered against the Accused, the Chamber alone was capable of honouring the request to include the names of Civil Parties and their relatives who died at S-21 in this judgment. It also notes that comparable, official acknowledgments of suffering before other international bodies have been characterized as reparation of considerable symbolic significance for victims.[1152]

4.4.3.2 Compilation and publication of statements of apology

668. The Civil Parties have requested the compilation and publication of all statements of apology made by KAING Guek Eav during the trial, together with comments of the Civil Parties. Numerous such statements were made during the course of trial. As the compilation of these apologies and expressions of remorse may provide some satisfaction to victims and as they are in substance the only tangible means by which KAING Guek Eav may acknowledge his responsibility and the collective suffering of the victims of his

[1151] According to the "Déclaration des revenus et biens" (Declaration of Means) completed by the Accused at the request of the Chamber in October 2009, KAING Guek Eav has no bank account, owns no property and has no income; *see* "Déclaration des revenus et biens de l'Accusé", E175/1.1, 16 October 2009. The Chamber notes that the Accused has been in detention since 1999.

[1152] *See e.g.,* Impunity, Commission on Human Rights Res. 2002/79 (UN Doc. E/CN.4/RES/2001/70), 25 April 2002, para. 9: "[The Commission on Human Rights] [r]ecognizes that, for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators […] of these violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to encourage victims to participate in such a process."

criminal conduct, the Chamber grants this request.[1153] The Chamber nevertheless rejects the request to include statements by Civil Parties within this compilation, on grounds that such statements are distinct from the apologies made by KAING Guek Eav, and as their content has not been specified.

4.4.3.3 Requests concerning publication of the judgment and outreach

669. Requests for, amongst other things, the production of documentaries and the dissemination in the broadcast media of portions of the judgement are rejected on grounds of lack of specificity. The precise nature of the measures sought and their costs are uncertain and indeterminable and accordingly not amenable to an award against KAING Guek Eav. The Chamber notes, however, that the judgement will be issued publicly, and made available on the ECCC website, where it will be accessible to all media outlets wishing to make reference to it. It further notes that public provision of information regarding the judgement will occur as a feature of the ECCC Public Affairs Section's outreach activities, which are likely to contribute significantly to reconciliation initiatives within Cambodian society at large and public education.

4.4.3.4 Requests for individual monetary awards to Civil Parties or establishment of a fund

670. All requests which, whether directly or indirectly, seek individual monetary awards for Civil Parties, or the establishment of a trust fund for victims, are beyond the scope of available reparations before the ECCC. Accordingly, requests such as the provision of vocational training, micro-enterprise loans and business skills training are rejected.

[1153] Although not ordered against a convicted person, the Chamber notes the widespread recognition of similar measures as reparations; *see e.g., Rainbow Warrior (New Zealand/France)*, Decision, Arbitral Tribunal (UNRIAA, vol. XX, p. 217), 30 April 1990, para. 122 (noting the practice of international courts and tribunals of using satisfaction as a form of reparation (in the wide sense). Satisfaction may consist of an expression of regret, a formal apology, a declaratory judgment or another appropriate modality. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.); *see also* UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, Annex, UN Doc. E/CN.4/2000/62, 18 January 2000 (including among measures constituting satisfaction to victims apologies, including public acknowledgement of the facts and acceptance of responsibility).

4.4.3.5 Requests for measures by the Royal Government of Cambodia

671. Although likely to contribute to the collective and moral reparation of the harm suffered by victims, these requests fall outside the jurisdiction of the ECCC as they are not measures which can be satisfied through orders made against KAING Guek Eav. They are rejected on grounds that the institution of a national commemoration day for victims and the issuance of official statements of apology fall exclusively within national governmental prerogatives, which the ECCC has no competence to compel.

4.4.3.6 Requests for the construction of pagodas and other memorials

672. While sympathetic to these requests, the Chamber lacks sufficient specificity regarding the exact number of memorials sought and their nature, their envisaged location, or estimated cost. No information has been provided, for example, regarding the identity of the owners of all proposed sites, whether they consent to the construction of each proposed memorial, or whether additional administrative authorisations such as building permits would be necessary to give effect to each measure. As the material before it does not enable the Chamber to issue an enforceable order against KAING Guek Eav to pay a fixed or determinable amount in reparation, these requests are rejected.

4.4.3.7 Requests to preserve the S-21 archives, Vann Nath's paintings and the S-21 and S-24 sites

673. While acknowledging the significance of preservation efforts in this area, the Chamber notes that these requests are not in the form of particularized and quantified claims that may be readily transformed into orders against KAING Guek Eav. Further, the Chamber has been provided with no particulars regarding the current legal ownership of these sites, archives or items, or whether their owners or possessors consent to proposals that they be accessed or altered[1154], or the reallocation of revenues derived from them to Civil Parties. They are accordingly rejected.

[1154] *See e.g.,* "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, ERN (English) 00399719 (requesting, amongst other measures, erection of a plaque memorializing the victims, the construction of a walkway and the engraving of detainee names on the external wall of S-21).

4.4.3.8 Requests for the provision of access to free medical care and educational measures

674. Requests of this type – which by their nature are not symbolic but instead designed to benefit a large number of individual victims – are outside the scope of available reparations before the ECCC.[1155] Provision of free medical care to a large and indeterminate number of victims may purport to impose obligations upon national healthcare authorities and thus exceed the scope of the ECCC's competence. The Chamber is similarly unable to order measures that may impact on national education policies such as teacher training, salaries, and curriculum development. Even if awards of this sort were within the scope of Internal Rule 23(1)(b), proof would be required as to the link between the measure sought by each claimant and the crimes for which KAING Guek Eav has been found responsible. No such material has been provided to the Chamber. Further, the number and identity of all intended beneficiaries of these requests, the nature of the measures sought and the cost of their provision are neither particularized nor readily quantifiable within the available resources of the Chamber.

675. Although victim needs in these areas are undisputed, they are inherently incapable of satisfaction through an order against the Accused, and the requests in their current form cannot provide the basis of enforceable orders against KAING Guek Eav. They are consequently rejected.

[1155] *See* Internal Rule 23(1)(b).

5 DISPOSITION

676. For the foregoing reasons, having considered all the evidence and the submissions of the Parties, the Chamber decides as follows:

677. The Chamber finds the Accused **GUILTY**.pursuant to Articles 5, 6 and 29 (new) of the ECCC Law of the following crimes committed in Phnom Penh and within the territory of Cambodia between 17 April 1975 and 6 January 1979:

- Crimes against humanity (persecution on political grounds) (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts).
- Grave breaches of the Geneva Conventions of 1949, namely:
    - wilful killing,
    - torture and inhumane treatment,
    - wilfully causing great suffering or serious injury to body or health,
    - wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and
    - unlawful confinement of a civilian.

678. For the reasons given by the Chamber in its Decision on the Preliminary Objection, it has not evaluated the guilt or otherwise of the Accused in respect of national crimes of premeditated murder and torture, violations of Articles 501, 506 and 500, respectively, of the 1956 Penal Code and punishable before the ECCC pursuant to Article 3 (new) of the ECCC Law.[1156]

679. On the basis of the foregoing, the majority of the Chamber (Judge LAVERGNE dissenting) sentences the Accused to a single sentence of **35 years** of imprisonment.

[1156] Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187, 26 July 2010.

680. The Chamber considers that a reduction in the above sentence of **5 years** is appropriate given the violation of the Accused's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007.

681. The Accused is entitled to credit for the entirety of his time spent in detention, *i.e.* from 10 May 1999 to 30 July 2007 (under the authority of the Cambodian Military Court) and from 31 July 2007 until the Judgement becomes final (under the authority of the ECCC).[1157]

682. The Chamber declares all Civil Parties listed in paragraphs 645 and 650 to have suffered harm as a direct consequence of the crimes for which KAING Guek Eav has been convicted.

683. The Chamber shall compile all statements of apology and acknowledgements of responsibility made by KAING Guek Eav during the course of the trial. This compilation shall be posted on the ECCC's official website within 14 days of the date of this judgement becoming final. It rejects all other Civil Party claims.

684. This judgement, which was pronounced publicly on 26 July 2010, is appealable by the Parties in accordance with the Internal Rules. Given the gravity of the crimes for which he has been convicted, KAING Guek Eav shall remain in detention until this judgement becomes final.

[1157] *See* Decision on Request for Release, E39/5, 15 June 2009.

Done in Khmer, English and French.

Dated this twenty-sixth day of July 2010
At Phnom Penh
Cambodia

Greffiers

LIM Suy Hong Matteo CRIPPA SE Kolvuthy Natacha WEXELS-RISER DUCH Phary

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Judge NIL Nonn
Presiding

_____ _____
Judge Silvia CARTWRIGHT Judge YA Sokhan

_____ _____
Judge Jean-Marc LAVERGNE Judge THOU Mony

[Seal of the Tribunal]

6 ANNEX I: PROCEDURAL HISTORY

6.1 Arrest, Transfer and Detention of the Accused

1. On 10 May 1999, the Cambodian military authorities arrested and detained the Accused at the Phnom Penh Military Court Prison. He was indicted by the Cambodian Military Court for crimes against domestic security and genocide, and subsequently with genocide, crimes against humanity, war crimes and crimes against internationally protected persons.[1] His provisional detention, which was extended annually, continued under the jurisdiction of the Military Court until his transfer to the ECCC.[2]

2. On 30 July 2007, the Accused was detained by order of the Co-Investigating Judges of the ECCC and transferred to the ECCC Detention Centre. On 31 July 2007, the Co-Investigating Judges issued an order for the provisional detention of the Accused.[3] On 3 December 2007, the Pre-Trial Chamber dismissed an appeal lodged by the Defence against this order.[4] The Co-Investigating Judges extended the Accused's provisional detention until his appearance before the Trial Chamber.[5] This decision was confirmed by the Pre-Trial Chamber.[6]

3. On 1 April 2009, the Defence challenged the lawfulness of the Accused's provisional detention and requested his release for the duration of the trial.[7] On 15 June 2009, the Trial Chamber denied the Defence request, and ordered that the Accused

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1 Introductory Submission (entitled "Indictment"), E52/4.3, 10 May 1999; "Detention Order", E52/4.8, 10 May 1999; Introductory Submission (entitled "Order to Forward Case for Investigation"), E52/4.26, 6 September 1999; "Detention Order", E52/4.22, 10 September 1999; *see also* Second Introductory Submission (entitled "Second Order to Forward Case for Investigation"), E52/4.9, 10 May 1999; "Decision on Extension of Judicial Investigation", E52/4.34, 18 May 2000; "Decision on Extension of Judicial Investigation, E52/4.46, 15 May 2001.

2 "Detention Order Duch", E52/4.47, 22 February 2002; E52/4.48, 22 February 2003; E52/4.54, 22 February 2004; E52/4.57, 28 February 2005; E52/4.60, 28 February 2006; "Detention Order", E52/4.63, 28 February 2007*; see also* "Decision on Extension of Judicial Investigation", E52/4.52, 20 February 2004.

3 "Arrest Warrant", C1, 30 July 2007; "Detention Order", C4/2, 31 July 2007; "Order of Provisional Detention", C3/10, 31 July 2007.

4 "Decision on Appeal against Provisional Detention Order of Kaing Guek Eav *alias* 'Duch'", C5/45, 3 December 2007.

5 "Order on extension of provisional detention", C3/II, 28 July 2008.

6 "Detention Order", D99/3/43, 5 December 2008.

7 "Written Record of Proceedings – 1 April 2009", E1/7.

remain in provisional detention for the duration of the trial.[8] However, the Chamber found that the Accused's prior detention before the Military Court constituted a violation of applicable Cambodian domestic law and internationally recognised fair trial rights. It declared that if convicted, the Accused would be entitled to a reduction in sentence, to be determined at the sentencing stage, as a remedy for these violations.[9] The Chamber further declared that in calculating the length of any sentence to be served, the Accused would be entitled to credit for the entirety of the time spent in detention from 10 May 1999 onwards.[10]

6.2 Investigation Phase

6.2.1 Preliminary investigation

4. The Co-Prosecutors initiated a preliminary investigation on 10 July 2006.[11] On 18 July 2007, they filed an Introductory Submission with the Co-Investigating Judges, thus opening a judicial investigation against five suspects, including the Accused.[12]

6.2.2 Initial appearance and charges

5. The initial appearance of the Accused before the Co-Investigating Judges took place on 31 July 2007. The Accused was notified that he was under judicial investigation for the facts alleged in the Introductory Submission and was charged with crimes against humanity, and subsequently with grave breaches of the Geneva Conventions of 1949.[13]

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8 Decision on Request for Release, E39/5, 15 June 2009, paras 9-14, 22-26; "Written Record of Proceedings – 15 June 2009", E1/32.
9 Decision on Request for Release, E39/5, 15 June 2009, paras 34-36.
10 Decision on Request for Release, E39/5, 15 June 2009, paras 27-29.
11 Amended Closing Order, para. 4.
12 "Introductory Submission", D3, 18 July 2007.
13 "Written Record of Initial Appearance", D7, 31 July 2007; "Written Record of Interview of Charged Person", D20, 2 October 2007.

6.2.3 Separation Order

6. On 19 September 2007, the Co-Investigating Judges ordered the separation of the Case File of the Accused in relation to facts concerning S-21. These were investigated under Case File number 001/18-07-2007 and comprise the present case.[14]

6.2.4 Conclusion of investigation and Closing Order

7. On 15 May 2008, the Co-Investigating Judges notified the Parties pursuant to Internal Rule 66(1) that they considered their investigation to be concluded.[15] Pursuant to Internal Rule 66(4), the Co-Investigating Judges forwarded the Case File to the Office of the Co-Prosecutors on 23 June 2008.[16] On 18 July 2008, the Co-Prosecutors filed their Final Submission and the Defence their response on 24 July 2008.[17]

8. On 8 August 2008, the Co-Investigating Judges issued the Closing Order, indicting the Accused for the crimes against humanity of imprisonment, enslavement, torture, rape, murder, extermination, persecution and other inhumane acts and for the following grave breaches of the Geneva Conventions of 1949: unlawful confinement of a civilian, wilfully depriving rights to a fair trial, wilfully causing great suffering, torture and inhumane treatment, and wilful killing.

6.3 Appeal of the Closing Order

6.3.1 Co-Prosecutors' Appeal

9. On 21 August 2008, the Co-Prosecutors appealed the Closing Order to the Pre-Trial Chamber, alleging that the Co-Investigating Judges erred by failing to indict the Accused

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[14] "Separation Order", D18, 19 September 2007. All other facts related to all suspects mentioned in the Introductory Submission were investigated under Case File number 002/19-09-2007.
[15] "Notice of Conclusion of Judicial Investigation", D89, 15 May 2008.
[16] "Forwarding Order", D95, 23 June 2008.
[17] "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, 18 July 2008; "Response of Kaing Guek Eav's Defence Team to the Prosecutor's Final Submission", D96/1, 24 July 2008.

for the domestic crimes of homicide and torture under the 1956 Cambodian Penal Code, and for the commission of crimes through participation in a joint criminal enterprise.[18]

6.3.2 Pre-Trial Chamber Decision

10. On 5 December 2008, the Pre-Trial Chamber issued its decision on the Co-Prosecutors' appeal against the Closing Order. The Pre-Trial Chamber concluded that the domestic crimes of torture and homicide, punishable under Article 3 of the ECCC Law and Articles 500, 501 and 506 of the 1956 Penal Code, contained distinct elements not present in the international crimes of murder and torture. As these offences were not subsumed by the international crimes, the Pre-Trial Chamber added these charges to the Amended Closing Order.[19] The Pre-Trial Chamber further concluded that although the facts in the Closing Order suggested co-perpetration of the acts committed within S-21, participation in a joint criminal enterprise did not form part of the factual basis for the investigation. As the Accused was not informed about his alleged participation in a joint criminal enterprise prior to the Final Submission, the Chamber declined to charge the Accused with this form of responsibility in the Closing Order.[20] The effect of this decision was to remit the Accused for trial pursuant to the Amended Closing Order.

6.4 Civil Parties

6.4.1 Joining of Civil Parties

11. A number of individuals applied to join Case 001 as Civil Parties. Twenty-eight applicants joined during the investigative phase, with a further sixty-six applying to join during the trial proceedings prior to the 2 February 2009 deadline.[21] Four of these applications were subsequently withdrawn or rejected.[22] Accordingly, a total of 90 Civil

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[18] "Record of Appeals", D99/3, 21 August 2008; "Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav 'Duch'", D99/3/3, 5 September 2008.
[19] "Decision on Appeal against Closing Order Indicting Kaing Guek Eav Alias 'Duch'", D99/3/42, 5 December 2008, paras 72, 84, 99-101, 103, 107.
[20] "Decision on Appeal against Closing Order Indicting Kaing Guek Eav Alias 'Duch'", D99/3/42, 5 December 2008, paras 125, 141.
[21] Amended Closing Order, para. 6.
[22] Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, E2/94/2, 4 March 2009; Decision on Request to Extend Deadline for the Filing of Civil Party Applications, E2/92/2, 10 March

Parties participated in the trial proceedings of Case 001. The Civil Parties were organised into four groups, each represented by their own counsel.

6.4.2 Hearing of Civil Parties

12. On 30 April 2009, following requests by the Civil Parties to be heard at trial, the Trial Chamber agreed to hear seven Civil Parties alleged to be former S-21 detainees during the trial segment concerning the functioning of S-21. 15 Civil Parties were heard between 17 and 24 August 2009. [23]

6.5 Trial Proceedings

6.5.1 Trial preparation and initial hearing

13. Prior to and during trial proceedings, the Trial Chamber held several Trial Management Meetings. These meetings, held in closed session, assisted the Chamber in the management of numerous trial-related procedural matters. [24]

14. The initial hearing took place on 17 and 18 February 2009. Amongst other things, this hearing considered the Preliminary Objection raised by Defence, the Co-Prosecutors' motion to file new evidence, protective measures, and the admissibility of Civil Party applications. Further, the Chamber sought clarification on the intention of the Co-Prosecutors and the Defence to raise certain issues during the trial, and also reviewed

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2009; "CPG3: Lettre d'abandon de Droit de la Constitution de la Partie Civile au près des Chambres Extraordinaires au sein des Tribunaux Cambodgiens", E2/65/5, 15 September 2009; Decision on Request to Extend Deadline for the Filing of Civil Party Applications, E2/92/2, 10 March 2009 (rejecting, for lack of substantiation, request of Civil Party Group 1 to belatedly admit the Civil Party application of Norng Chanphal (E2/92)). NORNG Chanphal later testified before the Chamber as a witness (T., 2 July 2009).

[23] Decision Concerning the Scheduling of the Hearing of Civil Parties During the Substantive Hearing, E57, 30 April 2009. 28 Civil Parties initially requested to be heard. This number was subsequently reduced to 22 after 6 Civil Parties declined or were unavailable to be heard by the Chamber; *see* Written Record of Proceedings – 06 July 2009, 11-12 August 2009, 18 August 2009, 20 August 2009 and 24 August 2009, comprising documents E1/43, E1/61, E1/64, E1/66 and E1/67; *see also* Written Record of Proceedings, 17-20 August 2009 and 24 August 2009, comprising documents E1/63 to E/67..

[24] Trial Management Meetings were held on 15 and 16 January, 11 June and 23 June 2009, respectively.

progress on agreed facts and the finalization of witness lists.[25] The Chamber also decided during this hearing to call a number of witnesses and experts to be heard during trial.[26]

6.5.2 Preliminary Objection

15. On 28 January 2009, the Defence filed a preliminary objection alleging that prosecution of the Accused for the domestic crimes of murder and torture pursuant to Articles 500, 501 and 506 of the 1956 Penal Code was barred because the applicable limitation period had expired.[27] The Trial Chamber indicated that it would issue its decision on the preliminary objection at the same time as the judgement on the merits.[28]

6.5.3 Substantive hearing

16. Pursuant to the Trial Chamber's "Direction on the Scheduling of the Trial", the substantive hearing was divided into seven different segments:

i. Issues relating to M-13;
ii. Establishment of S-21 and the Takmao prison;
iii. Implementation of CPK policy at S-21;
iv. Armed conflict;
v. Functioning of S-21 including Choeung Ek,
vi. Establishment and functioning of S-24; and

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[25] "Written Record of Proceedings – 17 and 18 February 2009, E1/3 and E1/4; *see also* "Agenda for Initial Hearing", E8/1, 13 February 2009; Direction Requesting Additional Information from the Parties and Co-Investigating Judges in Preparation of the Initial Hearing, E5/11, 5 February 2009.

[26] "Written Record of Proceedings – 17 and 18 February 2009, E1/3 and E1/4. At various stages during trial, the Chamber issued additional decisions removing from this list several witnesses and experts; *see e.g.* Decision on Protective Measures for Witnesses and Experts and on Parties' Requests to Hear Witnesses and Experts: Reasons, E40/1, 10 April 2009; Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, E135, 7 August 2009; and "Written Record of Proceedings – 29 June 2009, 6 July 2009, 16 July 2009, 27 August 2009 and 15 September 2009, comprising documents E1/39, E1/43, E1/50, E1/70 and E1/75.

[27] "Preliminary Objection Concerning Termination of Prosecution of Domestic Crimes", E9/1, 28 January 2009; "Co-Prosecutors' Written Response to the Defence's Preliminary Objection to the Applicability of the 1956 Cambodian Penal Code", E9/7, 18 May 2009; "Group 1 – Civil Parties' Co-Lawyers' Submission on the Preliminary Objection" E9/5, 18 May 2009; "Submission of Co-Lawyers for Civil Parties – Group 2 – on the, Preliminary Objection Concerning Termination of Prosecution of Domestic Crimes", E9/8, 18 May 2009; "Response (Group 3) to the Preliminary Objection Concerning Expiry of the Statute of Limitations for Domestic Crimes", E9/6, 18 May 2009; "Conclusion Écrites Concernant L'Exception Préliminaire Soulevée Par La Défense", E9/9, 18 May 2009.

[28] Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, ECCC Trial Chamber, E/187, 26 July 2010.

vii. Issues relating to the character of the Accused.[29]

17. On 30 March 2009, the substantive hearing commenced with the reading of parts of the factual analysis in the Amended Closing Order and of the charges against the Accused.[30] Opening statements by the Co-Prosecutors, followed by the Accused and his Defence co-lawyers, took place on 31 March 2009.[31]

18. On 31 March 2009, the Co-Prosecutors informed the Trial Chamber that the Defence either agreed with or did not dispute 238 of the 351 proposed facts alleged in the Amended Closing Order.[32] As directed by the Trial Chamber, the Co-Prosecutors read these facts in court. [33]

19. At trial, the Trial Chamber heard testimony from 9 experts and 24 witnesses, including 7 character witnesses. In addition to the 22 Civil Parties heard during the course of trial, the records of interviews of a number of witnesses were read out on 4, 5, 11 and 12 August 2009. The Chamber invited the Parties to make observations on each statement.[34]

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[29] Direction on the Scheduling of the Trial, E26, 23 March 2009.

[30] "Written Record of Proceedings – 30 March 2009", E1/5; *see also* "Order Scheduling the Start of the Substantive Hearing and Sitting Days for First Three Months", E15, 23 February 2009.

[31] "Written Record of Proceedings – 31 March 2009", E1/6; Direction on making a brief Opening Statement during the Substantive Hearing, E19, 10 March 2009. On 27 March 2009, the Trial Chamber rejected the request of the Co-Lawyers for the Civil Parties to submit an opening statement; *see* Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, E23/4, 27 March 2009.

[32] "Written Record of Proceedings – 31 March 2009", E1/6; "Response to Direction Requesting Additional Information from the Parties and Co-Investigating Judges in Preparation of the Initial Hearing", E5/11/1, 10 February 2009; "Response of the Co-Prosecutors Regarding Agreement on Facts", E5/11/2, 11 February 2009; *see also,* "Defence Position on the facts contained in the Closing Order", E5/11/6.1, 1 April 2009; "Defence's explanation concerning the document entitled 'Defence's Position on the facts contained in the Closing Order'", E5/11/6, 1 April 2009.

[33] "Written Record of Proceedings – 01 April 2009", E1/7.

[34] The records of interviews of the following witnesses were read in court: Khieu Ches (E3/456), Pes Math (E3/457), Nhem En (E3/458), Nhep Hau (E3/460), Kung Phai (E3/461, E3/462, E3/396, E3/244), Makk Sithim (E3/484, E3/396), Tay Teng (E3/485, E3/486, E3/218, E3/242), Soam Sam Ol (E3/487), Meas Pengkry (E3/446, E3/242, E3/218), Uk Bunseng (E3/490), Horn (Hân) Iem (E3/491), Phach Siek (E3/495), Kaing Pan (E3/496), and (in summary form) Chey Sopheara (E3/488); *see* "Written Record of Proceedings – 4, 5, 11 and 12 August 2009," comprising documents E1/57, E1/58, E1/61 and E1/62.

6.5.4 Other relevant issues

6.5.4.1 Co-Prosecutors' Motion Regarding Joint Criminal Enterprise

20. On 8 June 2009, the Co-Prosecutors requested the Chamber to declare the notion of Joint Criminal Enterprise to be applicable before the ECCC, and to apply it in relation to the commission of the crimes charged against the Accused.[35] The Chamber recalled that the Co-Prosecutors had expressed their intention to rely on the notion of Joint Criminal Enterprise during the initial hearing and indicated that it considered the issue to be live before the Chamber.[36] Following submissions by the Parties, the Trial Chamber indicated that it would issue its decision on this matter with the judgement on the merits.[37]

6.5.4.2 Civil Party Motion Regarding Submissions on Sentencing and on Character of the Accused

21. On 27 August 2009, following a joint Civil Party request, the Trial Chamber delivered two oral decisions, by a majority (Judge LAVERGNE dissenting in part).[38] The Chamber decided that the Civil Party lawyers lacked standing to make submissions on sentencing, including submissions on a sentence to be imposed, submissions relevant to sentencing.[39] The Trial Chamber also denied the Civil Parties' request to put questions relevant to the Accused's character to the Accused, two experts and nine witnesses.[40]

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35 "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, 8 June 2009.

36 "Written Record of Proceedings – 29 June 2009", E1/39.

37 "Civil Party Group 1 – Notification Pursuant to the Co-Prosecutors' Request for Application Joint Criminal Enterprise", E73/1, 30 June 2009; "Civil Parties Group 3 – Brief in Support of the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/3, 16 September 2009; "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, 17 September 2009.

38 "Groups 1 and 2 – Civil Parties' Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing", E72, 9 June 2009.

39 The Civil Party lawyers were permitted to refer to such factors only when referring to the guilt or innocence of the Accused or to a Civil Party claim for reparation; *see* "Written Record of Proceedings – 27 August 2009", E1/70; *see also* 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, E72/3, 12 October 2009.

40 "Written Record of Proceedings – 27 August 2009", E1/70; 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, E72/3, 12 October 2009.

22. On 1 and 25 September 2009 respectively, Civil Party Groups 3 and 2 appealed both decisions of the Trial Chamber.[41] On 24 December 2009, the Supreme Court Chamber declared these appeals inadmissible pursuant to Internal Rule 104(4).[42]

6.5.5 Closing statements

23. On 17 September 2009, the Civil Parties filed written submissions stipulating the forms of collective and moral reparations sought against the Accused, if convicted.[43]

24. Between 23 and 27 November 2009, the Parties presented their closing statements.[44] Following his closing statement, the Accused orally requested that the written version of his statement be put on file, which request the Trial Chamber granted.[45]

25. The Civil Parties' co-lawyers and the Co-Prosecutors presented rebuttal statements on 26 and 27 November 2009, to which the Defence responded on 27 November 2009.[46]

26. The Accused made his final statement on 27 November 2009. Although acknowledging his responsibility for the crimes committed, the Accused requested acquittal and release. Following the conclusion of closing statements, the President declared the trial proceedings closed. [47]

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[41] "CPG3 – Declaration d'Appel", E162, 1 September 2009; "Appeal of Co-Lawyers for Civil Parties (Group 2) Against Trial Chamber's Decisions to Exclude Civil Party Lawyers from Questioning the Accused, Witnesses and Experts on the Accused's Character and to Exclude Civil Parties from Submissions on Sentencing", E169, 25 September 2009.

[42] Decision on the Appeals Filed by Lawyers for Civil Parties (Groups 2 and 3) Against the Trial Chamber's Oral Decision of 27 August 2009, E169/1/2, 24 December 2009.

[43] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3, 17 September 2009; "CPG3 – Mémoire Additionnel Concernant la Réparation", E159/3/1, 17 September 2009.

[44] *See* "Written Record of Proceedings – 23-26 November 2009, comprising documents E1/78 to E/81; *see also* "Scheduling Order for Closing Statements", E170, 30 September 2009; "Civil Party Group 1 – Final Submission", E159/7, 10 November 2009; "Co-Lawyers' for Civil Parties (Group 2) – Final Submission", E159/6, 10 November 2009; "Civil Parties (Group 4) – Final Written Submission", E159/4, 10 November 2009; "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009; "Co-Prosecutors' Final Trial Submission with Annexes 1-5", E159/9, 11 November 2009; "Final Defence Written Submissions" E159/8, 11 November 2009; Direction on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions, E159, 27 August 2009.

[45] "Accused's Final Written Submission", E159/10, 25 November 2009; "Written Record of Proceedings – 25 November 2009", E1/80.

[46] "Written Record of Proceedings – 26 and 27 November 2009", documents E1/81 and E1/82.

[47] "Written Record of Proceedings – 27 November 2009", E1/82.

6.5.6 Subsequent proceedings

27. The Parties were subsequently given the opportunity to make written submissions on the impact, if any, of the new 2009 Penal Code, which entered into force after the closing statements. None of the parties availed themselves of this opportunity.[48]

28. The Chamber delivered its verdict and filed the written judgement on 26 July 2010. It sentenced the Accused to 35 years of imprisonment based on convictions for the crime against humanity of persecution (extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape) and other inhumane acts) as well as for grave breaches of the Geneva Conventions of 1949 (wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian).

[48] "Order Relevant to the 2009 Penal Code of Cambodia", E180/1, 4 February 2010.

7 ANNEX II: AERIAL VIEW OF THE S-21 COMPLEX

"Aerial Photograph of Tuol Sleng Genocide Museum", E3/16, ERN (Khmer, French and English) 00189137.

8 ANNEX III: LIST OF CIVIL PARTIES

Pseudonym	Full Name	Place of Residence	Date of Birth	Place of Birth	Occupation
D25/1	Mr. BOU Meng	[[Redacted]]	[[Redacted]]	[Redacted]	[Redacted]
D25/2	Ms. CHHIN Navy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/3	Mr. CHUM Mey	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/4	Ms. HAV Sophea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/5	Ms. PHUNG Guth Sunthary	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/6	Mr. CHUM Sirath	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/7	Ms. IM Sunthy	[Redacted]	[Redacted]	[Redacted]	[Redacted]

D25/8	Ms. MEASKETH Sanphotre	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/9	Ms. ROS Men	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/10	Mr. CHE Heap	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/11	Mr. KHUON Sarin	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/12	Mr. CHRAING Sam-Ean	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/13	Mr. SEANG Vanndi	[Redacted]	[Redacted]	[Redacted]	[Redacted]

D25/14	Mr. TOCH Monin	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/15	Mr. SUON Seang	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/16	Ms. CHUM Neou	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/17	Ms. KAUN Sunthara	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/18	Mr. MAN Saut	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/19	Ms. KONG Teis	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/20	Ms. NGETH Sok	[Redacted]	[Redacted]	[Redacted]	[Redacted]

D25/21	Mr. TATH Lorn	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/22	Mr. Timothy Scott DEEDS	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/23	Mr. YIM Leng	[Redacted]	[Redacted]	[Redacted]	Farmer
D25/24	Mr. UM Pyseth (successor of Ms. SUOS Sarin, deceased)	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/25	Mr. KE Khon	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/26	Ms. KIMARI Nevinka	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/27	Ms.TIOULONG Antonya	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/28	Ms. TIOULONG - ROHMER Neva	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/21	Ms. IEM Soy	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/22	Mr. CHHOEM Sitha	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/23	Mr. LAY Chan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/24	Ms. UL Say *alias* Riem	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/25	Mr. SIN Lim Sea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/26	Mr. OU Savrith	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/27	Ms. OU Kamela	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/28	Ms. ROS Chuor Siy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/29	Ms. KIMARI Visaka	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/30	Ms. NHOEM	[Redacted]	[Redacted]	[Redacted]	[Redacted]

	Kim Hoeurn				
E2/31	Ms. NHEK OU Davy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/32	Ms. NAM Mon	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/33	Mr. PHAOK Khan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/34	Ms. SO Saung	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/35	Ms. CHHAY Kan *alias* LIENG Kan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/37	Mr. KLAN Fit	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/38	Mr. HIET Tey Chov	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/39	Ms. SUON Sokhomaly	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/41	Ms. SIN Sinet *alias* Srun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/42	Ms. ROUN Sreynob	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/43	Ms. EL Li Mah	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/44	Ms. SMAN Nob	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/45	Ms. SMAN Sar	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/46	Ms. KE Samaut	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/47	Ms. MEN Lay	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/48	Ms. NHEM Sophan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/50	Mr. NETH Phally	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/51	Ms. MAN Mas *alias* MAN Malymas	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/52	Ms. KOM Men *alias* KUM Men	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/53	Ms. TRY Ngech Leang	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/54	Ms. HENG Ngech Hong	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/55	Mr. BENG Chanthorn	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/56	Mr. YUN Chhoeun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/57	Mr. LY Khiek	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/58	Mr. PUOL Punloek *alias* Nget	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/59	Mr. CHANN Krouch	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/60	Ms. NORNG Kim Leang	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/61	Mr. LY Hor	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/62	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/63	Ms. PANN Pech	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/64	Ms. NHEB Kimsrea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/66	Ms. PENH Sokkhun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/69	Ms. LIM Yon	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/70	Ms. CHAN Yoeurng	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/71	Ms. SOEM Pov	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/72	Ms. KAN San	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/73	Mr. NORNG Sarath *alias* Por	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/74	Ms. NGET Uy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/75	Ms. THIEV Neab *alias* KHIEV Neab	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/76	Ms. UNG Voeurn *alias* HUL Voeurn	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/78	Ms. MEAS Saroeurn	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/79	Ms. SEK Siek	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/80	Ms. CHIN Met	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/81	Mr. CHHAT Kim Chhun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/82	Mr. MORN Sothea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/83	Ms. HONG Savath	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/84	Mr. UK Vasorthin	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/85	Ms. Martine LEFEUVRE	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/86	Mr. Jeffrey JAMES	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/87	Mr. Robert HAMILL	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/88	Mr. Joshua ROTHSCHILD	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/89	Miss. OUK Neary	[Redacted]	[Redacted]	[Redacted]	[Redacted]
CIVIL PARTY APPLICATIONS WITHDRAWN DURING THE COURSE OF TRIAL					
E2/49	Mr. ENG Sitha	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/65	Ms. BUN Srey	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/77	Ms. KEANG Vannary	[Redacted]	[Redacted]	[Redacted]	[Redacted]

9 ANNEX IV: GLOSSSARY AND LIST OF ABBREVIATIONS

1956 Penal Code	Criminal Code of the Kingdom of Cambodia (1956), promulgated on 21 February 1955 by the King (Kram no. 933NS); Kingdom of Cambodia, Recueil Judiciaire, Special Edition, 1956, pp. 11-403
1993 (SOC) Code of Criminal Procedure	Law on Criminal Procedure, 8 March 1993, adopted by the National Assembly of the State of Cambodia on 28 January 1993, promulgated by Decree No. 21 on 8 March 1993.
1993 Constitution of the Kingdom of Cambodia	Constitution of the Kingdom of Cambodia (1993), adopted by the Constitutional Assembly and signed by the President on 21 September 1993.
2007 Code of Criminal Procedure	Code of Criminal Procedure of the Kingdom of Cambodia, promulgated by the King on 10 August 2007.
2009 Penal Code	Criminal Code of the Kingdom of Cambodia, promulgated by the King on 30 November 2009 (Part I directly in force; the other parts of the Code in force one year after promulgation).
Accused	Kaing Guek Eav *alias* Duch
Accused JCE Response	Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, 17 September 2009
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978
Amended Closing Order	Closing Order indicting Kaing Guek Eav *alias* Duch, D99, 8 August 2008, as amended by the Pre-Trial Chamber's Decision on Appeal Against the Closing Order, dated 5 December 2008
cf	compare
Chamber	Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia
Civil Parties	90 individuals who participated in the trial proceedings as Civil Parties, organised into four Civil Party groups

Closing Order	Closing Order indicting Kaing Guek Eav *alias* Duch, D99, 8 August 2008
Common Article 2	Article 2 common to the four Geneva Conventions of 12 August 1949
Control Council Law No. 10	Control Council Law 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, signed in Berlin, 20 December 1945, published in (1946) 3 Official Gazette Control Council for Germany at 50-55
CPK	Communist Party of Kampuchea
CPK Statute	Communist Party of Kampuchea: Statute, E3/28, January 1976
DC-Cam	Documentation Center of Cambodia, a Cambodian Non-Governmental Organization.
Defence	Defence for the Accused
DK	Democratic Kampuchea
DK Constitution	Constitution of Democratic Kampuchea, E3/27, 5 January 1976
e.g.	for example
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Agreement	Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005
ECCC Law	Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)
ECHR	European Convention on Human Rights and Fundamental Freedoms
ERN	Evidence Reference Number

fn.	footnote
FULRO	United Front for the Liberation of the Oppressed Races
Geneva Convention I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, entered into force 21 October 1950
Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, entered into force 21 October 1950
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135, entered into force 21 October 1950
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287, entered into force 21 October 1950
Geneva Conventions	The four Geneva Conventions of 1949 dated 12 August 1949
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
infra	below

Internal Rules	ECCC Internal Rules, fourth revision of 11 September 2009, entered into force on 21 September 2009
JCE	Joint Criminal Enterprise
KNUFNS	Kampuchean National United Front for National Salvation
KPNLAF	Kampuchea People's National Liberation Armed Forces
KPRA	Kampuchean People's Representative Assembly
KRA	Khmer Republic Army
M-13	Security centre in the Kampong Speu province
n/a	not applicable
no.	number
Nuremberg Charter	Charter of the International Military Tribunal for the Trial of the Major War Criminals - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), of 8 August 1945, 82 UNTC 280
Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal
Nuremberg Tribunal	International Military Tribunal for the Trial of the Major War Criminals
OCP	Office of the Co-Prosecutors
OCP JCE Request	Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, 8 June 2009
OCIJ	Office of the Co-Investigating Judges
p., pp.	Page, pages
para., paras	Paragraph, paragraphs
PTC	Pre-Trial Chamber
RAK	Revolutionary Army of Kampuchea

Rome Statute	Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9th, adopted at Rome on 17 July 1998, entered into force 1 July 2002.
RPE	Rules of Procedure and Evidence
S-21 or S-21 complex	The area of S-21 in Phnom Penh, including, unless the context otherwise requires, both the S-21 buildings at the current Tuol Sleng Genocide Museum site, as well as associated sites of Choeung Ek and S-24
S-24	Re-education Camp Prey Sar
SCSL	Special Court for Sierra Leone
supra	above
Tokyo Charter	Charter of the International Military Tribunal for the Far East of 19 January 1946, T.I.A.S No. 1589
Tokyo Tribunal	International Military Tribunal for the Far East of 19 January 1946
T.	Transcript
TPO	Trans-Cultural Psychosocial Organisation Cambodia, a Cambodian Non-Governmental Organization.

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before:	**Judge NIL Nonn, President** **Judge Silvia CARTWRIGHT** **Judge YA Sokhan** **Judge Jean-Marc LAVERGNE** **Judge THOU Mony**
Greffiers:	**LIM Suy-Hong, Matteo CRIPPA, SE Kolvuthy,** **Natacha WEXELS-RISER, DUCH Phary**
Duration of hearing:	**30 March 2009 until 27 November 2009**
Date:	**26 July 2010**
Classification:	**PUBLIC**

SEPARATE AND DISSENTING OPINION OF JUDGE JEAN-MARC LAVERGNE ON SENTENCE

Co-Prosecutors
CHEA Leang
Andrew T. CAYLEY

Accused
KAING Guek Eav *alias* Duch

Lawyers for the Civil Parties
TY Srinna
Karim KHAN
Alain WERNER
Brianne McGONIGLE
KONG Pisey
YUNG Panith
Silke STUDZINSKY
HONG Kimsuon
Pierre Olivier SUR
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MOCH Sovannary
Martine JACQUIN
Philippe CANONNE
Fabienne TRUSSES-NAPROUS
Christine MARTINEAU
Annie DELAHAIE
Elizabeth RABESANDRATANA

Lawyers for the Defence
KAR Savuth
François ROUX
Marie-Paule CANIZARÈS

1. It is with regret that I hereby express my dissent from the majority of the Chamber's decision in relation to the sentence to be imposed on the Accused, KAING Guek Eav. My dissent is not about the scope of the Accused's culpability, nor about the assessment of the particularly egregious nature of the crimes he committed, nor even about the aggravating or mitigating circumstances taken into account in this case. Moreover, the majority of the Chamber and I all agree that in this instance, the Accused ought not to be sentenced to the maximum penalty incurred for these crimes, namely a term of life imprisonment, but rather to a fixed term of imprisonment.

2. My dissent from my colleagues relates to an earlier stage in the Chamber's reasoning, and focuses on the analysis of the relevant legal framework which the Chamber must undertake in determining the quantum of sentence. While there is no doubt that under Rule 98(5) of the Internal Rules, the sentence must comply with the ECCC Agreement, the ECCC Law and the Internal Rules, it is equally clear, as the Chamber has itself noted, that these instruments are silent on the principles and factors to be considered at sentencing. In particular, they do not indicate whether the applicable regime is governed by international law or Cambodian law or some combination of each.[1] In determining the relevant legal framework, the Chamber therefore had to interpret this silence by reviewing the applicable international law and Cambodian legal standards. However, I am of the opinion that neither this review nor the canons of statutory interpretation can be considered as allowing the Chamber to sentence the Accused to more than 30 years imprisonment, if it does not otherwise sentence him to the maximum term of life imprisonment.

3. In reviewing the relevant international legal standards, the Chamber properly noted that while the jurisprudence of the *ad hoc* Tribunals shows that judges possess considerable discretion in sentencing, Article 77(1) of the Rome Statute is crystal clear in that it envisages no intermediate term of imprisonment between a life sentence and a fixed term of 30 years imprisonment. Accordingly, it cannot be argued that there is a common international legal principle on this matter.[2]

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1 *See* Section 3.2.1, para. 575.
2 *See* Section 3.2.1, paras. 576, 591-593.

4. A review of Cambodian law, at least in its most advanced form as reflected in the new Penal Code,[3] reveals no ambiguity, because here again, Article 95 provides that where life imprisonment cannot be imposed as a result of mitigating circumstances being granted, only a sentence of up to 30 years may be imposed.[4]

5. I consider the reference to Cambodian law here particularly relevant, owing to the special character of the ECCC, notably because this hybrid court has jurisdiction to prosecute both international and domestic crimes, and because the founding documents make no distinction as to the sentencing regime applicable to these two categories of offences. Thus, while this regime may be deemed *sui generis*, it is difficult to imagine that it is entirely extraneous to domestic law.

6. Further, reference to the latest expression of Cambodian law as reflected in the new Penal Code is also particularly apt. Indeed, it represents what the lawmakers of this country consider as the most advanced rules of law and justice, and its Article 95 is among the general provisions which are immediately applicable before all Cambodian courts.[5] Also, although direct application of this national legislation in the present case – a case involving international crimes – is not automatic, the fact is that apart from the issue of the immediate application of less stringent criminal law which primarily concerns domestic law, there is no valid reason to consider that what holds true for determining applicable penalties before Cambodian courts would not hold for the ECCC.

7. It must also be emphasised that all the factors which the Chamber considered in not imposing the maximum sentence are consistent with the provisions of Cambodian law concerning both the individualisation of penalties and mitigating circumstances.[6]

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[3] The Khmer version of the 2009 Penal Code was placed on the Case File on 5 January 2010, while the French and English versions were filed on 24 March 2010 (E180). While in the Order dated 4 February 2010, the parties were authorised to file submissions concerning the relevant provisions of Part I of the new Penal Code (E180/1), none of them filed any comments. However, the issue of the application of these provisions had been raised by the Defence (*see* T., 27 November 2009 (Defence), p. 48).

[4] Article 95 of the 2009 Penal Code provides: "If the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances may impose a sentence of between fifteen and thirty years imprisonment."

[5] *See* Royal Kram of 30 November 2009, E180.1 (available in English only). In addition, the fact that Part II of the Penal Code which contains the definition of punishable offences, including the crime of genocide, crimes against humanity and war crimes will not enter into force until December 2010, is of no relevance, as, on the one hand, the principles defined in Part I are general principles which apply to all domestic crimes and, on the other, the lawmakers must have clearly contemplated that they would apply to crimes of more or less the same gravity as those falling under the jurisdiction of the Chamber.

[6] Article 96 of the 2009 Penal Code provides that "his or her [the accused's] behaviour after the offence" is one of the factors to be considered in individualising penalties. This may clearly include acknowledging responsibility,

8. In conclusion, pursuant to the rules of statutory interpretation, notably where the law is unclear or silent, the most favourable solution must be applied to the accused in the event of uncertainty as to the application of a given rule. In addition to the widely-accepted principle that doubt must be resolved in favour of the accused,[7] Rule 21(1) of the Internal Rules also provides that the ECCC Law and the Internal Rules must be interpreted so as to safeguard the interests of accused.[8]

9. In this instance, the question is not whether the application of the 2009 Penal Code breaches provisions of the ECCC Agreement, but rather only how to interpret principles which are not defined in the ECCC Agreement or in the ECCC Law. In their decision, my colleagues opted for a standard that is not common to international criminal law or part of the latest Cambodian legislation, but one that is the least favourable to the Accused. I consider this choice to be inconsistent with the rules of statutory interpretation; I am therefore of the opinion that in this case, the law does not allow the Chamber to sentence KAING Guek Eav to more than 30 years imprisonment.

Done in Khmer, English and French.

Dated this twenty-sixth day of July 2010
At Phnom Penh
Cambodia

_____
Judge Jean-Marc LAVERGNE

[Seal of the Tribunal]

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expressing remorse and cooperating with the Court. Moreover, Article 93 of the same Code defines mitigating circumstances broadly, as depending on "the nature of the offence or the character of the accused."

[7] The principle that doubt must be resolved in favour of the accused does not apply only to the assessment of the evidence pertaining to the guilt of the accused; its application is broader and includes interpretation of ambiguous or uncertain applicable legal standards; *see e.g.,* Article 22(2) of the Rome Statute and Article 3(B) of the Special Tribunal for Lebanon Rules of Procedure and Evidence; *see further,* with regard to uncertainty arising from inconsistency between the French and English versions of the ICTR Statute, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Appeal Judgement, ICTR Appeals Chamber (ICTR-95-1-A), 1 June 2001, para. 151; or with regard to uncertainty concerning the definition of a crime, *Prosecutor v. Radislav Krstić,* Judgement, ICTY Trial Chamber (IT-98-33-T), 2 August 2001, paras. 491-503.

[8] This principle is not limited to the interpretation of the definition of the acts constituting a crime, but extends to all the provisions of the texts in question.

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before:	**Judge NIL Nonn, President** **Judge Silvia CARTWRIGHT** **Judge YA Sokhan** **Judge Jean-Marc LAVERGNE** **Judge THOU Mony**
Greffiers:	**LIM Suy-Hong, Matteo CRIPPA, SE Kolvuthy, Natacha WEXELS-RISER, DUCH Phary**
Duration of hearing:	**30 March 2009 until 27 November 2009**
Date:	**26 July 2010**
Classification:	**PUBLIC**

JUDGEMENT

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KAING Guek Eav *alias* Duch

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1 INTRODUCTION

1. The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("Chamber" and "ECCC", respectively) seised of Case File 001/18-07-2007/ECCC/TC,[1] renders its Judgement against Kaing Guek Eav *alias* Duch ("Accused"), a former mathematics teacher born on 17 November 1942 in the village of Poev Veuy, Peam Bang Sub-District, Stoeung District, in the province of Kompong Thom.

1.1 Establishment of the ECCC

2. Following an official request for assistance by Cambodia of 21 June 1997,[2] the United Nations and the Royal Government of Cambodia signed an Agreement on 6 June 2003 which envisaged the trial of senior leaders of Democratic Kampuchea ("DK") and those most responsible for the national and international crimes committed in DK between 17 April 1975 and 6 January 1979 ("ECCC Agreement").[3]

3. The ECCC was established under Cambodian law following the promulgation of the "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea" ("ECCC Law").[4]

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1 Decision on Appeal Against Closing Order Indicting Kaing Guek Eav *alias* 'Duch', D99/3/42, 5 December 2008 ("Decision on Appeal against the Closing Order").
2 UN Doc. A/51/930-S/1997/488 (24 June 1997); UN Doc. A/RES/52/135 (27 February 1998), para. 16.
3 "Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea", signed 6 June 2003 and entered into force on 29 April 2005; *see also* UN Doc. A/RES/57/228B (13 May 2003) (approving draft ECCC Agreement); UN Doc. A/60/565 (25 November 2005), para. 4.
4 "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea", 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

1.2 Brief Procedural Overview of the Case

4. On 18 July 2007, the ECCC Co-Prosecutors filed an Introductory Submission with the Co-Investigating Judges pursuant to Internal Rule 53, opening a judicial investigation against five individuals, including the Accused.[5]

5. On 19 September 2007, the Co-Investigating Judges ordered the separation of the Case File of the Accused in relation to facts concerning S-21, which were investigated under Case File number 001/18-07-2007 and which comprise the present case.[6]

6. On 8 August 2008, the Co-Investigating Judges issued a Closing Order indicting the Accused for crimes against humanity and grave breaches of the Geneva Conventions of 1949 ("Closing Order").[7]

7. The Co-Prosecutors appealed the Closing Order on 5 September 2008.[8] The Pre-Trial Chamber issued an oral decision on this appeal on 5 December 2008.[9] The Pre-Trial Chamber partially granted the Co-Prosecutors' first ground of appeal, finding that the domestic crimes of torture and premeditated murder as defined by the 1956 Penal Code of Cambodia ("1956 Penal Code") should be added to the Closing Order. The Pre-Trial Chamber dismissed the Co-Prosecutors' second ground of appeal, which had alleged that the Co-Investigating Judges erred in failing to include joint criminal enterprise as a form of responsibility in the Closing Order.

8. The Pre-Trial Chamber remitted the Accused for trial on the basis of the Closing Order as amended by its Decision on Appeal against the Closing Order ("Amended

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5 "Co-Prosecutors Introductory Submission", D3, 18 July 2007.
6 "Separation Order", D18, 19 September 2007. All other facts related to the Accused or the other individuals mentioned in the Introductory Submission were investigated under Case File number 002/19-09-2007.
7 "Closing Order indicting Kaing Guek Eav *alias* Duch", D99, 8 August 2008.
8 "Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav 'Duch' dated 8 August 2008", D99/3/3, 5 September 2008.
9 Decision on Appeal against the Closing Order.

Closing Order").[10] The Amended Closing Order established the factual allegations for the Chamber to determine at trial.

9. The initial hearing before the Chamber took place on 17 and 18 February 2009.[11] The substantive hearing commenced on 30 March 2009 and the hearing of the evidence concluded on 17 September 2009 after 72 trial days. 90 victims were joined as Civil Parties and were represented by lawyers, forming four Civil Party groups ("Civil Parties").[12]

10. Closing statements were made by the Co-Prosecutors, the Civil Parties, the Accused's Co-Lawyers, and the Accused from 23 to 27 November 2009.[13]

1.3 The Charges against the Accused

11. The Amended Closing Order alleges that the Accused, as Deputy Secretary or Secretary of S-21, planned, instigated, ordered, committed, or aided and abetted crimes against humanity,[14] grave breaches of the Geneva Conventions of 1949,[15] as well as the national crimes of premeditated murder and torture. In the alternative, he is responsible by virtue of superior responsibility. The offences for which he is charged are defined in Articles 5, 6 and 3 (new) of the ECCC Law, respectively. All charges pertain to acts and

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10 Decision on Appeal against the Closing Order, p. 41 (point 5).

11 "Order Setting the Date of the Initial Hearing", E8, 19 January 2009.

12 The Office of the Co-Investigating Judges received 28 Civil Party applications during the investigation phase. A further 66 Civil Party applications were received by the Chamber prior to the initial hearing, four of which were either withdrawn or rejected; *see* Direction on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, E2/94/2, 4 March 2009; Decision on Request to Reconsider Decision on Proof of Identity for Civil Party Application (E2/36), E2/94/4, 10 August 2009 (in relation to Civil Party application E2/36); "CPG3: Lettre d'abandon de droit de la constitution de la partie civile au près des chambres extraordinaires au sein des tribunaux cambodgiens", E2/65/5, 15 September 2009. Annex III to the Judgement indicates the full name, place of residence, birth date, birthplace and occupation of the Civil Parties as per Internal Rule 101(6)(f).

13 "Scheduling Order for Closing Statements", E170, 30 September 2009.

14 The Amended Closing Order charges the Accused with the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, rape, persecution on political grounds and other inhumane acts; *see also* Section 2.5.

15 The Amended Closing Order charges the Accused with the following offences as grave breaches of the Geneva Conventions of 1949: wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian; *see also* Section 2.6.

omissions committed in Phnom Penh and within the territory of Cambodia between 17 April 1975 and 6 January 1979.

12. Pursuant to Internal Rule 98(2), the Judgement is limited to the facts set out in the Amended Closing Order. However, the Chamber may change the legal characterisation of the crimes contained in the Amended Closing Order provided that no new constitutive elements are introduced.[16]

1.4 Jurisdiction of the Chamber over the Accused

13. Article 1 of the ECCC Law empowers the ECCC to "bring to trial senior leaders of [DK] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."[17]

14. No preliminary objection to the jurisdiction of the ECCC as such was raised at the initial hearing pursuant to Internal Rule 89.[18] In its closing statement, the Defence made extensive submissions alleging the lack of jurisdiction of the Chamber on the ground that the Accused was not a senior leader or one of those most responsible for the crimes committed during the DK regime.[19]

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[16] The French version of Internal Rule 98(2) is clearer in this regard: « La Chambre ne peut statuer que sur les faits mentionnés dans la décision de renvoi. Toutefois, la Chambre peut modifier les qualifications juridiques adoptées dans la décision de renvoi, sous réserve de n'introduire aucun élément constitutif nouveau. […]. »

[17] *See also* Article 2(1) of the ECCC Agreement, which defines the personal and subject-matter jurisdiction of the ECCC in accordance with the ECCC Law.

[18] Rule 89(1) then provided that "[a] preliminary objection concerning: a) the jurisdiction of the Chamber, […] shall be raised at the initial hearing, failing which it shall be inadmissible"; *see* T., 1 April 2009 (Defence), pp. 18-19 ("I am not intending to challenge [jurisdiction] because I am quite aware already and I could have raised it in the initial hearing already if I wished to do so"); *see also* T., 6 April 2009, p. 1 ("the Chamber wishes to reiterate its understanding that during his response to the opening statement by the Co-Prosecutors, the Defence lawyer did not make any formal submission on the legality of the proceedings of this Court". The Defence did not object to this understanding.")

[19] T., 25 November 2009 (Defence Closing Statement), pp. 84-109; T., 26 November 2009 (Defence Closing Statement), pp. 39-41 (alleging that senior leaders of DK comprised only the members of the Standing Committee, that the Accused merely executed orders, and that more people were killed in other prisons than in S-21. Equality before the law would require that if the Accused is to be tried, all other prison chiefs should also be tried by the ECCC.); *see also* T., 31 March 2009 (Response of the Defence to

15. The Chamber does not consider these belated submissions to constitute a preliminary objection. In addition, the Defence argued that Annex 5 of the 1991 Paris Peace Agreement and the 1994 Law on the Outlawing of the "Democratic Kampuchea" Group exempted the Accused from future prosecution.[20] The Chamber notes that these arguments were also belated and consequently rejects them.

1.4.1 Subject-Matter,Temporal and Territorial Jurisdiction

16. The Chamber has evaluated, on its own motion,[21] the question of whether there was any lack of jurisdiction over the Accused in the instant case. The subject-matter jurisdiction of the ECCC is limited to the offences listed in Articles 3 (new) to 8 of the ECCC Law insofar as they constituted crimes at the time of their alleged commission (Section 1.5). The crimes charged in the Amended Closing Order are within the scope of the subject-matter, temporal and territorial jurisdiction of the ECCC.

1.4.2 Personal Jurisdiction

17. Personal jurisdiction is confined either to "senior leaders of DK" or "those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia."[22]

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the Co-Prosecutors' Opening Statement), pp. 76-77, 82-83. The Co-Prosecutors contend that the Accused satisfies both criteria of senior leadership and being most responsible in view of his position and role at S-21, the uniqueness and importance of S-21 for the CPK, as well as the seriousness of his crimes ("Co-Prosecutors' Final Trial Submission With Annexes 1-5", E159/9, 11 November 2009, paras 239-245; T., 24 November 2009 (Co-Prosecutors' Closing Statement), pp. 8-12; T., 27 November 2009 (Co-Prosecutors' Rebuttal Statement), pp. 14-17; *see also* "Introductory Submission", D3, 18 July 2007, para. 115.) The Civil Parties who expressed themselves on this issue supported the position of the Co-Prosecutors (T., 26 November 2009 (Rebuttal Statements of Civil Party Groups 2 and 4), pp. 95-99, 108).

[20] *See* T., 25 November 2009 (Defence Closing Statement), pp. 115-116 (referring to the "Agreement on a comprehensive political settlement of the Cambodia conflict (with annexes)," concluded at Paris on 23 October 1991, 1663 UNTS No. 28613 ("1991 Paris Peace Agreement")) and the 1994 Law on the Outlawing of the "Democratic Kampuchea" Group (15 July 1994 (Reachkram no. 01.NS.94); *see also* Written Record of Interview of Charged Person, E3/11 (ERN 00159553-00159557).

[21] *See* Internal Rule 98(3).

[22] ECCC Agreement, Article 1.

18. The Co-Investigating Judges did not allege that the Accused was a senior leader of DK but instead charged him as being one of those most responsible for the offences committed during the temporal jurisdiction of the Chamber:

> 129. The judicial investigation demonstrated that, while DUCH was not a senior leader of Democratic Kampuchea, he may be considered in the category of most responsible for crimes and serious violations committed between 17 April 1975 and 6 January 1979, due both to his formal and effective hierarchical authority and his personal participation as Deputy Secretary then Secretary of S21, a security centre which was directly controlled by the Central Committee.[23]

19. Neither the ECCC Agreement nor the ECCC Law expressly defines "senior leaders of DK" or "those who were most responsible". The Group of Experts for Cambodia established in 1998 pursuant to General Assembly resolution 52/135, tasked with assessing the feasibility of bringing Khmer Rouge leaders to justice, concluded in its report that:

> the Group does not believe that the term "leaders" should be equated with all persons at the senior levels of Government of DK or even of the CPK. The list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng.[24]

20. The Group of Experts accordingly recommended that "any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of DK. This would include senior leaders with responsibility over the abuses *as well as* those at lower levels who are directly implicated in the most serious atrocities."[25]

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[23] Amended Closing Order, para. 129.
[24] UN Doc. A/53/850-S/1999/231, Annex ("Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135" dated 18 February 1999), para. 109.
[25] UN Doc. A/53/850-S/1999/231, Annex ("Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135" dated 18 February 1999), para. 110 (emphasis added).

21. Similar terminology was used by the Secretary General when transmitting the Group of Experts' report to the Security Council and the General Assembly,[26] and by the Commission of Human Rights, which examined the situation in Cambodia in 1999.[27]

22. The jurisprudence of other international tribunals which have also examined the notion of "most senior leaders suspected of being most responsible", have considered both the gravity of the crimes charged and the level of responsibility of the accused.[28] When assessing the gravity of the crimes charged, the Referral Bench of the International Criminal Tribunal for Yugoslavia ("ICTY") has relied on factors such as the number of victims, the geographic and temporal scope and manner in which they were allegedly committed, as well as the number of separate incidents, whereas the level of responsibility of the accused has been evaluated on the basis of considerations such as the level of participation in the crimes, the hierarchical rank or position of the accused, including the number of subordinates and hierarchical echelons above him or her, and the permanence of his position.[29] The Pre-Trial Chamber of the International Criminal Court ("ICC"), in determining the admissibility of a case, has evaluated similar factors.[30]

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[26] UN Doc. A/53/850-S/1999/231.

[27] Commission on Human Rights resolution 1999/76, 28 April 1999, para. 14.

[28] UN Doc. S2002/678, Enclosure ("Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts (June 2002)), para. 42; UN Doc. S/RES/1503 (2003); UN Doc. S/RES/1534 (2004), para. 5. This expression was first used in UN Doc. S/RES/1503 (2003), preamble (7th paragraph), by the Security Council; *see also* ICTY Rules of Procedure and Evidence ("RPE"), Rules 11bis (C) and 28(A) (*cf.* Article 1 of the ECCC Law, which instead refers to two distinct categories of suspects, "senior leaders" and "most responsible"); *Prosecutor v. Lukić et al.,* Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, ICTY Referral Bench (IT-98-32/1-PT), 5 April 2007, para. 26.

[29] *Prosecutor v. Lukić et al.,* Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, ICTY Referral Bench (IT-98-32/1-PT), 5 April 2007, paras 27, 28; *Prosecutor v. Kovačević*, Decision on Referral of Case Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-01-42/2-1), 17 November 2006, para. 20; *Prosecutor v. D. Milošević*, Decision on Referral of Case Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-98-29/1-PT), 8 July 2005, paras 23-24; *Prosecutor v. Janković*, Decision on Referral of Case Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-96-23/2-PT), 22 July 2005, para. 19; *Prosecutor v. Ademi et al.*, Decision on Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-04-78-PT), 14 September 2005, paras 28-29; *Prosecutor v. Ljubičić,* Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11*bis*; ICTY Referral Bench (IT-00-41-PT), 12 April 2006, paras 18-19*; see also Prosecutor v. Lukić et al.,* Decision on Milan Lukić's Appeal Regarding Referral, ICTY Appeals Chamber (IT-98-32/1-AR11*bis*.1), 11 July 2007, para. 22 (limiting the importance of geographic scope).

[30] *Situation in the DRC*, *Prosecutor v. Ntaganda,* Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC Pre-Trial Chamber I (ICC-01/04-02/06-20-Anx2), 10 February 2006 (unsealed on 21 July 2008 pursuant to Decision ICC-01/04-520), paras 51-64, 68-71, 74, 78-89 (quashed on appeal,

23. The Amended Closing Order alleged, amongst other things, that as Deputy of S-21, the Accused led the Interrogation Unit and participated in the planning of S-21 operations and training of staff on interrogation techniques. As Chairman of S-21, his role consisted of oversight of the entire S-21 operation including the annotation of confessions and the ordering of executions. S-21 was a very important security centre of DK, considered as an organ of the Communist Party of Kampuchea ("CPK"), reporting to the very highest levels of the CPK leadership, carrying out nation-wide operations and receiving high-level cadres and prominent detainees. More than 12,000 individuals[31] were detained at S-21, a number which is incomplete and must be read in light of the practice of not registering all detainees. Victims from every part of Cambodia were sent to S-21, with the result that the scope of its activities reached across the entire country. S-21 was operational from October 1975 to early January 1979, thus covering a significant portion of the DK regime's existence.[32]

24. Due to the scale of crimes committed during the DK period, the ECCC Agreement and ECCC Law impose no obligation to try all potential perpetrators of crimes falling within its jurisdiction.[33] Although hierarchical position is a relevant criterion, international tribunals have generally not undertaken rigid comparisons of the seniority of persons previously tried before them when making referral decisions.[34] The fact that other individuals within DK during the indictment period may have shared these attributes does therefore not preclude the Accused from also being considered as one of those most responsible.

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on different grounds, in *Situation in the DRC,* Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC Appeals Chamber (ICC-01/04-169), 13 July 2006 (unsealed on 23 September 2008 pursuant to Decision ICC-01/04-538), paras 73-79).

[31] The Amended Closing Order alleges that no fewer than 12,380 persons were detained at S-21. During the examination of the merits of the case, the Chamber concluded that the S-21 detainees numbered at a minimum 12,273; *see* Section 2.3.3.4.2.

[32] Amended Closing Order paras 20-21, 32-33, 37-38, 42-43, 47, 97-98, 107-109.

[33] *See* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, para. 5 (acknowledging that in deciding which individuals merit prosecution in the international forum, the Prosecutor may require a higher threshold to be met than mere existence of credible evidence to suggest the commission of crimes within the jurisdiction of the tribunal).

[34] *See e.g., Prosecutor v. Ademi et al.*, Decision on Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, ICTY Referral Bench (IT-04-78-PT), 14 September 2005, paras 30-31 (finding that the Accused's seniority did not *ipso facto* preclude referral to a national jurisdiction for trial).

25. The Chamber agrees with the assessment of the Co-Investigating Judges and accordingly finds that the Accused falls within the personal jurisdiction of the ECCC as one of those most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979. There is consequently no need to examine the issue of whether the Accused was a senior leader of the DK.

1.5 The Principle of Legality

26. Notwithstanding the Chamber's subject-matter jurisdiction over them, each of the charged crimes and forms of responsibility must also conform to the principle of legality.[35]

27. Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR") states that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[36] This principle is qualified in Article 15(2) of the ICCPR, which adds: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[37]

28. The international jurisprudence has clarified that compliance with the principle of legality requires that the offence with which an accused is charged was sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the

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[35] Article 33 (new) of the ECCC Law indicates that the Chamber must exercise its jurisdiction in conformity with Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 ("ICCPR"); *see also* 1993 Constitution of The Kingdom of Cambodia, Article 31(1) (the Kingdom of Cambodia "shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights.")

[36] Article 15(1) of the ICCPR further states, "[n]or shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

[37] The principle of legality is recognised by numerous other international instruments, including Article 11(2) of the Universal Declaration of Human Rights (UNGA Res 217A, 10 December 1948) and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5/213 UNTS 222, 4 November 1950) ("ECHR").

accused at the relevant time.[38] A State practice of tolerating or encouraging certain acts will not operate as a bar to their perpetrators being brought to justice and punished where those acts are crimes under national or international law.[39] The principle of legality applies both to the offences as well as to the forms of responsibility.[40] Accordingly, the Chamber must determine whether the offences and modes of participation charged in the Amended Closing Order were recognised under Cambodian or international law between 17 April 1975 and 6 January 1979.

29. The 1956 Penal Code was the applicable national law governing during the 1975 to 1979 period, as it remained in force following the promulgation of both the Constitution of the Khmer Republic on 10 May 1972 and the DK Constitution on 5 January 1976.

30. As regards relevant sources of international law applicable at the time, the Chamber may rely on both customary and conventional international law,[41] including the general principles of law recognised by the community of nations.[42]

31. An assessment of the foreseeability and accessibility requirements integral to the principle of legality should take into account the particular nature of international law, including its reliance on unwritten custom.[43] The ICTY Appeals Chamber has noted that,

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[38] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 38; *see also S.W. v. United Kingdom*, Judgment, ECtHR (no. 20166/92), 22 November 1995, paras 35-36 (indicating that the term "law" in Article 7 of the ECHR "comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.")

[39] *Kononov v. Latvia*, Judgment, ECtHR (no. 36376/04), 24 July 2008, para. 114(e).

[40] *See e.g., Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, paras 34-44 (as applied to joint criminal enterprise); *Prosecutor v. Aleksovski*, Judgement, ICTY Appeals Chamber (IT-95-14/1-A), 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 126 (as applied to grave breaches of the Geneva Conventions of 1949).

[41] *See e.g.*, *Aleksovski* Appeal Judgement, para. 126 (relying on customary and conventional law sources); *Prosecutor v. Kordić et al.*, Judgement, ICTY Appeals Chamber (IT-95-14/2-A), 17 December 2004 ("*Kordić* Appeal Judgement"), paras 41-42.

[42] *See* Article 15(2) of the ICCPR; *see also* Article 38(1) of the Statute of the International Court of Justice.

[43] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, paras 38-42; *see also Groppera Radio AG and Others v. Switzerland*, Judgement, ECtHR (No. 10890/84), 28 March 1990, para. 68 (stating that the scope of the notion of foreseeability depends to a considerable degree on the content of

> [a]s to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom.[44]

32. Further, "[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts."[45]

33. The Chamber may also rely on conventional international law where a treaty is (i) unquestionably binding on the parties at the time of the alleged offence and (ii) not in conflict with or derogating from peremptory norms of international law.[46] As stated by the ICTY Appeals Chamber, the principle of legality "is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary international law."[47] International tribunals have in practice nevertheless ascertained whether a treaty provision is also declaratory of custom.[48]

34. The legality principle does not prevent the Chamber from determining an issue through a process of interpretation and clarification of the elements of a particular offence. Nor does it prevent the Chamber from relying on appropriate decisions which interpret particular ingredients of an offence.[49] Specifically, the Chamber's reliance on

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the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed); *Kononov v. Latvia*, Judgment, ECtHR Grand Chamber (no. 36376/04), 17 May 2010, para. 235.

[44] *Prosecutor v. Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber (IT-01-47-AR72), 16 July 2003, para. 34.

[45] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 42.

[46] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 143 (as regards Article 3 of the ICTY Statute).

[47] *Kordić* Appeal Judgement, para. 44.

[48] *Prosecutor v. Galić*, Judgement, ICTY Appeals Chamber (IT-98-29-A), 30 November 2006, para. 85.

[49] *Aleksovski* Appeal Judgement, para. 126; *see also S.W. v. United Kingdom*, Judgement, ECtHR (no. 20166/92), 22 November 1995, paras 35-36.

decisions of international tribunals that post-date January 1979 does not contravene the principle of legality. Rather, these decisions provide interpretative guidance as regards the evolving status of certain offences and forms of responsibility under international law. In addition, the fact that the ECCC was established and conferred with jurisdiction over offences after they were allegedly committed does not violate the principle of legality.[50]

1.6 The Internal Rules and Applicable Evidentiary Principles

1.6.1 Governing Procedural Law

35. Pursuant to the ECCC Agreement and the ECCC Law, the Chambers of the ECCC operate in accordance with Cambodian procedural law.[51] Following its establishment, the ECCC adopted its Internal Rules.[52] The purpose of the Internal Rules is to consolidate applicable Cambodian procedure in relation to proceedings before the ECCC. The ECCC Agreement and the ECCC Law envisage that additional rules may be adopted where existing procedures do not deal with a particular matter, in case of uncertainty regarding their interpretation or application, or where questions arise regarding their consistency with international standards.[53] Thus, while Cambodian law governs the procedure before the Chamber, guidance is also sought from procedural rules established at the international level, where appropriate.

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[50] *Prosecutor v. Kallon et al.,* Decision on Constitutionality and Lack of Jurisdiction, Special Court for Sierra Leone ("SCSL") Appeals Chamber (SCSL-04-14-AR72 & SCSL-04-15-AR72 & SCSL-04-16-AR72), 13 March 2004, para. 82 ("[t]he fact that no court exists with jurisdiction to adjudicate crimes proscribed by international law at the time the offences were committed is not a bar to prosecution and not a violation of the principle *nullum crimen sine lege*."); *see also Prosecutor v. Delalić et al.,* Judgement, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001 ("*Čelebići* Appeal Judgement"), paras 179-180; *cf. Streletz, Kessler and Krenz v. Germany*, Judgment, ECtHR (no. 34044/96 & 35532/97 & 44801/98), 22 March 2001, paras 79-81.

[51] ECCC Agreement, Article 12; ECCC Law, Article 33 (new)*; see also* ECCC Law, Article 20 (new) (as concerns the Co-Prosecutors) and Article 23 (new) (as concerns the Co-Investigating Judges).

[52] The first version of the ECCC Internal Rules were adopted on 12 June 2007, with an initial revision adopted on 1 February 2008 (which came into force on 10 February 2008), a second revision on 5 September 2008 (in force on 15 September 2008), a third revision on 6 March 2009 (in force on 16 March 2009), a fourth revision on 11 September 2009 (in force on 21 September 2009) and a fifth revision on 9 February 2010 (in force on 19 February 2010). All references in this Judgement to an "Internal Rule" are, unless otherwise noted, to a Rule in the ECCC Internal Rules currently in force.

[53] Fifth preambular paragraph of the Internal Rules, citing ECCC Agreement, Article 12(1) and ECCC Law, Articles 20 (new), 23 (new) and 33 (new).

1.6.2 The Case File

36. The Case File is the result of the material collated during the judicial investigation phase in the present case. Material was added to it successively, at each stage of the ECCC proceedings.

37. The Chamber was formally seised of the Case File following the Pre-Trial Chamber's Decision on Appeal against the Closing Order.[54] The Chamber was granted access to the Case File for the purpose of advance preparation for trial by decision of the Pre-Trial Chamber of 11 September 2008: a practice which has since found expression in the Internal Rules.[55]

38. Material on the Case File is considered evidence and relied upon by the Chamber in decision-making only where it is put before the Chamber, subjected to examination, and where it is not excluded on the basis of the criteria contained in Internal Rule 87(3).

1.6.3 Admissibility of Evidence

39. Internal Rule 87(1) states that "[u]nless provided otherwise in these [Internal Rules], all evidence is admissible."[56] The scope of this general principle is qualified by Internal Rule 87(2), which 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."

40. Although the wording of Internal Rule 87(3) refers to "evidence from the case file", it is apparent from the entirety of that sub-rule that material on the Case File is not "evidence" as such until it is put before (*i.e.*, summarised, read out, or appropriately

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[54] Decision on Appeal against the Closing Order.

[55] Decision on Trial Chamber Request to Access the Case File, D99/3/5, 11 September 2008. Internal Rule 69(3), which came into force on 21 September 2009, provides that "[t]he filing of an appeal against a Closing Order does not prevent access by the Trial Chamber to the case file for the purposes of advance preparation for trial."

[56] Internal Rule 21(3) specifically provides that statements recorded under the use of inducement, physical coercion or threats thereof shall not be admissible as evidence before the Chamber.

identified) in court.[57] The Chamber may also admit new material not originally on the Case File, either on its own motion or at the request of a party.[58]

41. Further, to be used as evidence, material on the Case File must satisfy certain conditions of relevance and probative value. The Chamber may reject any material put before it based on the criteria listed in Internal Rule 87(3) (namely irrelevance, inability to prove the facts alleged, impossibility of obtaining evidence within a reasonable time, or due to the existence of breaches of fundamental legal standards concerning the rules of evidence).

42. The probative value of this evidence, and thus the weight to be accorded to it, is ultimately assessed by the Chamber.

43. In its practice, the Chamber ultimately had recourse to the fundamental fair trial principles enshrined in Internal Rule 21 and Article 33 (new) of the ECCC Law, as well as to the jurisprudence of international criminal tribunals. In light of this jurisprudence, the Chamber has considered hearsay and circumstantial evidence to be admissible where sufficiently relevant and probative.[59] With regard to hearsay statements, the Chamber gave particular consideration to whether the Accused was able to confront the source of such statements.[60] In keeping with international jurisprudence, the Chamber has also found that the testimony of a single witness can establish a fact at issue where such evidence is sufficiently relevant and probative.[61]

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[57] *See* Decision on Admissibility of Material on the Case File as Evidence, E43/4, 26 May 2009, paras 5-7.

[58] *See* Decision on Admissibility of New Materials and Direction to the Parties, E5/10/2, 10 March 2009 (a party making such a request must do so by reasoned submission and establish that the requested testimony or evidence had been unavailable before the opening of the trial); *see also* Internal Rule 87(4) (permitting the Chamber to summon or hear any witness, or admit new evidence during the trial, where conducive to ascertaining the truth).

[59] *See e.g., Prosecutor v. Nahimana et al.,* Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 509; *Čelebići* Appeal Judgement, para. 458.

[60] Decision on Admissibility of Material on the Case File as Evidence, E43/4, 26 May 2009, paras 14-16 (statements excluded where confrontation of their author by the Accused had not occurred and was no longer possible).

[61] *See e.g., Aleksovski* Appeal Judgement, 24 March 2000, para. 62; *see also, Prosecutor v. Brima et al.,* Judgement, SCSL Trial Chamber (SCSL-04-16-T), 20 June 2007 ("*Brima* Trial Judgement"), para. 109; *Akayesu* Trial Judgement, para. 135.

1.6.4 Burden and Standard of Proof

44. Internal Rule 21(d) enshrines the right of an accused to be presumed innocent as long as his or her guilt has not been established.[62] This presumption places the burden of establishing the guilt of an accused before the ECCC on the Co-Prosecutors.[63] Internal Rule 87(1) further provides that "[i]n order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt."

45. The basis of this finding is expressed differently in common law and civil law systems, and within the different language versions of Internal Rule 87(1). Cambodian law derives from civil law and, in particular, from the notion of the judge's *intime conviction.*[64] This notion is retained in the French version of Internal Rule 87(1), whereas both the Khmer and English versions of this Internal Rule state that a finding of guilt against the accused requires that the Chamber be convinced beyond a reasonable doubt.[65] Despite these conceptual differences, the Chamber has adopted a common approach that has evaluated, in all circumstances, the sufficiency of the evidence. Upon a reasoned assessment of evidence, any doubt as to guilt was accordingly interpreted in the Accused's favour.

1.6.5 Sources of Evidence Put Before the Chamber

1.6.5.1 Agreed facts and admissions by the Accused

46. The Chamber directed the Co-Prosecutors and the Defence to submit filings indicating their joint agreement, if any, with facts in the Amended Closing Order.[66] These

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[62] *See also* ECCC Agreement, Article 13; ECCC Law, Article 35 (new). The presumption of innocence is enshrined in a number of human rights instruments, including Article 14(2) of the ICCPR and Article 6(2) of the ECHR.

[63] Internal Rule 87(1).

[64] *See also* Article 321 of the 2007 Code of Criminal Procedure: "the Court has to consider the value of the evidence submitted for its examination, following the judge's *intime conviction.*"

[65] The French version of Internal Rule 87(1) reads: "[p]our condamner l'accusé, la Chambre doit avoir *l'intime conviction* de sa culpabilité" (emphasis added). By contrast, the ICTY, the ICTR and ICC have all equated the term "beyond reasonable doubt" to "au-delà de tout doute raisonnable."

[66] Direction Requesting Additional Information from the Parties and Co-Investigating Judges in Preparation of the Initial Hearing, E5/11, 5 February 2009, para. 5.

submissions were filed on 11 February 2009 and 1 April 2009, respectively.[67] During the hearing of 1 April 2009, the Chamber instructed the Co-Prosecutors and the Defence to publicly read out facts that were jointly agreed to or that were not disputed.[68]

47. Broadly speaking, the Accused agreed with or did not dispute a significant number of facts contained in the Amended Closing Order.[69]

48. Unlike the legal framework of other international tribunals, the governing law of the ECCC provides no procedure for the acceptance and recording of a plea of guilty by an accused.[70] Before these other tribunals, a guilty plea typically permits a Trial Chamber, following a significantly shortened evidentiary phase, to proceed directly to a consideration of factors relevant to sentence.[71] Absent such a mechanism, the Chamber was compelled to hear and evaluate all evidence put before it, including in relation to matters not in dispute. The agreement on facts nevertheless significantly assisted the Chamber in identifying the most contentious issues at trial and in streamlining the proceedings.

49. Pursuant to the Internal Rules, the agreement on facts neither binds the Chamber nor relieves the Co-Prosecutors of their burden of proof. Where material from the agreement on facts was put before the Chamber and subjected to examination, the Chamber

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[67] "Response of the Co-Prosecutors Regarding Agreement on Facts", E5/11/2; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, which is attached as Annex 1 to the "Defence's explanation concerning the document entitled 'Defence's Position on the facts contained in the Closing Order'", E5/11/6; *see also* "Annex 2: Part III Character Information", E5/11/6.2 , 30 April 2009.

[68] T., 1 April 2009, pp. 17, 51-100. Several opportunities were provided to the Accused during hearings to further clarify his position with regard to particular facts in the Amended Closing Order (*see e.g.,* T., 30 April 2009, pp. 57-78; 18 May 2009, pp. 5-59; 16 June 2009, pp. 78-81, 86-87; 17 June 2009, pp. 37-39).

[69] *See e.g.,* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 3, 7, 35, 39, 58-60, 169, 203, 213.

[70] *See e.g.,* Rules 62 and 62*bis* of the ICTR RPE; Rules 62 and 62*bis* of the ICTY RPE, and Rules 61 and 62 of the RPE of the SCSL.

[71] *See e.g.*, *Prosecutor v. Serugendo,* Judgement and Sentence, ICTR Trial Chamber (ICTR-2005-84-I), 12 June 2006, paras 4-11 (noting that a plea agreement was filed by the parties on 16 February 2006 and conviction entered by the Trial Chamber following a plea hearing on 15 March 2006); *Prosecutor v. Bralo*, Sentencing Judgement, ICTY Trial Chamber (IT-95-17-S), 7 December 2005, para. 3 (noting that a plea agreement was filed by the parties on 19 July 2005 and conviction entered by the Trial Chamber following a hearing on the same day).

remained free to assess what weight, if any, to give it.[72] The Internal Rules do, however, permit the Chamber to accept such facts as proven.[73]

1.6.5.2 Questioning of the Accused and the privilege against self-incrimination

50. Accused persons enjoy a fundamental right not to be compelled to testify against themselves or to confess guilt.[74] The Accused was informed of this right and nevertheless chose to respond to questions at trial and to confirm many of the facts contained in the Amended Closing Order.[75] The Accused's responses constituted evidence, the probative value of which has been evaluated by the Chamber.[76]

51. Internal Rule 90(1) obliges the Chamber to pose all pertinent questions to the Accused, irrespective of whether these would tend to prove or disprove his guilt. Over the course of the trial, the Chamber (followed by the Parties) questioned the Accused in relation to seven thematic areas of relevance to the proceedings.[77]

1.6.5.3 Witnesses, Civil Parties and Experts

52. The Internal Rules exempt certain individuals from the requirement of testifying under oath or affirmation.[78] These individuals may nevertheless testify and have their

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[72] T., 17 February 2009, pp. 15-16 (noting the role of the agreement on facts in the proceedings).

[73] New sub-Rule 87(6) of the Internal Rules, which came into force on 21 September 2009, clarifies that "[w]here the Co-Prosecutors and the Accused agree that alleged facts contained in the Indictment are not contested, the Chamber may consider such facts as proven."

[74] *See* ECCC Law, Article 35 (new)(g); Internal Rule 21(1)(d); *see also* Article 14(3)(g) of the ICCPR.

[75] T., 30 March 2009, p. 5.

[76] *See also* Internal Rule 87(5) ("The Chamber shall give the same consideration to confessions as to other forms of evidence.")

[77] Direction on the Scheduling of the Trial, E26, 20 March 2009, para. 9 (these seven thematic areas were: issues relating to M-13; establishment of S-21 and the Takmao prison; implementation of CPK policy at S-21; armed conflict; functioning of S-21, including Choeung Ek; establishment and functioning of S-24; and issues relating to the character of the Accused). Civil Parties were not, however, permitted to pose questions to the Accused or to witnesses on issues relating to the character of the Accused; *see* Oral Decision of the Chamber at T., 27 August 2009, p. 74 (Judge LAVERGNE dissenting); Decision on Civil Party Co-Lawyer's 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, E72/3, 09 October 2009; Decision on the Appeals Filed the Lawyers for Civil Parties (Groups 2 and 3) Against the Trial Chamber's Oral Decisions of 27 August 2009, E169/1/2, 24 December 2009.

[78] Included in this category are the Accused, the Civil Parties and witnesses exempt from doing so pursuant to Internal Rule 24(2).

statements put before the Chamber and assessed as evidence where relevant and probative.

53. In particular, a number of the individuals who testified before the Chamber were survivors of S-21 and S-24. The ECCC legal framework distinguishes between the survivors who testified as witnesses and the survivors who were joined as Civil Parties and also provided evidence before the Chamber. Pursuant to Internal Rule 23(6), upon joining as a Civil Party, a victim becomes a party to the proceedings. These survivors were accordingly no longer questioned as witnesses and were exempted by the Internal Rules from the requirement to testify under an oath or affirmation.

54. A total of 24 witnesses testified under oath before the Chamber during the proceedings.[79] Protective measures were afforded in a limited number of cases.[80] 22 Civil Parties provided evidence before the Chamber.

55. Pursuant to Internal Rule 31, the Chamber sought expert opinion on a variety of subjects relevant to the proceedings.[81] Expert testimony is designed to provide specialised knowledge, be it a skill, or knowledge acquired through training or research, which assists the Chamber in understanding the evidence presented. The Chamber retains its exclusive responsibility to decide any issue within its competence. A total of nine experts appeared before, or made submissions to, the Chamber over the course of the trial.

1.6.5.4 Documents

56. Over the course of the trial, approximately 1,000 documents were put before the Chamber and subjected to examination.

57. As a general rule, documents were required to be available in all three working languages of the ECCC (Khmer, French and English) in order to be put before the

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[79] Internal Rule 24(2) excludes a number of witnesses, including the father, mother and ascendants of the Accused or the Civil Parties, from taking an oath prior to their statements before the Trial Chamber.

[80] *See* Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, E135, 7 August 2009.

[81] *See* Decision on Protective Measures for Witnesses and Experts and on Parties' Request to Hear Witnesses and Experts – Reasons, E40/1, 10 April 2009, paras 26-28; Decision Concerning the Assignment of Experts, E51, 23 April 2009.

Chamber.[82] In light of the requirements of Internal Rule 87, only those parts of documents which were read out in full or summarised and subjected to examination were considered put before the Chamber. Practices developed before the Chamber to expedite proceedings in relation to uncontested documents have since been reflected in amendments to the Internal Rules.[83]

1.6.6 Spelling of Names and Locations

58. The spelling of certain names in transcripts and documents sometimes differed based on a number of circumstances, such as the person's area of provenance, the pronunciation of the name or its subsequent interpretation. Similarly, the spelling of certain locations sometimes differed across various references. The Chamber has accepted that names and locations with similar but not identical spelling may nonetheless refer to the same individuals or locations. Given the Cambodian practice of adopting different names, as well as the prevalence of aliases and revolutionary names within the CPK at the time, the Chamber also notes that individuals were sometimes referred to by various appellations.

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82 *See also* Oral Decision of the Chamber at T., 19 May 2009, pp. 31-33.

83 On 21 September 2009, an amendment to Internal Rule 87(3) came into force which clarified that "[e]vidence 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" (emphasis added); *see also* Oral Decision of the Chamber at T., 20 May 2009, pp. 4-6 (noting that where the discussion of a document extended beyond its initial summary, the entire discussion is available for the Chamber's decision. Further, a party need not have specifically commented on a document for it to be considered subjected to examination).

2 FACTUAL AND LEGAL FINDINGS

2.1 Historical Context and Armed Conflict

59. A brief overview of the historical context in which the DK regime took power in Cambodia indicates that during most of the period of the DK regime, Cambodian and Vietnamese armed forces engaged in increasingly violent hostilities. This culminated in the Vietnamese military offensive, the fall of Phnom Penh on 7 January 1979 and the DK leadership fleeing the capital.[84]

60. The Cambodian-Vietnamese conflict stemmed from various factors, some of which dated back centuries. The Vietnamese Southern expansion started in the 15th century, resulting in hereditary enmity between Cambodia and Vietnam. In addition to this historical animosity, disputes over border demarcations drawn by the French, often favouring the Vietnamese side, and in particular over the Brevié line (drawn in 1939 as a maritime boundary for administrative and policing purposes) further increased tension.[85]

61. The Cambodian communists in particular harboured resentment towards Vietnam after the 1954 Geneva Conference, where they perceived betrayal by their Vietnamese counterparts.[86] This sentiment was further aggravated in the early 1970s. While the

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[84] T., 25 May 2009 (Nayan CHANDA), pp. 52, 71.

[85] T., 25 May 2009 (Nayan CHANDA), pp. 31-32, 35, 56, 57, 64, 81-83; T., 26 May 2009 (Nayan CHANDA), p. 25. Expert Nayan CHANDA described the conflict as arising in part from "anti-Vietnamese racism" (T., 25 May 2009, p. 35); *see also* "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 5, 32-33, 49, 54-56, ERN (English) 00192190, 00192217-00192218, 00192234, 00192239-00192241 and more generally pp. 49-57, ERN (English) 00192234-00192242; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, pp. 2-3, 37, ERN (English) 00187381-00187382, 00187396; "US Department of State 'International Boundary Study No.155'", including Appendix 12: Translation of letter dated 31 January 1939 by Mr. Brevié establishing the Brevié Line, E3/520, in particular ERN (English) 00157794. *See further* "1:959,000 scale colour nautical map of Gulf of Siam showing off-shore islands in relation to Vietnam, Cambodia and Thailand", E3/534, for a map showing the Brevié Line and "Black Paper" (book), published September 1978, E3/199, Chapter 1: "The Annexationist Nature of Vietnam", pp. 3-13, ERN (English) 00082514-00082519 (for an illustration of anti-Vietnamese rhetoric).

[86] T., 25 May 2009 (Nayan CHANDA), pp. 32-33, 87; T., 26 May 2009 (Nayan CHANDA), p. 13. Unlike their Vietnamese and Laotian counterparts, the Cambodian communists ("Khmer Issarak") were excluded from participation in the negotiations. In addition, the Vietnamese communists gave up their colleagues' claims for communist-controlled areas to the Royal Government of Cambodia. Finally, the

Vietnamese had assisted the Khmer Rouge in their resistance struggle against the Cambodian pro-American LON Nol regime, which had overthrown Prince Sihanouk in March 1970, tension again arose following the Paris peace talks in 1972-1973 between the Vietnamese and the United States of America. The United States demanded that the Khmer Rouge enter into negotiations with the LON Nol government, which they refused, believing that they were close to victory. The Vietnamese and the United States signed a peace treaty in 1973, and the United States commenced a bombing campaign on Cambodia. The Khmer Rouge viewed the peace treaty as a betrayal by the Vietnamese, which freed up American bombers to inflict massive bombings on Cambodia. The peace agreement was followed by Khmer Rouge attacks on Vietnamese arms depots, hospitals and base camps, and executions of Vietnamese cadres inside Cambodia.[87]

62. Tensions were further exacerbated by the Khmer Rouge and then DK leaders' belief that Vietnam intended to impose and control an Indochinese Federation, which would result in Cambodia being "swallowed" by its eastern neighbour.[88] The Vietnamese, on the other hand, feared domination by the Khmer Rouge's ally, China. It was within this climate of distrust and hostility that the first border clashes between Cambodia and Vietnam occurred soon after the fall of Phnom Penh to the Kampuchea People's National Liberation Armed Forces ("KPNLAF") on 17 April 1975 and that of Saigon to the North Vietnamese army two weeks later, on 30 April 1975.[89]

63. The Amended Closing Order summarises the conflict between Cambodia and Vietnam as follows:

Cambodian communists were ordered to disband and disarm ("Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 58-59, ERN (English) 00192243-00192244).

[87] T., 25 May 2009 (Nayan CHANDA), pp. 53-55, 88; T., 26 May 2009 (Nayan CHANDA), p. 13; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 48, 64, 68, 72, ERN (English) 00192233, 00192249, 00192253, 00192257.

[88] T., 25 May 2009 (Nayan CHANDA), pp. 27-28, 32, 83-85; "Letter to the UN Secretary General from the Representative of the DK Government dated 2 January 1979, E3/528, ERN (English) 00078239; *see also* an illustration of this belief and related propaganda in "Black Paper" (book), published September 1978, E3/199, pp. 14-15, 19-21, ERN (English) 00082520, 00082522-00082523; "DK Embassy in Beijing Public Statement entitled 'News of Democratic Kampuchea, No. 005'", E3/758; "Press Communiqué of the Spokesman of the Ministry of Propaganda and Training (and Information) of the Democratic Kampuchea", E3/761; "International Media Report 'Phnom Penh Rally Marks 17th April Anniversary'", E3/783, ERN (English) S00010558..

[89] T., 25 May 2009 (Nayan CHANDA), pp. 32-34, 88; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 5-6, ERN (English) 00192190-00192191.

> 16. Almost immediately following the KPNLAF's entry into Phnom Penh on 17 April 1975, international armed conflict broke out between Vietnam and Cambodia. Protracted hostilities continued until at least 6 January 1979.
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> 17. Although Democratic Kampuchea and the Socialist Republic of Vietnam only officially recognised the existence of international armed conflict on 31 December 1977, there is evidence that, from mid-April 1975, with the exception of several respites during peace negotiations or diplomatic and cultural visits, there was escalating and increasingly frequent armed violence between the two States. In particular, the former KPNLAF, renamed the Revolutionary Army of Kampuchea [("RAK")], fought the Vietnam People's Army at various times in the Cambodian territories of: Ratanakiri; Mondulkiri; Kratie; Kompong Cham; Prey Veng; Svay Rieng; Kandal; Takeo; Kampot; and the islands of Wai, Koh Ach, Koh Tral, Koh Ses, Koh Thmei, Koh Sampoch, Koh Rong, and Koh Muk Ream.
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> 18. At the end of 1977, the conflict escalated into a full-scale war which reached deep into Democratic Kampuchea, and led the DK to seize the United Nations Security Council of the matter on 31 December 1978. By 7 January 1979, the RAK had been forced to flee Phnom Penh and, from that point forward, the regime rapidly lost effective control of the greater part of Cambodian territory.[90]

64. The Accused did not dispute that there was an armed conflict with Vietnam as of 31 December 1977. Initially, he took no position in relation to the preceding period. During his testimony on 9 and 10 June 2009, however, he acknowledged the existence of a continuous armed conflict between DK and Vietnam from 17 April 1975 to 6 January 1979, although claiming to have had limited knowledge of it at the time. In its final submission and closing statement, the Defence reiterated its acknowledgment that DK and Vietnam were in armed conflict from 31 December 1977, but alleged that the existence of an armed conflict before late 1977 remained uncertain.[91] The Co-Prosecutors submitted that an international armed conflict existed between 17 April 1975 and 6 January 1979.[92]

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[90] Amended Closing Order, paras 16-18 (footnotes omitted).

[91] T., 9 June 2009 (Accused), pp. 75-79, pp. 84-89; T., 10 June 2009 (Accused), pp. 69, 75-76. For more details on the knowledge of the Accused at the time, *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 28, 28a-d. "Final Defence Written Submissions", E159/8, paras. 25-34; T., 25 November 2009 (Defence Closing Statement), pp. 80-82.

[92] "Co-Prosecutors' Final Trial Submission with Annexes 1-5", E159/9, paras. 49-61, 295; T., 25 November 2009 (Co-Prosecutors' Closing Statement), pp. 48-50. The Civil Parties did not make any submissions with regards to the existence of an international armed conflict.

65. The relationship between Vietnam and Cambodia during the DK period can be divided into two main phases; the first from the KPNLAF's entry into Phnom Penh on 17 April 1975 until the DK's severance of diplomatic relations with Vietnam on 31 December 1977[93] and the second from 31 December 1977 until the fall of Phnom Penh on 7 January 1979, when the DK government fled the capital.

2.1.1 April 1975 to 31 December 1977

66. As early as April 1975, disputes over the control of a number of islands off the Cambodian and Vietnamese coasts resulted in armed confrontations between the armed forces of the two nations. In May 1975, the RAK forces seized the islands of Phu Quoc ("Koh Tral" in Khmer) and Tho Chu ("Koh Krachak" in Khmer), causing numerous casualties, before the islands were re-taken by the Vietnamese army two weeks later. Efforts to assert control over disputed islands, in particular the island of Puolo Wai, resulted in the seizure by the RAK of an American container ship, the *Mayaguez*, near this island. Puolo Wai was captured by the Vietnamese army in June 1975 but returned to DK two months later.[94]

67. The Vietnamese army also conducted raids into the Cambodian provinces of Ratanakiri and Mondulkiri. From August to December 1975, there were a number of RAK incursions into Vietnamese territory, including into the provinces of Ha Tien, Tay Ninh, Kontum and Darlac. DK leaders also believed they were the victims of a failed coup or assassination in this period, staged by Vietnam.[95]

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[93] "Radio announcement by Democratic Kampuchea Ministry of Foreign Affairs announcing the severing of relations with Vietnam", E3/171; "Statement of the Minister of Foreign Affairs of Democratic Kampuchea", 31 December 1977, E3/756.

[94] T., 25 May 2009 (Nayan CHANDA), pp. 8-9, 43-44, 58-59, 63, 65; T., 26 May 2009 (Nayan CHANDA), p. 17; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 5, 9-15, ERN (English) 00192190, 00192194-00192200; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 8, ERN (English) 00187387; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, pp. 10, 16, ERN (English) 00187275, 00187281 (for a Vietnamese perspective).

[95] T., 25 May 2009 (Nayan CHANDA), pp. 43-44; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service,

68. According to Expert Nayan CHANDA, more than 150,000 civilians of Vietnamese origin residing in Cambodia were expelled in the five months following the fall of Phnom Penh to the Khmer Rouge on 17 April 1975 and took refuge in the South of Vietnam.[96]

69. Numerous DK internal documents show that border clashes occurred throughout 1976 and that DK continued to regard Vietnam as its enemy at the time. In particular, various DK military reports and telegrams from early 1976 described incidents, armed attacks and killings on both sides of the border, mainly near the Pou Nhak Mountain (O Vay) and in the provinces of Svay Rieng (Chantrea district), Prey Veng (Preah Sdah district) and Mondulkiri (in Ou Reang and Dak Dam) by either Vietnamese or RAK forces, and requested military instructions. At least four meetings of the CPK Standing Committee, held between February and May 1976, addressed the border situation and clashes with Vietnam (in particular in the provinces of Ratanakiri, Svay Rieng, Kandal (Kaam Samna) and Mondulkiri (including in Dak Dam)) and decided on military measures to be taken in response. Military meeting minutes and a speech by DK Minister of Foreign Affairs IENG Sary in December 1976, in which he indicated that aggression against DK would be resisted, also attest to the continuation of the conflict between DK and Vietnam in the latter part of 1976. Several border discussions took place during 1976, but were generally inconclusive.[97]

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entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 8, ERN (English) 00187387; "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, p. 10, ERN (English) 00187275 (for a Vietnamese perspective); "Black Paper" (book), published September 1978, E3/199, p. 76, ERN (English) 00082551; "News of DK: News Summary from Phnom Penh", E3/755, ERN (English) 00305342.

[96] T., 25 May 2009 (Nayan CHANDA), pp. 10-11, 45; T., 26 May 2009 (Nayan CHANDA), p. 2.

[97] T., 26 May 2009, p. 7; s*ee, e.g.,* "Black Paper" (book), published September 1978, E3/199; "DK Telegram entitled 'Telegram via Kolaing to Uncle 89' dated 23 January 1976", E3/806; "DK Report entitled 'Report from Sector 23 to East Zone' dated 20 February 1976", E3/768; "CPK Standing Committee Meeting Minutes entitled 'Minutes, Meeting of Standing Committee' dated 22 February 1976", E3/750; "DK Telegram by Chhin entitled 'Telegram To Beloved Brother 89' dated 29 February 1976", E3/809; "DK Telegram by Ya entitled 'Telegram 25, Dear Respected Brother' dated 7 March 1976", E3/791; "DK Military Report entitled 'To beloved Brother 89' dated 9 March 1976", E3/753; "CPK Standing Committee Meeting Minutes entitled 'Record of Meeting of the Standing Committee' dated 11 March 1976", E3/89; "DK Telegram by Chhon entitled 'Telegram 21, Band 676, To Beloved and Missed Brother Pol' dated 21 March 1976", E3/114; "CPK Standing Committee Meeting Minutes entitled 'Record of Meeting of the Standing Committee' dated 26 March 1976", E3/751; "CPK Standing Committee Meeting Minutes entitled 'Examination of the Reaction of Vietnam During the Fifth Meeting' dated 14 May 1976", E3/752, ERN (English) 00182693; "DK Military Meeting Minutes by Division 920 entitled

70. Expert Nayan CHANDA spoke of a lull in the fighting between DK and Vietnam in 1976, but acknowledged that he had not had access to internal DK documents such as those cited above. The Chamber notes that until the severance of diplomatic relations in December 1977, and in some instances even beyond that date, a policy of secrecy concerning the conflict was implemented in both countries. There appears to have been a variety of reasons for the secrecy, the main one stemming from a political will to avoid interference from other countries.[98] The Chamber therefore considers that any appearance of a relative respite in 1976 is attributable not to any cessation of hostilities, but rather to the covert nature of the armed conflict between DK and Vietnam at the time.

71. The existence of conflict between DK and Vietnam in 1976 is also evident from the presence of Vietnamese prisoners in S-21 as early as that year. The Accused did not dispute that the first record of an S-21 prisoner described as "Vietnamese" dates back to 7 February 1976. He also acknowledged that Vietnamese prisoners were sent to S-21 as early as 1975 and that their number increased, particularly in 1978 as the conflict with Vietnam escalated, to a total of 345 by 6 January 1979. All Vietnamese prisoners at S-21 were divided into one of three categories (soldiers, spies and civilians), interrogated, sometimes tortured, and invariably killed.[99]

'Plenary Meeting of the 920th Division' dated 7 September 1976", E3/145; "DK Military Meeting Minutes by Division 801 entitled 'DK Military Meeting Minutes of Division 801' dated 16 December 1976", E3/162; "International Media Report dated 19 January 1978 on Speech of Pol Pot on 17 January 1978", E3/200, ERN (English) S00008671; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 8, ERN (English) 00187387; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, pp. 11, 20-21, ERN (English) 00187276; 00187285, 00187286 (for a Vietnamese perspective).

98 T., 25 May 2009 (Nayan CHANDA), pp. 21, 71, 73-74, 90-91, 105-107, 109-110; T., 26 May 2009 (Nayan CHANDA), pp. 6-7; T., 6 August 2009 (David CHANDLER) pp. 17-18, 99-100; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 83, 91, 196, 318, ERN (English) 00192268, 00192276, 00192381, 00192503.

99 T., 9 June 2009 (Accused); pp. 72, 96-97; T., 10 June 2009 (Accused), pp. 2, 3, 5-19; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras. 108 (a, b, c); T., 1 April 2009 (Agreed Facts), pp. 72-73; "Vietnamese Prisoners Entering S-21", E68.27; "S-21 Prisoners identified as Vietnamese", E68.30.

72. From January 1977, DK increasingly conducted raids into Vietnamese territory, none of which were publicised in either country, and prepared army units in the east of the country for an attack on Vietnam.[100]

73. On 30 April 1977, the RAK initiated a large-scale attack against the Vietnamese township of Tinh Bien and a string of villages in the An Giang Province in the Mekong Delta, killing many civilians. The aggression continued through the following months. After unpublicised bombing of Cambodia by Vietnam starting in May 1977 and unsuccessful peace attempts in June 1977, a second major DK attack followed on 24 September 1977 in the Tay Ninh Province, killing hundreds of civilians.[101]

74. The Vietnamese army retaliated in October and November 1977 with a major unpublicised military operation into the Cambodian province of Svay Rieng, resulting in few losses for the RAK forces. It launched a further extensive attack in December 1977 at various points along the border, in particular in the provinces of Kampong Cham, Svay Rieng and Takeo, this time inflicting major defeats on the DK side.[102]

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[100] T., 25 May 2009 (Nayan CHANDA), pp. 13, 91-94, 107-108; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, ERN (English) 00192272; T., 6 August 2009 (David CHANDLER) pp. 16-18, 99-100; "'Voices from S-21 – Terror and History in Pol Pot's Secret Prison'" (book) by David CHANDLER, E3/427, p. 61, ERN (English) 00192740; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, p. 22, ERN (English) 00187287 (for a Vietnamese perspective).

[101] T., 25 May 2009 (Nayan CHANDA), pp. 11-18, 41, 43-44, 46; T., 26 May 2009 (Nayan CHANDA), pp. 18-19; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 87, 91-92, 186, 193-194, 198, 220, ERN (English) 00192272, 00192276-00192277, 00192371, 00192378-00192379, 00192383, 0192405; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, pp. 8-9, ERN (English) 00187387-00187388; "DK Telegram by Chhean entitled 'Telegram 46 - Radio Band 600 - Respected and beloved brother' dated 15 June 1977", E3/818; "DK Telegram by Chhean entitled 'Telegram 62 - Radio Band 1474 - Respectfully Presented to Respected and Beloved Mo-81' dated 14 August 1977", E3/824; *see also* "Report by the Ministry of Foreign Affairs of the Socialist Republic of Vietnam entitled '*Facts and Documents on Democratic Kampuchea's Serious Violations of the Sovereignty and Territorial Integrity of the Socialist Republic of Viet Nam*' dated January 1978", E3/526, pp. 14, 22-23, ERN (English) 00187279, 00187287-00187288 (for a Vietnamese perspective).

[102] T., 25 May 2009 (Nayan CHANDA), pp. 19-21, 44, 106; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 196, 206-207, ERN (English) 00192381, 00192391-00192392; "Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs, Committee on International Relations by the Congressional Research Service, entitled '*Vietnam-Cambodia Conflict*' dated 4 October 1978", E3/201, p. 9, ERN (English) 00187388; "DK Telegram by Chhon entitled 'Telegram 56 - Radio Band 348 - Dear Respected and Beloved M 870' dated 26 October 1977", E3/834; "DK Telegram by

2.1.2 31 December 1977 to 7 January 1979

75. The existence of an international armed conflict between DK and Vietnam from the end of December 1977 to at least 6 January 1979 is uncontested by the parties.[103]

76. At the end of December 1977, the DK leaders decided to publicise the war. On 31 December 1977, following a speech by DK President KHIEU Samphan denouncing Vietnamese aggression, the DK Minister of Foreign Affairs IENG Sary issued a statement severing diplomatic relations with Vietnam, and Vietnamese troops withdrew from Cambodia.[104]

77. On 6 January 1978, POL Pot presented the Vietnamese withdrawal as a "grand victory" over the Vietnamese army, and confessions of Vietnamese prisoners at S-21 started being broadcast for propaganda purposes.[105]

78. There was a wave of purges in the Cambodian Eastern Zone starting in January 1978, and border clashes continued throughout that year. In particular, on 14 March 1978, RAK forces conducted a violent attack in the Chau Doc area, resulting in many civilian casualties. In April 1978, Radio Phnom Penh broadcast excerpts from a resolution adopted at a "Phnom Penh Rally", in which the participants, including the DK

Chhon entitled 'Telegram 54 - Radio Band 642 - Dear Respected, Beloved and Missed M 870' dated 26 October 1977", E3/835; "DK Telegram by Chhon entitled 'Report to Brother about Situation of Enemy along the Route 22-7' dated 22 December 1977", E3/858; "DK Telegram by Chhon entitled 'Telegram 90: to Beloved Office 870 about situation of enemies in battle field route No 22' dated 9 December 1977", E3/849.

[103] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para 28.

[104] T., 25 May 2009 (Nayan CHANDA), pp. 44, 47, 49-50, T., 6 August 2009 (David CHANDLER), p. 100; "Statement of the Minister of Foreign Affairs of Democratic Kampuchea", 31 December 1977, E3/756; "Radio announcement by Democratic Kampuchea Ministry of Foreign Affairs announcing the severing of relations with Vietnam", E3/171; ""Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 207-208, 213, 297, ERN (English) 00192392-00192393, 00192398, 00192482.

[105] T., 10 June 2009 (Accused), pp. 3, 7-8; "Speech by Pol Pot entitled 'The Valiant and Powerful Revolutionary Army of Kampuchea Under the Leadership of the Communist Party of Kampuchea' dated 17 January 1978", E3/757, ERN (English) S00005012; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, p. 213, ERN (English) 00192398. Various Vietnamese prisoners' confessions, broadcast between January and December 1978, are contained in documents ranging from E3/665 to E3/747. *See, e.g.,* "Radio broadcast of confession by SRV Lt. Tran Van Hay transcribed in the Foreign Broadcast Information Service (Cambodia), 23 January 1978", E3/665; "Radio broadcast of confession by SRV 'spy', former South-Vietnam Lt. Tran Ngoc Tuong reported among various other foreign newsreports in BBC SWB (Far Eastern Relations), 17 June 1978", E3/716; "Radio broadcast of confession by female SRV 'spy' Le Thi Vinh Sang reported among various other foreign newsreports in BBC SWB (Far Eastern Relations), 22 December 1978", E3/746.

leaders, "solemnly pledged", *inter alia,* to "exterminate resolutely all agents of the expansionist, annexationist Vietnamese aggressors from our units and from Cambodian territory forever". This policy was reiterated in May 1978, when a broadcast aired by Radio Phnom Penh appealed to DK soldiers to kill the whole of the Vietnamese population.[106]

79. In June 1978, Vietnam started bombing Cambodia and in October 1978 it commenced preparations for a major offensive by placing troops and artillery along the border. The Kampuchean National United Front for National Salvation ("KNUFNS"), dedicated to overthrowing the DK regime, was founded.[107]

80. The Vietnamese Army launched a large-scale attack against DK in late December 1978. Despite fierce resistance by the RAK, the KNUFNS and Vietnamese troops entered DK and within a few days had captured Phnom Penh on 7 January 1979.[108]

81. DK was also involved in armed border clashes with Thailand around the same time, though these skirmishes were of much lesser significance than those with Vietnam.[109]

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[106] T., 25 May 2009 (Nayan CHANDA), pp. 16-18, 22, 26-27, 66; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 213-214, 221-224, 251, ERN (English) 00192398-00192399, 000192406-00192409, 00192436; "Broadcast entitled 'Phnom Penh Rally Marks the 17th April Anniversary' dated 16 April 1978", E3/783, ERN (English) S00010563; "Report about Cambodia's Strategy of Defence against Vietnam dated 15 May 1978", including a Broadcast of 10 May 1978, E3/198, ERN (English) 00003960; *see also* Expert Nayan CHANDA's account of Ros Saroeun's discovery of "Directive 870" dated 1 April 1977 to at least one DK district chief, requesting him to hand over to the state security service all ethnic Vietnamese in the district, and all Khmers who had any Vietnamese connection and his conclusion that this was the beginning of a campaign to kill all ethnic Vietnamese (T., 25 May 2009 (Nayan CHANDA), pp. 66-67; 107-108; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, p. 86, 186, ERN (English) 00192271, 00192371.)

[107] T., 25 May 2009 (Nayan CHANDA), pp. 28, 48-49; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 318, 333-334, 339, ERN (English) 00192503, 00192518-00192519, 00192524; "'The Vietnam – Kampuchea Conflict (A Historical Record)' dated 1979" (book), E3/522, pp. 45-46, ERN (English) 00187363-00187364.

[108] T., 25 May 2009 (Nayan CHANDA), pp. 48, 52; "Brother Enemy: The War after the War" (book) by Nayan CHANDA, E3/193, pp. 337, 341, 343, 345-346, ERN (English) 00192522, 00192526, 00192528 ("Soon nine of Vietnam's twelve divisions, accompanied by three regiments of front soldiers, would close in on Phnom Penh from the southeast to the north"), 00192530-00192531; *see also* "Telegram dated 31 December 1978 from the Deputy Prime Minister in Charge of Foreign Affairs of Democratic Kampuchea addressed to the President of the Security Council (UN S/13001)", E3/785; "Telegram dated 3 January 1979 from the Deputy Prime Minister in Charge of Foreign Affairs of Democratic Kampuchea addressed to the President of the Security Council", E3/209.

[109] T., 25 May 2009 (Nayan CHANDA), pp. 26-27, 73; T., 26 May 2009 (Nayan CHANDA), p. 24.

2.2 Overview of DK Period

82. The Accused has indicated either that he agrees with, or does not dispute,[110] paragraphs 10-15 of the Amended Closing Order, which provide the following overview of the DK period:

> 10. On 17 April 1975, the army of the Communist Party of Kampuchea (CPK), the Kampuchea People's National Liberation Armed Forces (KPNLAF), entered Phnom Penh and seized national power. With the end of the civil war against LON Nol's Khmer Republic, the CPK's stated policy was to pass to "… *the next phase of making socialist revolution*". During the three years, eight months, and twenty days, that followed, the CPK exercised effective authority over Democratic Kampuchea, and pursued a policy of "*completely disintegrat[ing]*" the economic and political structures of the Khmer Republic and creating a "*new, revolutionary State power*".
>
> 11. Historians and observers agree that this programme was implemented through a number of means including the forced transfer of residents of Phnom Penh and other former Khmer Republic strongholds to the countryside; the creation of Party-controlled agricultural production cooperatives where people were made to work under extremely difficult conditions to increase food production; and the elimination of officials and supporters of the previous regime.
>
> Many of these CPK policies required the transformation of "*new people*" into peasants. These individuals were broadly made up of evacuated city dwellers and peasants living under LON Nol control until April 1975, as distinct from "*old*" or "*base*" people who were essentially peasants from areas already under the authority of the CPK during the Khmer Republic period.
>
> 12. Politically motivated extra-judicial executions were committed from the outset by military units. They continued thereafter in security centres throughout the country. The CPK foreshadowed these events by [organising], in February 1975, a "Popular National Congress of the National United Front of Kampuchea", at which it publicly announced that seven so-called Khmer Republic "*super-traitors*" were to be summarily killed for treason, post-liberation.
>
> The Congress also declared that lower-level Khmer Republic personnel would be welcomed by the revolutionary forces *"provided they immediately cease their service to the seven traitors and stop cooperating with them*". This implied that any such personnel who did not immediately defect to the Communist side were vulnerable to summary execution.

[110] T., 1 April 2009 (Agreed Facts), pp. 54-55; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 10-27.

In fact, it appears that from the early 1970s, CPK security organs such as M13, chaired by DUCH, had been tasked with executions, indicating that a policy of physically eliminating persons deemed "enemies" of the revolution was already institutionalised prior to 17 April 1975.

13. The CPK destroyed the legal and judicial structures of the Khmer Republic. While it is true that Democratic Kampuchea adopted a Constitution in January 1976, its Chapter 7, concerning "*Justice*," showed the CPK's priority was to protect the State from subversion. Article 10 provided for an unspecified "*highest level of punitive sanction*" for "*opposition and wrecking activities of a systematic character that endanger the State*",[111] while declaring that other "*crimes*" must be dealt with through "*re-education and refashioning within the context of State or popular organs*".

Although Article 9 promised that "*courts constituted as People's Courts belonging to the people*" would "*embody the people's justice and defend the people's rights and democratic freedoms,*" there is no evidence that they were ever created. Moreover, while the first, and apparently only meeting of what was said to be a popularly elected People's Representative Assembly mandated the formation of a Judicial Committee in April 1976, no evidence exists of any implementation of Article 9. This left the punishments set forth in Article 10 to be applied arbitrarily. Furthermore, there is no evidence that the CPK established appropriate facilities for captured enemy combatants or civilians, or mechanisms to challenge the legality of their arrest, detention or punishment.

14. The old legal structures were replaced by re-education, interrogation and security centres where former Khmer Republic officials and supporters, as well as others accused of offences against the CPK, were detained and executed.

This network[112] of security centres was supplemented by a programme of surveillance at all levels of the regime which aimed to identify, report, and eliminate potential enemies of those in control of the Party.

15. Thus, numerous persons, rightly or wrongly linked to the Khmer Republic or its purported social class foundations, were punished or summarily executed by the CPK in the days and weeks immediately following the "liberation" of Phnom Penh, through to the end of the regime.[113]

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[111] The Chamber notes that this language does not correspond to the English translation of "Constitution of Democratic Kampuchea", E3/27, at ERN 00184836, which states: "Dangerous activities in opposition to the people's State must be condemned to the highest degree."

[112] The Accused did not agree that there was a direct link between the security centres and therefore did not accept the use of the word "network". In all other respects however, he agreed with this statement; *see* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 25-26; T., 1 April 2009 (Agreed Facts), p. 55.

[113] Amended Closing Order, paras 10-15 (footnotes omitted).

83. It is within this historical and political context that the structure and policy of the CPK, particularly as it applied to the operation of S-21 and the charges against the Accused, are examined.

2.2.1 CPK structure

84. Following the liberation of Phnom Penh, the CPK met at a Party Congress in January 1976 to formalise by statute ("CPK Statute"),[114] a complex, centrally-organised structure by which it intended to govern. The CPK Statute provided that the entire government apparatus and the armed forces would be under the complete control of the CPK.[115] Its provisions reflected earlier policy and structures devised at the First Congress of the CPK in 1960, including the establishment of a Central Committee and a Standing Committee.[116]

85. In practice, the Central Committee met rarely. Its powers were delegated to, and exercised by its executive, the Standing Committee, the membership of which comprised the Secretary and Prime Minister POL Pot, his Deputy Secretary NUON Chea and seven other high-level members of the CPK, either as full or alternate members.[117] The Standing Committee met frequently and its daily work was conducted from Office 870 based in Phnom Penh.[118] Office 870 and the Standing Committee were known also as the "Centre", the "Organization,"[119] or "Angkar"[120] and were responsible for monitoring and

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[114] "Communist Party of Kampuchea: Statute", E3/28, pp. 1-55; "CPK Magazine entitled 'Revolutionary Flag', dated June 1976", E3/36.
[115] "Communist Party of Kampuchea: Statute", E3/28, Art. 27; "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182814.
[116] T., 18 May 2009 (Craig ETCHESON), p. 77. An earlier meeting of the Standing Committee also signalled the manner in which work would be delegated, the operational process, preparations for living in common and specific work arrangements for commerce and the military; *see* "Meeting of the Standing Committee of 9 October 1975", E3/14.
[117] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 12; "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182814.
[118] T., 21 May 2009 (Craig ETCHESON), p. 22; "Meeting of the Standing Committee of 9 October 1975", E3/14.
[119] Also known as the "Party Centre"; *see* "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, fn. 18; T., 18 May 2009 (Craig ETCHESON), pp. 70, 81.
[120] T., 18 May, 2009 (Accused), p. 17; T., 18 May 2009 (Craig ETCHESON), pp. 69-70.

implementation of CPK policy nationwide.[121] Office 870 discharged these responsibilities through a network of subsidiary offices.[122]

86. The CPK Statute was a primary source of CPK policy, albeit applying directly only to those who were members of the Party.[123] Nonetheless its provisions had implications for the whole of the country.[124] From the outset, the entire civilian population was governed by a network of bodies tightly controlled by the Central Committee through the Standing Committee. The country was divided into Zones, and then subdivided into Sectors, Districts, and Communes.[125] With the advent of the DK regime, Communes which traditionally had been divided into villages were "combined into larger entities known as Cooperatives, within which communal eating and work were organized".[126] Other Commune or Cooperative units comprised mobile brigades, groups of 100 workers and local militia.[127] The Commune or Cooperative branches of the CPK were under the leadership of branch secretaries.[128]

87. Zones were governed by three-person Zone Committees comprising a Secretary, Deputy-Secretary responsible for security and a Member responsible for economics appointed by the Standing Committee. In addition to the six original Zones there were a number of autonomous sectors, and special municipal regions under military authority, including DK's capital city, Phnom Penh.[129] At each level, the leadership structure

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[121] T., 18 May 2009 (Craig ETCHESON), p. 81; "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182809.
[122] T., 21 May 2009 (Craig ETCHESON), p. 28; *see also* "Meeting of the Standing Committee of 9 October 1975", E3/14.
[123] T., 21 May 2009 (Craig ETCHESON), p. 20.
[124] T., 21 May 2009 (Craig ETCHESON), p. 20 ("[…] because the Statute of the Communist Party of Kampuchea was the guiding document of the organization which exercised dictatorial state power in Cambodia, in fact many of the provisions embodied within the Statute of the Communist Party were imposed on the entire people of the nation.")
[125] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras. 7-10; T., 18 May 2009 (Craig ETCHESON), p. 76; "Communist Party of Kampuchea: Statute", E3/28, Article 7.
[126] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 10; *see also* "CPK Magazine entitled 'Revolutionary Flag', Special Issue, October - November 1977", E3/29, ERN (English) 00182581.
[127] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 10; "Communist Party of Kampuchea: Statute", E3/28, Article 9.
[128] "Communist Party of Kampuchea: Statute", E3/28, Article 9.
[129] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 7; T., 18 May 2009 (Craig ETCHESON), pp. 74-76 (later various changes were made to the number and composition of the Zones and autonomous regions).

mirrored the Zone governing body; those governing were appointed by the body immediately superior to it, and the appointments were finally approved by the Standing Committee itself. Each body or organ reported to the body above it, and ultimately to the Standing Committee.[130]

88. The CPK Statute established criteria for membership and required Party members to be "self-aware" and to "build a clear, clean and pure personal history […] constantly."[131] It also demanded regular self-assessment sessions at all levels of the Party and among the cadres, exhorting members of the CPK to "take criticism and self-criticism as [the] daily routine" and to "cling closely to the principles and stances of independence, mastery, self-reliance, and self-determination of fate."[132]

89. The CPK directed the Central Committee to implement the Party's "lines" (or policies) throughout the country, instruct the Zone, Sector, and Military Organizations and the Party organs responsible for various nation-wide departments. It was further directed to administer and deploy "cadre and party members within the Party as a whole […] while maintaining a clear and constant grasp on their biographies and political, ideological and organizational stances and constantly educating and indoctrinating them in terms of politics, ideology and organization."[133]

90. All bodies, including the military, were required to report to the Central Committee through the Standing Committee, and were prohibited from communicating with each other. As the Accused described the reporting obligations, they were vertical, never horizontal.[134] According to his testimony, the Accused received instructions from his superior, SON Sen and later NUON Chea, but did not communicate with any other organ of the CPK directly.[135] The rule against direct communication between organs of the CPK applied to the military as well as to the Zones and their subsidiary organs, and was

[130] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 8.
[131] "Communist Party of Kampuchea: Statute", E3/28, preambular para. 6.
[132] "Communist Party of Kampuchea: Statute", E3/28, preambular paras 7 and 8.
[133] T., 18 May 2009 (Craig ETCHESON), p. 68; *see also* "Communist Party of Kampuchea: Statute", E3/28, Art. 23.
[134] T., 9 June 2009 (Accused), pp. 51-52 (adopting Etcheson's analysis in "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 56).
[135] T., 29 April 2009 (Accused), p. [82]; T., 9 June 2009 (Accused), p. 39.

intended to ensure that the Central Committee of the CPK held and controlled all information and directed the actions of the whole population, from the most senior member of the Party to the humblest citizen.[136]

91. There was no traditional bureaucratic structure operating in the various Ministries, which were simply areas of responsibility assigned to a Party member.[137] The Standing Committee managed the appointment of senior officials to the Party, government and military. It also appointed leading officials to government posts, and appointed and removed senior military members of the General Staff.[138] Every aspect of life in DK was managed through these structures, from security (both internal and external), foreign affairs, energy and commerce to production, farming, political instruction, health care, education and communications.[139]

2.2.2 The Constitution of Democratic Kampuchea

92. Contemporaneously with the enactment of the CPK Statute, the CPK promulgated the "Constitution of Democratic Kampuchea" ("DK Constitution").[140] The DK Constitution provided for a "Kampuchean People's Representative Assembly" ("KPRA") to be elected by secret ballot in direct general elections, an executive body elected by and responsible to the KPRA, a judicial system staffed by judges selected and appointed by the KPRA, and a State Praesidium to be selected and appointed every five years by the KPRA.

93. The members of the KPRA, however, were never elected; the Central Committee appointed the chairman and other high officials both to it and to the State Praesidium.[141]

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[136] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 36.
[137] T., 27 May 2009 (Craig ETCHESON), pp. 65-66; *see also* "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 001828313-001828314; "Meeting of the Standing Committee of 9 October 1975", E3/14, ERN (English) 00183393-00183408.
[138] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 18; *see also* "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13.
[139] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 35; *see also* "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182809; "Meeting of the Standing Committee of 9 October 1975", E3/14.
[140] "Constitution of Democratic Kampuchea", E3/27.
[141] "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13, ERN (English) 00182813.

Plans for elections of members were discussed, but the 250 members of the KPRA were in fact appointed by the upper echelon.[142] There is evidence to suggest that the Central Committee did not intend to establish either of these organs as provided for in the DK Constitution,[143]and that the DK Constitution was, as the Accused has said, a "façade".[144]

2.2.3 The Judiciary

94. In his book, Expert David CHANDLER also states that after the Khmer Rouge victory of 17 April 1975, the judicial system of Cambodia disappeared.[145] There were no courts, judges, laws or trials in DK. The "people's courts" stipulated in Article 9 of the DK Constitution were never established.[146] The KPRA met once in April 1976, but its legislative and policy responsibilities were undertaken by the Standing Committee and no laws or enforcement mechanisms, including courts which might conduct trials, were ever established.[147] The Chamber accordingly finds that during the DK regime, there was no functioning judicial system to provide procedural safeguards for detainees.

2.2.4 The Military

95. The Central Committee also exercised rigid control of the military. The RAK as required by the CPK Statute became a "mainforce Army belonging to the Centre."[148] For

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[142] T., 21 May 2009 (Craig ETCHESON), p. 17.

[143] "Minutes of Meeting on Base Work 8 March 1976", E3/44, ERN (English) 001826308 ("If anyone asks […] do not speak playfully about the Assembly in front of the people to let them see that we are deceptive, and our Assembly is worthless.")

[144] T., 9 June 2009 (Accused), p. 25 ("And the DK constitution, as I told Your Honours, it is a façade […] a decoration of their activities"); T., 21 May 2009 (Craig ETCHESON), p. 17 ("The KPRA […] did not meet regularly, did not pass any laws, and in fact did not appear to have any duties at all other than to serve as a propaganda façade […] to burnish the reputation of DK among other nations of the world.")

[145] "Voices from S-21: Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 120, ERN (English) 00192813.

[146] T., 6 August 2009 (David CHANDLER), p. 34 (in Expert CHANDLER's opinion, the only trace of a judicial system was the interrogation, normally a precursor to a judicial prosecution, but there was no constitutionally-based body to deal with the information gathered); T., 19 May 2009 (Craig ETCHESON), p. 48.

[147] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras 149-151. A judicial committee was approved by the KPRA in April 1976: "Document on Conference I of Legislature I of the People's Representative Assembly of Kampuchea, 11-13 April 1976", E3/43; T., 19 May 2009 (Craig ETCHESON), pp. 47-48.

[148] "Communist Party of Kampuchea: Statute", E3/28; "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 12.

organizational purposes, the Standing Committee, delegated by the Central Committee, controlled the three branches of the Military directly.[149] A Military Committee was established by the Central Committee and chaired by POL Pot. SON Sen to whom the Accused reported initially, and NUON Chea who succeeded him as the Accused's superior, were both members of the Military Committee.[150]

96. Zones and Sectors also commanded armed units under a General Staff, and Districts controlled less formal militia. All had internal security responsibilities which included the power to arrest and execute personnel within their own area of authority, and all reported through the level above to the Standing Committee. According to Expert Craig ETCHESON, the Districts, which maintained "Security offices" and decided which "enemies" would be "disposed of" locally and which sent to higher authorities, played a key role in the DK regime.[151]

2.2.5 Relevant CPK policy

2.2.5.1 Secrecy

97. The CPK maintained almost total secrecy concerning its leadership and the implementation of its policy. Party members were enjoined to "[a]lways and absolutely strive to maintain Party secrecy with a high stance of revolutionary vigilance."[152] Breaches of secrecy could invoke Party discipline.[153]

98. The policy of secrecy contributed to the regime's ability to hide its illegal activities within Cambodia and from international scrutiny.

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[149] "Communist Party of Kampuchea: Statute", E3/28, Art. 27: The three categories were: regular army, sector army and militia.
[150] T., 18 May 2009 (Craig ETCHESON), pp. 81-82; T., 28 May 2009 (Craig ETCHESON), p. 61.
[151] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras 9, 89.
[152] "Communist Party of Kampuchea: Statute", E3/28, Art. 2: Internal Duties, para. E; *see also* T., 6 August 2009 (David CHANDLER), pp. 75-76, 97-99; T., 15 June 2009 (Accused), p. 79.
[153] "Communist Party of Kampuchea: Statute", E3/28, Art. 4(2).

2.2.5.2 "Smashing" enemies

99. The most critical aspect of CPK policy as it relates to this trial was that of "smashing" enemies, a policy introduced at M-13[154] and continued after 17 April 1975. This policy was sanctioned by Chapter 7, Article 10 of the DK Constitution, under the heading "Justice", which stated that violations of the laws of the people's State including dangerous activities in opposition to the people's State must be condemned to the highest degree. According to Expert Craig ETCHESON, POL Pot himself spoke at a conference in 1976 concerning the need to deal with enemies in the cooperatives through "continuous absolute measures to smash them."[155]

100. Described by the Accused as global, the policy stood "for S-21, for the entire party, the military, the State authority in the bases, and the Police Offices throughout the country."[156] Those deemed to be enemies and therefore to be executed, "evolved and broadened over the period as a result of domestic developments and the international armed conflict between Cambodia and Vietnam."[157] To "smash" meant more than to kill. As the Accused described it: "[…] to smash […] means to arrest secretly […, to interrogate] with torture employed, and then [to execute] secretly without the knowledge of [the detainees'] family members. [It also meant that] the person was not to be released […] So if he was smashed […] this did not go through the judicial process because there was no law, no court, the Standing Committee governed all the three main powers."[158] Moreover, to smash was frequently translated as "smash to bits" as in to smash into little pieces [... it] involved not merely a physical smashing but also a psychological smashing, and the regime of prisoner treatment inside S-21 was ideally suited to this sort of dehumanization and debasement of the individual psyche […] [S]mash means something more than merely kill."[159]

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154 T., 18 May 2009 (Accused), p. 15.
155 "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 26, fn. 51.
156 Amended Closing Order, para. 33 (footnotes omitted).
157 Amended Closing Order, para. 34
158 T., 18 May 2009 (Accused), p. 14.
159 T., 28 May 2009 (Craig ETCHESON), pp. 2-3.

101. The DK Constitution in its chapter entitled "Justice" also provided that "Other cases [than 'Dangerous activities'] are subject to constructive re-education in the framework of the State's or people's organizations."[160]

2.2.6 30 March 1976 Directive

102. One of the most critical and influential directives to full-rights members of the Party from the Central Committee was the "Decision of the Central Committee Regarding a Number of Matters" dated 30 March 1976, a document that the Accused himself had not seen until the investigation preceding this trial.[161] In it, those CPK entities entitled to "smash" or kill enemies were listed as follows:

> 1. The right to smash inside and outside the ranks [...]
> - If in the base framework, to be decided by the Zone Standing Committee.
> - Surrounding the Center Office, to be decided by the Central Office Committee.
> - Independent Sectors, to be decided by the Standing Committee
> - The Center Military, to be decided by the General Staff.

103. According to Expert Craig ETCHESON, this document, although apparently emanating from the Central Committee, was likely to have been drafted by the Standing Committee. Its importance lies in the delegation to the four organs mentioned of independent authority to kill.[162] Expert David CHANDLER described the 30 March 1976 Decision as "[…] the closest thing we've got to […] a smoking gun authorizing the smashing of enemies of Democratic Kampuchea. Of course, this document was extremely closely held. There were only six or seven copies made, and only one of these copies survived."[163]

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[160] "Constitution of Democratic Kampuchea", E3/27, Art. 10.
[161] "Decision of the Central Committee Regarding a Number of Matters of 30 March 1976", E3/13.
[162] T., 27 May 2009 (Craig ETCHESON), p. 64.
[163] T., 6 August 2009 (David CHANDLER), pp. 25-26; "Voices from S-21: Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 51, ERN (English) 00192730.

2.2.7 Dissemination of CPK policy

104. Policy was disseminated by various means including through Directives[164] to all organizational units, by stadium rallies, through a Party Training school where cadres of the CPK were instructed in the policy of the Party and the government of Democratic Kampuchea, and by strictly-controlled broadcasts on State radio. There were telegraphed instructions as well as face-to-face meetings at which policy could be communicated. In addition, the CPK required regular meetings among the Party members and cadres at all levels.[165]

105. The DK periodical "Revolutionary Flag" was an important form of communication and was widely circulated among full-rights members of the Party who were obliged to study it. According to Expert Raoul JENNAR, it was believed that all its articles were written by POL Pot.[166] It could contain general instructions concerning agricultural production as well as directives which resulted in intensified purges of "burrowing enemies" with emphasis on "new" people from the cities who were deemed to be inferior to the peasant farmers.[167] The communications were based at least to some degree on reports from Zones to Office 870, which usually emphasized their activities in searching for enemies often to the detriment of reports on economic and production issues.[168] In a Special Issue of the Revolutionary Flag magazine published in 1977, every level of the Party was exhorted to "adopt the role of leading the army and the people to attack all such enemies, sweep them cleanly away, sweep, sweep and sweep again and again ceaselessly, so that our Party forces are pure, our leading forces at every level and in every sphere are clean at all times."[169] Surviving documents also demonstrate routine reporting of executions ordered by Sector leaders.[170]

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164 T., 21 May 2009 (Craig ETCHESON), p. 35.
165 "Communist Party of Kampuchea: Statute", E3/28, Art. 18, 20; "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 57.
166 "Report by Consultant Raoul M. Jennar", E3/511, p. 4, ERN (English) 00283026.
167 T., 21 May 2009 (Craig ETCHESON), p. 42.
168 T., 21 May 2009 (Craig ETCHESON), p. 46.
169 "'Revolutionary Flag', Special Number, May-June 1978", E3/35, ERN (English) 00185343.
170 "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, paras 64-68.

106. Reflecting the control of the military as provided in the CPK Statute, there were also communications concerning the search for internal enemies from military units to the Party Centre. Expert Craig ETCHESON, referring to the letters sent by Division 502 Commander SOU Met to the Accused explaining the reason members of his division were sent to S-21, concluded that they were a good illustration of taking "an absolute stance towards sweeping clean enemies burrowing from within", as urged in Revolutionary Flag publications.[171]

107. "Revolutionary Youth" magazine was another important publication, directed at younger cadres. It was published monthly by the Propaganda and Education Organisation of the "Youth League" and contained articles urging youth to "have the view of constantly preparing for war."[172] The thrust of the publication was to encourage young cadres to be self-reliant, to work hard, and to support the revolution. Special emphasis was placed on engaging in physical labour and food production, to achieve three tons of paddies per hectare.[173] Cadres were told to "strengthen the stance of attacking the enemy absolutely, no matter what kind of enemy they are", to "attack and eliminate all private property" and to "regularly study the political, ideological, and organizational lines of the Party […] in order to increase political capability." At the same time, they were encouraged to "consciously and unconditionally respect the organizational discipline of the Party at all times."[174]

108. By 1978, the periodical was expounding the treachery of the Vietnamese and Americans and urging youth to "concentrate and monitor and continue to actively purge [sweep clean] enemy elements boring holes within in order to screen the units, ministries, offices, cooperatives, and our entire national society to be clean, good, fresh and

[171] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, para. 123; T., 19 May 2009 (Craig ETCHESON), p. 7; T., 27 May 2009 (Craig ETCHESON), p. 56.
[172] "CPK magazine 'Revolutionary Youth,' issue dated February 1978," E3/532, p. 10, ERN (English) 00278717.
[173] "Revolutionary Youth', Issue number 5, May 1976", E3/136, p. 3, ERN (English) 00357870.
[174] "CPK magazine 'Revolutionary Youth,' issue dated February 1978," E3/532, p. 10, ERN (English) 00278717.

beautiful" in an echo of the language used in the Special Issue of the Revolutionary Flag magazine published in 1977.[175]

2.2.8 CPK security structure

109. A critical element of the DK structure was the Security apparatus. Internal security was entrusted to SON Sen, who was originally an alternate member of the Standing Committee. He was promoted to full membership of the Standing Committee during 1978, and became Deputy Prime Minister responsible for National Defence.[176] In addition, he was Chief of Staff of the General Staff of the RAK, thereby holding important civilian and military posts in DK.[177] Described by Expert Raoul JENNAR as "the mentor of the Accused,"[178] and the person who trained and protected him before 1975 and after 1979, SON Sen studied in France, was a member of the French Communist party and participated in the activities of the Marxist circle of Khmer students. Expert Raoul JENNAR's opinion was that SON Sen subscribed to the ideology that he learned during this period which advocated iron discipline and degradation of those accused by the regime. He further stated that this policy was imposed by him at S-21, and continued when NUON Chea assumed responsibility as the Accused's superior in 1977.[179]

110. The Santebal security system was established well before the CPK came to power.[180] As parts of Cambodia were captured during the LON Nol regime, beginning in 1971, security centres were opened in the "liberated zones". M-13 (Section 2.3.2), situated in Kampong Speu province, was one of these early Santebals. Later they were established in all parts of the country and to date, 196 centres have been identified by the

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[175] "CPK magazine 'Revolutionary Youth,' issue dated February 1978," E3/532, p. 11, ERN (English) 00278718.
[176] T., 18 May 2009 (Craig ETCHESON), p. 71.
[177] "Written Record of Analysis by Investigator Craig C. Etcheson", E3/32, ERN (English) 00146854.
[178] T., 14 September 2009 (Raoul JENNAR), p. 57.
[179] T., 14 September 2009 (Raoul JENNAR), p. 59.
[180] "Report by Consultant Raoul M. Jennar", E3/511, p. 10, ERN (English) 00283032; *see also* T., 14 September 2009 (Raoul JENNAR), p. 57. According to Expert David CHANDLER, "Santebal" is a Khmer compound term that combined the words "santisuk" (security) and "nokorbal" (police); *see* "Voices from S-21: Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 3, ERN (English) 00192682; *see also* T., 22 April 2009 (Accused), p. 78 ("The word Santebal means those who looked after the peace, who preserve the peace in the country.")

Documentation Centre of Cambodia ("DC-Cam"). Their primary purpose was to "identify and kill internal enemies", to encourage informing on others and to obtain confessions.[181] Expert Raoul JENNAR contended that these methods were based on Stalinist policies and that those identified as "enemies" were to be executed or "smashed", a word used in Lenin's writings.[182]

2.3 S-21 and the Role of the Accused

111. The Amended Closing Order states, and the Accused has acknowledged, that he served as Deputy and then Chairman of S-21, a security centre tasked with interrogating and executing perceived opponents of the CPK from 1975 to 1979.[183] Section 2.3 provides a summary of the Accused's background prior to assuming these positions and describes the organisational structure of S-21, including Choeung Ek and S-24, as well as the role of the Accused at these locations. Section 2.4 describes the offences committed within S-21. The Chamber's legal findings regarding these offences and the Accused's criminal responsibility for their perpetration follow in Sections 2.5-2.7.

2.3.1 Relevant background information

112. The Accused was born on 17 November 1942 in Kompong Thom Province, into a family of poor peasants of Chinese origin. He was the eldest of five children and the only son. A good pupil, he completed his schooling at the Kompong Thom junior high school, followed by high school in Siem Reap at the Lycée Sisowath in Phnom Penh, where he passed his baccalaureate.[184] He joined the Khmer Rouge in October 1964. Upon completion of his education, he was appointed as a mathematics teacher at the junior high school in Skoun, Kompong Cham in 1965.[185] He began increasingly dedicating himself to

[181] "Report by Consultant Raoul M. Jennar", E3/511, p. 11, ERN (English) 00283033; T., 14 September 2009 (Raoul JENNAR), p. 79.
[182] "Report by Consultant Raoul M. Jennar", E3/511, p. 11, ERN (English) 00283033; T., 14 September 2009 (Raoul JENNAR), p. 87.
[183] *See generally* T., 1 April 2009 (Agreed Facts); "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1.
[184] "Part III: Character Information", E5/11/6.2, paras. 330, 331, 335, 337.
[185] "Part III: Character Information", E5/11/6.2, para. 338; T., 1 September 2009 (TEP Sem), p. 52; "The Lost Executioner" (book) by Nic DUNLOP, E160.1, pp. 59-60, ERN (English) 00370004-00370005.

revolutionary activities and left his teaching position to join the underground resistance on 29 October 1967.[186]

113. The Accused was arrested on 5 January 1968 and later sentenced to 20 years imprisonment for breach of State security.[187] Following his detention in Tuol Kork and Phnom Penh, he was transferred to the army prison at Prey Sar in May 1968, where he witnessed, but was not subjected to, illegal executions and torture.[188] The Accused subsequently was inducted as a full rights member of the CPK,[189] and chose "Duch" as his revolutionary name.[190]

114. Following the 18 March 1970 *coup d'état* led by General LON Nol against Prince NORODOM Sihanouk, the Accused was released from prison on 3 April 1970, whereupon he recommenced his activities on behalf of the Khmer Rouge.[191]

2.3.2 M-13

115. In July 1971, the Accused was tasked with directing M-13,[192] a security centre for interrogating individuals suspected of being spies or enemies of the CPK.[193] As Chairman of M-13, the Accused first operated under the supervision of VORN Vet from 20 July 1971 until the middle of 1973 and subsequently of SON Sen until January 1975.[194]

116. M-13 was divided by the Accused into two distinct facilities: M-13A, which was directly supervised by the Accused, and M-13B, which was managed by his deputy.

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186 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 4.
187 T., 1 April 2009 (Agreed Facts), p. 53.
188 T., 6 April 2009 (Accused), pp. 36-43.
189 The Chamber notes that there are some discrepancies regarding the exact date on which he was inducted; *cf.* T., 6 April 2009 (Accused), pp. 35-36 and T., 28 April 2009 (Accused), p. 56.
190 T., 6 April 2009 (Accused), pp. 47-49.
191 T., 1 April 2009 (Agreed Facts), p. 53; T., 6 April 2009 (Accused), pp. 18, 36-37.
192 Events relating to M-13 fall outside the temporal jurisdiction of the ECCC. *See* Article 2 (new) of the ECCC Law (limiting the jurisdiction of the ECCC to crimes committed "during the period from 17 April 1975 to 6 January 1979"). Given that M-13 was in many ways a precursor to S-21, the Chamber nonetheless heard testimony regarding the functioning of M-13 and the Accused's role therein.
193 T., 6 April 2009 (Accused), pp. 20, 65-68; T., 20 April 2009 (CHAN Khan), p. 90.
194 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 6.

Individuals sent to M-13A were interrogated, tortured and executed, while those sent to M-13B could be re-educated and released.[195]

117. As Chairman of M-13, the Accused was responsible for ensuring that the policy of interrogating and "smashing" detainees at M-13A was implemented. He recruited staff, including youths, amongst the local peasants and provided them with training in interrogation techniques.[196] He supervised the interrogation of M-13A detainees, which were frequently carried out by his staff through violence,[197] principally via beatings with bamboo branches.[198] The confessions of the detainees were then passed on by the Accused to his superiors, though he suspected that much of the information in them was fabricated. Once he considered the interrogation of a detainee to be complete, he ordered their execution.[199] Detainees at M-13A also died as a result of the detention conditions, which included a lack of adequate food and medical care.[200]

118. The Accused's experience operating M-13 prepared him for his work as Deputy and then Chairman of S-21.[201] In particular, he relied on many of the same techniques and policies in his operation of both M-13A and S-21, including the use of torture during interrogations,[202] the recruitment and indoctrination of youths as staff members,[203] and the systematic execution of detainees following the completion of their interrogation.[204] Further, many of the Accused's staff from M-13 accompanied him to S-21, where they continued to serve as his subordinates.[205]

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[195] T., 6 April 2009 (Accused), pp. 22, 70, 75-78; T., 7 April 2009 (Accused), pp. 2-3, 12-13, 23-24, 90, 99-100.
[196] T., 7 April 2009 (Accused), pp. 23-27, 49, 64-66, 91-92, 108; T., 8 April 2009 (Accused), pp. 3, 9.
[197] T., 6 April 2009 (Accused), p. 22; T., 7 April 2009 (Accused), pp. 18, 21-22; T., 8 April 2009 (François BIZOT), pp. 69-70; T., 20 April 2009 (CHAN Khan), p. 98; T., 21 April 2009 (CHAN Khan), p. 23.
[198] T., 7 April 2009 (Accused), p. 63; T., 9 April 2009 (UCH Sorn), p. 67.
[199] T., 7 April 2009 (Accused), pp. 21-24, 80-82; T., 8 April 2009 (Accused), pp. 104-106.
[200] T., 6 April 2009 (Accused), pp. 22, 78, 89-91.
[201] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 35, 202; T., 6 April 2009 (Accused), p. 51; T., 28 April 2009 (Accused), pp. 57-59.
[202] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 35, 202; T., 7 April 2009 (Accused), pp. 65-66; T., 27 April 2009 (Accused), p. 90.
[203] T., 27 April 2009 (Accused), pp. 88-90.
[204] T., 29 April 2009 (Accused), pp. 76-77.
[205] T., 1 April 2009 (Agreed Facts), pp. 58, 63.

2.3.3 S-21

2.3.3.1 Establishment of S-21

119. The Amended Closing Order states:

> 20. On 15 August 1975, SON Sen, called DUCH to a meeting at the Phnom Penh train station together with IN Lorn *alias* Nat from Division 703 of the RAK. The purpose of the meeting was to plan the establishment of S21, which for the purpose of this Closing Order includes the detention centre and surrounding area (Tuol Sleng), as well as its execution and re-education camp branches on the outskirts of Phnom Penh, named Choeng Ek and Prey Sâr (S24), respectively. S21 was unique in the network of security centres given its direct link to the Central Committee and its role in the detention and execution of CPK cadre.
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> 21. SON Sen appointed Nat as Chairman of S21 and Committee Secretary, with DUCH as his deputy in charge of the interrogation unit. Following the meeting, DUCH brought a number of his former M13 staff to Phnom Penh to join forces with the Division 703 personnel already conducting security operations against former LON Nol regime members in Phnom Penh. S21 became fully operational in October 1975.[206]

120. The Accused agreed with these statements, though he disputed that S-21 could be described as unique.[207]

121. The Accused remained in Phnom Penh following the 15 August 1975 meeting and collected documents from the institutions of the former LON Nol government. In October 1975, the Accused, as the Deputy of IN Lorn *alias* Nat, established and began supervising the S-21 interrogation unit.[208]

122. The Accused stated that he was reluctant to accept his initial appointment as Deputy of S-21 and tried instead to apply for work in the Ministry of Industry. When this request was denied, the Accused did not "dare" contest his appointment because, in his words,

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[206] Amended Closing Order, paras 20-21 (footnotes omitted).
[207] T., 1 April 2009 (Agreed Facts), pp. 57-58, 63; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 33.
[208] T., 22 April 2009 (Accused), pp. 74-76; T., 28 April 2009 (Accused), pp. 6-8; "Written Record of Interview of Duch by CIJ on 7 August 2007", E3/23, ERN (English) 00147518; "Written Record of Interview of Duch by CIJ on 22 November 2007", E3/15, ERN (English) 00153567.

"my duty is my duty."[209] He married on 20 December 1975, with his superiors' approval, and had four children, two of whom were born while he was in charge of S-21.[210]

2.3.3.2 Initial locations of S-21

123. The Amended Closing Order states:

> 26. The original S21 complex was located in Phnom Penh in Boeng Keng Kang 3 sub-district, Chamkar Mon district. The detention and interrogation facilities were originally located in a block of houses on the corner of streets 163 and 360. In late November 1975, S21 moved to the National Police Headquarters on Street 51 (Rue Pasteur) near Central Market (Phsar Thmei), yet in January 1976, it moved back to its original location.[211]

124. The Accused agreed with these statements.[212]

2.3.3.3 Appointment and role as Deputy of S-21

125. As Deputy of S-21, the Accused was in charge of an interrogation unit comprised of approximately 20 former subordinates from M-13 and RAK members from Division 703.[213] Detainees were brought to the S-21 interrogation unit from the Ta Khmao Psychiatry Hospital, which IN Lorn *alias* Nat, and his Division 703 staff had converted into a detention centre.[214]

126. The Accused had four main tasks as head of the interrogation unit: (i) collating documents collected from the institutions of the LON Nol government; (ii) preparing reports for his superiors based on these documents; (iii) teaching interrogation methods to

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[209] T., 28 April 2009 (Accused), pp. 41-42, 44; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 35.
[210] "Part III: Character Information", E5/11/6.2, paras. 341, 342. The Accused also explained that during the time of the DK period or in its immediate aftermath, two of his brothers in law were purged, one of whom was detained, tortured and executed at S-21. Two of his sisters and six of his nephews and nieces also died (T., 15 September 2009 (Accused), p. 42).
[211] Amended Closing Order, para. 26 (footnotes omitted).
[212] T., 1 April 2009 (Agreed Facts), pp. 59-60, 63; T., 22 April 2009 (Accused), pp. 76-77; T., 23 April 2009 (Accused), pp. 14, 21-22; T., 27 April 2009 (Accused), pp. 43-44; T., 28 April 2009 (Accused), pp. 8-9.
[213] T., 23 April 2009 (Accused), pp. 15-17; T., 17 June 2009 (Accused), pp. 67-68.
[214] T., 22 April 2009 (Accused), pp. 75-77, 83; T., 27 April 2009 (Accused), pp. 66-69; T., 28 April 2009 (Accused), pp. 11-12, 18-20.

the staff of the interrogation unit; and (iv) reporting detainees' confessions to his superiors.[215]

127. The Accused acknowledged that, as Deputy, he permitted S-21 interrogators to use torture.[216] The Accused was also aware that, following the completion of their interrogation, detainees were taken away and executed.[217]

2.3.3.4 Appointment and role as Chairman of S-21

128. Paragraph 22 of the Amended Closing Order states:

> 22. In March 1976, Nat was transferred to the General Staff, and DUCH replaced him as Chairman and Secretary of S21. DUCH confirmed KHIM Va[k] *alias* Hor, a former Division 703 cadre, as his deputy responsible for the day-to-day operation of the office. However, DUCH admitted he continued personally to oversee the interrogation of the most important prisoners, and to be ultimately responsible for S21. The third member of the S21 Committee, and head of S24 was NUN Huy *alias* Huy Sré. […].[218]

129. The Accused agreed with these statements.[219]

130. The Accused stated that he asked his superior, SON Sen, to select his former teacher CHHAY Kim Huor to replace IN Lorn *alias* Nat, as Chairman of S-21. When this request was denied, the Accused did not further contest his appointment and began serving as Chairman of S-21 in March 1976. According to the Accused, he was appointed to replace Nat, because he was "faithful or very honest to" his superiors, while Nat and his Division 703 staff were not considered as trustworthy. The Accused also considered himself to be a better interrogator than Nat by virtue of his experience running M-13.[220]

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[215] T., 29 April 2009 (Accused), pp. 40-41; *see also* T., 22 April 2009 (Accused), pp. 79-80; T., 16 June 2009 (Accused), p. 24; T., 17 June 2009 (Accused), pp. 66-67.
[216] T., 29 April 2009 (Accused), pp. 18-19; T., 16 June 2009 (Accused), pp. 44-45.
[217] T., 22 April 2009 (Accused), p. 85.
[218] Amended Closing Order, para. 22 (footnotes omitted).
[219] T., 1 April 2009 (Agreed Facts), pp. 58, 63; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 34-37.
[220] T., 27 April 2009 (Accused), pp. 91-94; T., 29 April 2009 (Accused), pp. 13, 62; T., 30 April 2009 (Accused), pp. 10-11; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 35.

131. The Accused indicated that as Chairman he reported to SON Sen from March 1976 until September 1977, when SON Sen was sent to take direct command of the RAK in its increasing hostilities with Vietnam, and then to NUON Chea, the CPK Deputy Secretary.[221]

132. In conjunction with his appointment as Chairman of S-21, the Accused was named Secretary of the S-21 Committee.[222] As Chairman and Secretary, the Accused had full authority over all S-21 staff, including the two other members of the S-21 Committee, KHIM Vak *alias* Hor, and NUN Huy *alias* HUY Sre.[223] The role of the Accused as the undisputed head of S-21 is confirmed by the Accused's own admissions, the testimony of witnesses and Civil Parties, as well as documents put before the Chamber during the proceedings.[224]

133. The Accused's Deputy, KHIM Vak *alias* Hor, was entrusted with managing the daily operations of S-21, and overseeing the work of the guards and the interrogators

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[221] T., 1 April 2009 (Agreed Facts), p. 63; "Written Record of Interview of Duch by CIJ on 7 August 2007", E3/23, ERN (English) 00147520; T., 23 June 2009 (Accused), pp. 48-49; T., 18 May 2009 (Craig ETCHESON), p. 88.

[222] T., 22 April 2009 (Accused), pp. 81-82.

[223] T., 15 June 2009 (Accused), p. 66; T., 16 June 2009 (Accused), pp. 42-43, 76; T., 17 June 2009 (Accused), pp. 21-22, 65; T., 23 June 2009 (Accused), pp. 16, 48; T., 20 July 2009 (Accused), p. 64.

[224] *See* T., 1 April 2009 (Agreed Facts), pp. 58-59, 63; T., 28 July 2009 (SUOS Thy), p. 36 ("[F]or the prisoners to be taken out or in there had to be an authorization from Duch who was the Chairman of S-21. Everything had to be done through him and with his authorization."); T., 16 July 2009 (HIM Huy), p. 44 ("At S-21 the most senior person was Duch. So it was only him who could order for such arrest."); T., 20 July 2009 (HIM Huy), p. 6 ("When detainees were being transported to Choeung Ek, Duch did not oversee these but, actually, he was the one who made the decision to have these people taken away to be executed."); T., 20 July 2009 (HIM Huy), p. 10 ("At S-21, nobody ordered [the Accused]. It was only him who ordered other people […] He could do all these things because at that location he was the top-most leader."); T., 20 July 2009 (HIM Huy), p. 57 ("At S-21 Duch was the Chairman; next Brother Hor, the one-eyed Hor, and then Huy he was a member and he in charge of the rice fields at Prey Sar."); T., 6 August 2009 (David CHANDLER), p. 11 ("As the man in charge of S-21, Duch worked hard to control every aspect of its operations."); T., 29 June 2009 (VANN Nath), p. 76 ("S-21 was [the Accused's] location and he was the boss"); T., 21 July 2009 (PRAK Khan), p. 32 ("As a rule had it, an interrogator was not allowed to torture anyone unless there was instruction otherwise by Duch to torture the detainees."); T., 3 August 2009 (SEK Dan), p. 15 ("I would say that would only be Duch who ordered the arrest of those adult medics."); T., 11 August 2009 (SAOM Met), p. 21 ("During the meetings, we were told that planning was coming from Brother Duch through Hor, Huy [Sre] and then to us."); T., 5 August 2009 (CHEAM Sour), p. 46 ("The law is in the hand of Duch and he issued orders to his subordinates. I did not know from whom he received his orders. He issued orders to his subordinates to torture or kill the prisoners but I myself never saw him torture or kill any prisoner. Whenever he issued his order, day or night, it had to be implemented."); "Written Record of interview of Duch by CIJ on 29 November 2009", E3/17, ERN (English) 00154198-00154199.

within S-21. The Accused used Hor, as well as his own assistants, to issue orders to the staff of S-21.[225] The Accused met frequently with Hor to stay informed of recent activities and confirmed "that [he (the Accused)] knew clearly on a day to day basis exactly what was happening at S-21".[226]

134. The Accused met less frequently with the third member of the S-21 Committee, NUN Huy *alias* HUY Sre, who managed the functioning of S-24.[227]

2.3.3.4.1 Relocation of S-21

135. The Accused agreed that in April 1976, upon his decision, S-21 detainees were moved to the premises of the Pohnea Yat Lycée, a high school located between streets 113, 131, 320, and 350, in Phnom Penh. S-21 operated at this location, which is now the site of the Tuol Sleng Genocide Museum, until 6 January 1979.[228] The decision to relocate, which was approved by the Accused's superior, SON Sen, was intended to facilitate the interrogation of detainees and to guard against their escape.[229]

136. Following its relocation, the secrecy of S-21's operations became of paramount importance.[230] S-21 staff were not allowed to move freely nor to communicate with others outside the compound without authorisation.[231]

137. The existing school buildings of the Pohnea Yat Lycée (referred to at trial as Buildings A through E) were converted to be used for S-21's purposes.[232] In particular, detainees were interrogated in Building A, and detained in Buildings B, C and D. Most

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[225] T., 23 April 2009 (Accused), pp. 30-32; T., 27 April 2009 (Accused), p. 19; T., 29 April 2009 (Accused), p. 71; T., 17 June 2009 (Accused), pp. 22-23; T., 16 July 2009 (HIM Huy), pp. 17, 28; T., 21 July 2009 (PRAK Khan), pp. 5-7, 14-15.
[226] T., 17 June 2009 (Accused), p. 23.
[227] T., 17 June 2009 (Accused), pp. 21-22; *see also* Section 2.3.3.7.
[228] T., 1 April 2009 (Agreed Facts), pp. 60, 63.
[229] T., 23 April 2009 (Accused), p. 22; T., 27 April 2009 (Accused), p. 44; T., 28 April 2009 (Accused), p. 9.
[230] T., 6 August 2009 (David CHANDLER), pp. 44-47.
[231] T., 3 August 2009 (LACH Mean), p. 101; *see also* T., 21 July 2009 (PRAK Khan), p. 11; T., 22 July 2009 (PRAK Khan), p. 78; T., 4 August 2009 (KHIEU Ches statement read), p. 71; T., 10 August 2009 (CHUUN Phal), p. 60 and T., 6 August 2009 (David CHANDLER), p. 9; *see also* "Submission of Kaing Guek Eav's Comments on the book entitled 'Voices from S-21 – Terror and History in Pol Pot's Secret Prison' by David Chandler", E108/1.1, ERN (English) 00270554.
[232] *See generally* T., 1 April 2009 (Agreed Facts), pp. 60-61, 63; *see further* Annex II.

detainees were kept in common detention cells, in addition to which the Accused ordered the construction of individual detention cells for more important detainees.[233] Building E was used to store documents, to photograph incoming detainees, and as an artist workshop for producing CPK propaganda.[234] The Accused stated that while he visited Building E a number of times, he did not visit Buildings B, C and D.[235]

138. In addition to the buildings located within the walls of the Pohnea Yat Lycée, S-21 used a number of other nearby buildings. These included interrogation houses, execution sites, mess halls for S-21 staff, a medical centre, staff residences, houses and offices of the Accused, and a reception hall for detainees. These buildings were located within a second outer perimeter also protected by armed guards.[236]

139. Special detainees, including foreigners and former S-21 staff, were also interrogated and detained in a Special Prison located outside the walls of the Pohnea Yat Lycée. These interrogations were later moved to Building A. The Accused acknowledged repeatedly visiting the Special Prison.[237]

2.3.3.4.2 Overview of S-21 detainees

140. The detainee population at S-21 was comprised of former LON Nol cadres and soldiers, military personnel of the RAK, numerous DK and CPK high and low-ranking cadres, their family members and affiliates, women, children, foreign nationals from

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[233] T., 23 April 2009 (Accused), pp. 25-26; T., 28 April 2009 (Accused), pp. 37-38; T., 29 April 2009 (Accused), p. 70; *see also* T., 29 June 2009 (VANN Nath), p. 73; T., 21 July 2009 (PRAK Khan), p. 43; T., 1 July 2009 (BOU Meng), pp. 20-21, 26; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 48

[234] T., 23 April 2009 (Accused), pp. 25-26; T., 22 June 2009 (Accused), p. 64; *see also* T., 29 June 2009 (VANN Nath), p. 74; T., 1 July 2009 (BOU Meng), p. 35.

[235] T., 15 June 2009 (Accused), pp. 64-65, 89; *see also* T., 29 June 2009 (VANN Nath), pp. 74-75, 84; T., 1 July 2009 (BOU Meng), pp. 36-37.

[236] T., 1 April 2009 (Agreed Facts), pp. 62-63; *see also* "Written Record of Interview of Duch by CIJ on 22 November 2007", E3/15, ERN (English) 00153567-00153569, 00153575; T., 21 July 2009 (PRAK Khan), pp. 5, 62.

[237] T., 29 April 2009 (Accused), pp. 85-86; T., 15 June 2009 (Accused), pp. 64-65, 89; *see also* T., 28 July 2009 (SUOS Thy), p. 33; T., 21 July 2009 (PRAK Khan), pp. 12-13; T., 22 July 2009 (PRAK Khan), p. 6; T., 10 August 2009 (SAOM Met), pp. 87-88.

various countries, particularly Vietnamese soldiers and civilians, as well as a number of S-21 staff members and their relatives.[238]

141. The Revised S-21 Prisoner List indicates that no fewer than 12,273 individuals were detained at S-21.[239] This list is a revision of an earlier list relied upon in the Amended Closing Order which indicated that no fewer than 12,380 individuals were detained at S-21.[240] The Revised S-21 Prisoner List contains 5,994 entries as men, 1,698 as women and 89 as children.[241] 5,609 entries are members of the RAK and 4,371 are DK cadres, while 1,751 are neither members of RAK nor DK cadres.[242] Furthermore, it describes 876 entries as relatives of somebody else;[243] 328 as soldiers in the Khmer Republic Army ("KRA");[244] 279 as either teachers, professors, students, doctors, lawyers or engineers;[245] 345 as Vietnamese, of whom 122 are described as Vietnamese soldiers, 144 as Vietnamese spies while for the remaining 79, who were presumably civilians, no description is provided.[246] Finally, it also contains 155 entries for former S-21 Staff and 590 for individuals arrested from S-24.[247] Certain of the entries on the Revised S-21 Prisoner List contain minimal information.[248]

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[238] T., 15 June 2009 (Accused), pp. 7-11, 32; T., 24 June 2009 (Accused), p. 70; T., 27 July 2009 (SUOS Thy), pp. 73-78; T., 21 July 2009 (PRAK Khan), pp. 46-47; T., 10 August 2009 (SAOM Met), p. 88.

[239] "Revised S-21 Prisoner List", E68.1.

[240] *See* Amended Closing Order, paras 107, 140; "S-21 Prisoner List (1975-1978)", E3/38 Annex A. This list was a collation by the Office of the Co-Prosecutors of previous lists compiled by DC-Cam based on the original prisoner lists and execution logs of S-21. The Combined S-21 Prisoner List contained 107 entries which appeared to be duplicate entries and were thus removed by the Office of the Co-Prosecutors from the Revised Prisoner List. *See* "Co-Prosecutors' Rule 92 Motion to disclose analysis of the revised S-21 Prisoner List", E68, 19 May 2009, paras 3-4.

[241] "S-21 Prisoners Identified as Men", E68.5; "S-21 Prisoners Identified as Women", E68.6; "S-21 Prisoners Identified as Children", E68.7.

[242] "S-21 Prisoners from the RAK", E68.9; "S-21 Prisoners From DK Government Offices", E68.10; "S-21 Prisoners Not Coming from the RAK or DK Government Offices", E68.11.

[243] "S-21 Prisoners Identified as the Relative of Someone Else", E68.22. The largest entries were for wives (583), daughters (112) and sons (107), as well as husbands, mothers and fathers.

[244] "S-21 Prisoners described as former Khmer Republic soldiers", E68.24.

[245] "S-21 Prisoners described as teachers, professors, students, doctors, lawyers or engineers", E68.26.

[246] "Vietnamese Prisoners Entering S-21", E68.27; "S-21 Prisoners identified as Vietnamese soldiers", E68.28; "S-21 Prisoners described as Vietnamese spies", E68.29; "S-21 Prisoners identified as Vietnamese", E68.30; *see also* Section 2.5.2.3.

[247] "S-21 Prisoners who were former S-21 staff", E68.39; "S-21 Prisoners arrested from S-24 (Prey Sar)", E68.41. The List contains 47 entries as former S-24 staff, 342 as detainees undergoing tempering at S-24 and 201 for which it is not possible to determine whether they were S-24 staff or detainees undergoing tempering at S-24; *see* "S-21 Prisoners identified as former S-24 staff", E68.42; "S-21 Prisoners who were

142. Notwithstanding the thoroughness of the administrative record keeping at S-21, the Revised S-21 Prisoner List is incomplete. This is attributable to certain S-21 policies, such as not registering children who were brought along with their parents, and to the fact that files may have been lost since the abrupt abandonment of S-21 by the Accused and his staff on 7 January 1979.[249] The Revised S-21 Prisoner List does not, for example, include the names of Civil Party BOU Meng, Witness VANN Nath, Witness NORNG Chanphal's mother, MUM Yauv, or of the Accused's own brother-in-law, all of whom were detained at S-21.[250]

143. The Chamber thus considers that while the Revised S-21 Prisoner List establishes the minimum number of S-21 victims, their numbers are likely to be considerably greater than indicated.

2.3.3.4.3 Organisation of S-21

144. The Accused ran S-21 along hierarchical lines and established reporting systems at all levels to ensure that his orders were carried out immediately and precisely.[251] The following units operated at S-21 under the Accused's command.

2.3.3.4.3.1 The Documentation Unit

145. The Documentation Unit, also referred to as the "Personnel and Administration Unit", was responsible for registering and maintaining records of staff and detainees at S-

previously prisoners at S-24", E68.43; "S-21 Prisoners coming from S-24 but not clearly identified as former S-24 staff or S-24 prisoners", E68.44.

[248] *See e.g.,* "S-21 Prisoners Whose Origin Could Not Be Determined", E68.12.

[249] *See* T., 27 July 2009 (SUOS Thy), pp. 73-74; T., 28 July 2009 (SUOS Thy), pp. 12, 18-23; *see also* T., 2 July 2009 (NORNG Chanphal), p. 74; "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185503; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 102; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, pp. 35-36, ERN (English) 00192714-00192715.

[250] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 170, 229; T., 8 July 2009, pp. 1-3; "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185503.

[251] T., 1 April 2009 (Agreed Facts), pp. 59, 63; *see also* T., 23 April 2009 (Accused), pp. 30-35; T., 29 April 2009 (Accused), pp. 54-55; "Written Record of interview of Duch by CIJ on 29 November 2007, E3/17, ERN (English) 00154198-00154199.

21. Witness SUOS Thy headed the Documentation Unit and reported to the Accused through KHIM Vak *alias* Hor.[252]

146. Detainees were brought to the Documentation Unit handcuffed and blindfolded by the Special Unit. After the detainees' names, occupations and place of origin were recorded, they were taken to the nearby Photography Unit, where they were photographed, typically with an identification number. Children who were detained along with their parents were neither registered nor photographed. Following the taking of their photographs, detainees were placed in their respective detention cells by the guards and their location was communicated to the Documentation Unit.[253]

147. Detainees were sent to S-21 at all hours of the day. They typically arrived in groups of fewer than 20 but were on occasion sent *en masse* in groups of more than 100, particularly towards the end of 1978. When such large groups arrived, the detainees were brought directly, by truck, to the detention buildings where the Documentation Unit registered their names. Detainees who were former S-21 staff or those who were kept in the Special Prison were not brought to the Documentation Unit in person. Rather, KHIM Vak *alias* Hor communicated their information to the Documentation Unit so that they could be properly registered. The Documentation Unit also processed Vietnamese civilians and military personnel detained at S-21. A typewritten list of all newly-registered S-21 detainees was communicated daily by the Documentation Unit to Hor.[254]

148. The Documentation Unit also followed a strict protocol when detainees were removed from S-21 for execution. Witness SUOS Thy stated that "[r]egarding the outgoing prisoners, when there was an annotation from Duch a list would be given to Hor and Hor would send the list to me to extract the names and the room numbers and the

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[252] T., 1 April 2009 (Agreed Facts), pp. 58, 63; *see also* T., 27 April 2009 (Accused), pp. 36-38; T., 28 July 2009 (SUOS Thy), pp. 29-30.
[253] T., 27 July 2009 (SUOS Thy), pp. 69-70, 73-74, 81; *see also* T., 4 August 2009 (NHEM En statement read), pp. 108-110; T., 30 June 2009 (CHUM Mey), pp. 9-10; T., 1 July 2009 (BOU Meng), pp. 11, 20, 45; T., 2 July 2009 (NORNG Chanphal), p. 74.
[254] T., 27 July 2009 (SUOS Thy), pp. 73, 75-80, 85, 100; T., 28 July 2009 (SUOS Thy), p. 8; T., 16 July 2009 (HIM Huy), pp. 33-34; T., 4 August 2009 (NHEM En statement read), pp. 114-115; *see also* "S-21 Prisoner List containing names of Vietnamese prisoners entered on 28 April 1978", E3/435, ERN (English) 00181718.

buildings so that the guards would be able to identify them and to take them out."[255] Witness SUOS Thy confirmed that "[o]nly Duch had the authority to annotate anyone to be smashed, and they used the code name like in Khmer 'kam kam' which could be translated as 'smash'."[256] The detainees included in the list would be brought to the front gate, their identities verified once again by the Documentation Unit, and then transported to Choeung Ek for execution. The Documentation Unit would update the list of detainees who had been executed by 7 a.m. the following day.[257]

149. The thoroughness of the documentation kept at S-21 was illustrated by additional testimony at trial. Expert David CHANDLER stated that the archives of S-21 were likely the largest in the Santebal apparatus and were, under the leadership of the Accused, kept in a particularly professional way and in great detail. The archives discovered at S-21 included over 4,000 confessions, hundreds of pages of administrative documents, rosters of detainees, lists of executions, study session documents and self-criticism materials. In CHANDLER's opinion, the efficiency with which documents were processed at S-21 reflected both a desire on the part of the Accused to demonstrate the quality of the work being carried out under his supervision, as well as an attempt to respond to the needs of the CPK leadership.[258] He further added that "[a] prison of this dimensions had no precedent in Cambodian history that I am aware of, and an interrogation facility of this thoroughness […] capable of producing such masses of documents, was unprecedented in [the] Cambodian past as well."[259]

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[255] T., 27 July 2009 (SUOS Thy), p. 70.
[256] T., 27 July 2009 (SUOS Thy), pp. 95-96; s*ee also* T., 6 August 2009 (David CHANDLER), pp. 102-103; T., 28 July 2009 (SUOS Thy), p. 21.
[257] T., 27 July 2009 (SUOS Thy), pp. 70, 90-94, 97; T., 28 July 2009 (SUOS Thy), p. 15; *see also* Section 2.3.3.6.
[258] T., 6 August 2009 (David CHANDLER), pp. 23-25, 50, 61-63, 69-70, 100-101; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 154, ERN (English) 00192847; T., 28 May 2009 (Craig ETCHESON), pp. 20, 91-92.
[259] T., 6 August 2009 (David CHANDLER), p. 46.

2.3.3.4.3.2 The Interrogation Unit

150. The Interrogation Unit was tasked with obtaining written confessions from individuals detained within the S-21 complex detailing "their traitorous activities", as well as the names of other individuals implicated.[260]

151. The Interrogation Unit was divided into distinct groups, the leader of each of which "was accountable or had to answer" to the Accused.[261] These interrogation groups included the "cold group" (which did not use physical violence), the "hot group" (which would immediately use physical violence) and the "chewing group" (which used a mixture of cold and hot methods over an extended period of time). Detainees were often moved back and forth between these groups until their interrogation was deemed complete.[262]

152. In addition, as Chairman of S-21, the Accused created a separate group, comprised of wives of trusted S-21 staff, to interrogate female detainees. The Accused also created and trained a group, headed by HOEUNG Song Huor *alias* Pon, tasked solely with interrogating high-ranking detainees at S-21.[263]

153. The majority of those detained within the S-21 complex were systematically interrogated.[264] Interrogators did not choose the detainees they would question but were assigned to them.[265] Detainees were taken from their cells, handcuffed and blindfolded, and handed over to an interrogator by the guards.[266] A single staff member would

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[260] T., 16 June 2009 (Accused), p. 25; T., 18 May 2009 (Accused), pp. 56-57; T., 27 May 2009 (Accused), p. 52; *see also* T., 21 July 2009 (PRAK Khan), p. 19; T., 3 August 2009 (LACH Mean), p. 79.
[261] T., 29 April 2009 (Accused), p. 67; *see also* T., 1 April 2009 (Agreed Facts), pp. 85-86; T., 23 April 2009 (Accused), p. 34; T., 21 July 2009 (PRAK Khan), p. 20.
[262] T., 1 April 2009 (Agreed Facts), p. 86; T., 23 April 2009 (Accused), p. 34; T., 16 June 2009 (Accused), pp. 15, 17-20; T., 21 July 2009 (PRAK Khan), pp. 22-23.
[263] T., 23 April 2009 (Accused), pp. 34-35; T., 27 April 2009 (Accused), pp. 17, 73; T., 29 April 2009 (Accused), p. 71; T., 15 June 2009 (Accused), p. 24; T., 16 June 2009 (Accused), pp. 17, 49. The women interrogators were later executed as a result of internal purges at S-21.
[264] *See, however,* T. 21 July 2009 (PRAK Khan), p. 30 (testifying that 50-60% of detainees were not interrogated).
[265] T., 1 April 2009 (Agreed Facts), pp. 85-86.
[266] T., 27 July 2009 (SUOS Thy), pp. 85-86; T., 14 July 2009 (MAM Nai), p. 23; T., 21 July 2009 (PRAK Khan), pp. 25-26; T., 3 August 2009 (LACH Mean), pp. 83-84; T., 10 August 2009 (CHUUN Phal), p. 27.

typically conduct the interrogation,[267] though Vietnamese detainees were sometimes also interrogated with the assistance of an interpreter.[268] Interrogators routinely used violence, in addition to "doing politics",[269] to extract the detainees' written confessions.[270] Detainees who could not write dictated their confession to an S-21 staff member who would transcribe it.[271] Detainees were kept in individual cells between interrogation sessions.[272]

154. Interrogators would send their reports, along with any confessions obtained, to the Accused,[273] typically via their supervisor.[274] In the case of the most important detainees, these documents were communicated directly to the Accused via his personal messengers.[275] Each detainee's interrogation would continue, sometimes multiple times a day over an extended period of time, until the Accused considered his or her confession to be complete.[276]

155. Given that detainees were considered guilty by reason of their presence at S-21, the role of interrogators was simply to "validate the Party's verdict by extracting full confessions."[277] Thus, the contents of confessions were in many respects pre-ordained as interrogators, who were instructed by the Accused to establish links between the detainees and the CIA, KGB, and/or the Vietnamese, forced detainees into providing

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[267] T., 16 June 2009 (Accused), p. 79; T., 21 July 2009 (PRAK Khan), p. 24.
[268] T., 23 April 2009 (Accused), p. 34; T., 14 July 2009 (MAM Nai), pp. 22, 26-27; T., 15 July 2009 (MAM Nai), p. 36.
[269] T., 6 August 2009 (David CHANDLER), pp. 29-30 ("Doing politics is a more complicated area. This is everything but torture. This was questioning, cajoling, getting to know, trying to undermine, trying to befriend, trying to contradict; all these kind of interrogatory methods; some of them quite professional -- professionally done, others done in an extremely amateur fashion as ways of getting a confession without torture.")
[270] T., 27 April 2009 (Accused), p. 64; T., 6 August 2009 (David CHANDLER), p. 35; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 130, ERN (English) 00192823.
[271] T., 16 June 2009 (Accused), p. 25.
[272] T., 1 July 2009 (BOU Meng), p. 30.
[273] T., 14 July 2009 (MAM Nai), pp. 24-25, 28; T., 1 April 2009 (Agreed Facts), p. 70.
[274] T., 3 August 2009 (LACH Mean), p. 85; T., 27 April 2009 (Accused), p. 26.
[275] T., 27 April 2009 (Accused), p. 26.
[276] T., 1 April 2009 (Agreed Facts), pp. 85-86; T., 16 June 2009 (Accused), p. 28; T., 3 August 2009 (LACH Mean), pp. 85-86.
[277] "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 78, ERN (English) 00192771; T., 6 August 2009 (David CHANDLER), p. 27.

scripted answers.[278] As stated by Civil Party BOU Meng, who endured such an interrogation session:

> They put me to lie face down and then they started to beat me until they had enough, and then they kept asking me when I entered CIA and KGB and who introduced me into the agents. And I did not know how to respond to them because [… having] never been involved in such organization, how could I respond to them that I introduced anyone into the CIA, even myself. I did not know what CIA was.[279]

2.3.3.4.3.3 The Defence Unit

156. The Defence Unit, also referred to as the Military Unit, was comprised of two sub-units.[280]

157. The first sub-unit, the Guard Unit, was made up of staff whose duty it was to guard the detainees within the S-21 complex, deliver them to the interrogators and keep them alive until their interrogation was completed.[281] This sub-unit was typically divided into four groups with 10 to 12 guards in each group, including youths.[282] KHIM Vak *alias* Hor and his subordinate, Phal, administered the unit.[283]

158. The second sub-unit, the Special Unit, was responsible for receiving detainees and escorting them inside the S-21 complex. Detainees were typically arrested and brought to S-21 by their own units, though some were given a pretext to visit the Special Unit, at which point they would be arrested.[284] On occasion, the Special Unit was used for transport or to conduct arrests, including those of Vietnamese detainees, outside the confines of S-21.[285] The Special Unit was also tasked with guarding the outside of the S-

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[278] T., 6 August 2009 (David CHANDLER), pp. 28-29; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, pp. 81-82, 94, ERN (English) 00192774-0192775, 0192787; *see also* T., 21 July 2009 (PRAK Khan), p. 18; T., 3 August 2009 (LACH Mean), p. 78.
[279] T., 1 July 2009 (BOU Meng), p. 28; *see also* T., 30 June 2009 (CHUM Mey), p. 24.
[280] T., 27 April 2009 (Accused), pp. 18-21.
[281] T., 27 April 2009 (Accused), pp. 21, 23.
[282] T., 4 August 2009 (KHIEU Ches statement read), pp. 67-68; T., 10 August 2009 (CHUUN Phal), p. 18.
[283] T., 1 April 2009 (Agreed Facts), pp. 58, 63; T., 27 April 2009 (Accused), pp. 20-21.
[284] T., 15 June 2009 (Accused), pp. 18, 33-34; T., 27 July 2009 (SUOS Thy), pp. 82-83; T., 16 July 2009 (HIM Huy), pp. 12, 23; T., 19 May 2009 (Craig ETCHESON), p. 56.
[285] T., 16 July 2009 (HIM Huy), pp. 12, 30, 38; T., 20 July 2009 (HIM Huy), p. 26; T., 11 August 2009 (SAOM Som Ol statement read), pp. 67-68.

21 complex and intervening in emergencies.[286] Moreover, members of the Special Unit were responsible for transporting detainees to Choeung Ek for execution.[287] The Special Unit was initially headed by Peng, then by Witness HIM Huy.[288]

2.3.3.4.3.4 Other S-21 Units

159. A number of other units also operated within S-21. These included the Typewriting Unit (which typed up the detainees' confessions), the Telephone Unit (for calls to and from S-21), the Photography Unit (which took photographs of detainees when they arrived at S-21), the Medical Unit (which was tasked with treating S-21 staff and keeping S-21 detainees alive until their confession was completed), the Food Unit (which had a kitchen for the S-21 staff and another for the detainees), the Messenger Unit, and the Mapping Unit.[289]

160. A select number of S-21 detainees were also placed in S-21 workshops and tasked with producing CPK propaganda materials and repairing equipment.[290]

2.3.3.5 Responsibilities as Chairman of S-21

161. In addition to supervising the above units, the Accused carried out particular tasks within S-21, the most significant of which are discussed below.

2.3.3.5.1 Recruitment of staff

162. The Accused acknowledged that a number of his S-21 staff were former M-13 subordinates.[291] Further, he agreed that, as Chairman of S-21, he continued his former M-13 practice of recruiting young and impressionable staff to work as his subordinates.

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[286] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 38(d); T., 27 April 2009 (Accused), pp. 24-25; T., 15 June 2009 (Accused), p. 44; T., 17 June 2009 (Accused), pp. 11-12; T., 21 July 2009 (PRAK Khan), pp. 6-8.
[287] T., 16 July 2009 (HIM Huy), pp. 62-69, 95; *see also* Section 2.3.3.6.
[288] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 38(d); T., 20 July 2009 (HIM Huy), pp. 75-78.
[289] T., 1 April 2009 (Agreed Facts), pp. 59, 63; T., 27 April 2009 (Accused), pp. 25-29, 38; T., 28 April 2009 (Accused), p. 40; T., 15 June 2009 (Accused), pp. 39, 93; T., 4 August 2009 (NHEM En statement read), p. 106; T., 3 August 2009 (SEK Dan), pp. 7-8; T., 11 August 2009 (MAKK Sithim statement read), p. 38.
[290] T., 17 June 2009 (Accused), pp. 18-19, 49; *see also* Section 2.4.2.
[291] T., 1 April 2009 (Agreed Facts), pp. 58, 63.

In particular, he sought permission from SON Sen to recruit around 60 poor and uneducated teenagers from Kampong Chhnang Province.[292] As stated by the Accused regarding Witness CHUUN Phal:

> He was within the selected criteria of my request and his class origin was a poor peasant background. Therefore, his education was very low as evidenced in the Chamber today. Probably he could read a few words, that's all. And he fits the criteria for my request from the best. And his age of 15 or 16 would also fall within the criteria of my selection. I did not want to select any person who was already trained or educated by anybody. So I needed to select those who I could train psychologically and politically.[293]

2.3.3.5.2 Training of staff

163. Teaching, particularly political training, was one of the most important tasks at S-21 for the Accused, who noted that he alone was responsible for educating those who worked there. He also taught annually at meetings of S-21 cadres at a training school established near his home.[294] He applied lessons learned at the political school of the General Staff or at the annual Party Congress at compulsory, regular education meetings,[295] attended by the leaders of S-21 units.[296]

164. Further regular sessions at the training school included practical training in interrogation methods, increasing from annually in 1977 to monthly and weekly sessions in 1978.[297] The Accused trained his interrogators to use physical and psychological violence but instructed them to keep detainees alive until he considered their confessions to be complete.[298] The Accused stated that interrogation training was a way of avoiding S-21 staff killing the detainees.[299] He acknowledged that his teachings and instructions

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[292] T., 27 April 2009 (Accused), pp. 35-37, 88-90; T., 21 May 2009 (Craig ETCHESON), p. 23.
[293] T., 10 August 2009 (Accused), p. 64; *see also* T., 27 April 2009 (Accused), p. 83; T., 21 May 2009 (Craig ETCHESON), p. 23.
[294] T., 8 June 2009 (Accused), pp. 46-49; *see also* T., 8 June 2009 (Accused), pp. 35-36; T., 9 June 2009 (Accused), pp. 23-24.
[295] T., 1 April 2009 (Agreed Facts), pp. 67-68; T., 8 June 2009 (Accused), pp. 51-52; T., 30 April 2009 (Accused), p. 30.
[296] T., 8 June 2009 (Accused), pp. 39-40.
[297] T., 8 June 2009 (Accused), pp. 51-53; T., 16 June 2009 (Accused), p. 24; T., 22 June 2009 (Accused), pp. 117-118; T., 21 July 2009 (PRAK Khan), pp. 16-18.
[298] T., 1 April 2009 (Agreed Facts), pp. 85-86, 90-92; T., 21 July 2009 (PRAK Khan), pp. 17, 66.
[299] T., 29 April 2009 (Accused), p. 65; *see also* T., 21 July 2009 (PRAK Khan), pp. 17, 66.

were reflected in notebooks belonging to S-21 interrogators put before the Chamber.[300] These notebooks include instructions such as: "if Angkar instructs not to beat, absolutely do not beat. If the party orders us to beat, then we beat with mastery, beat them to talk, not to die, to escape, not to become so weak and feeble that they fall ill and we lose them."[301]

165. The consequence of the trainings, as acknowledged by the Accused, was that S-21 staff, including the youths he specifically sought out, were taught to obey orders, to be cruel, to detain, to interrogate, to torture and to kill. As stated by the Accused, "[t]hey changed their nature. They became from the gentle to become cruel […], very extreme in the matter […]. They were in the class wrath, class anger […] but the one who made the education, it was me, to turn them to be extreme, to be absolute."[302]

2.3.3.5.3 Role in arrests

166. The Amended Closing Order states:

> 51. According to DUCH, no one could be sent to S21 without a decision of the Party. DUCH explained that for the arrest of members of the Central Committee, the decision had to be made by its Standing Committee. For others, DUCH claimed that his superior, NUON Chea, called the head of the relevant unit for discussion and a joint decision on arrest. DUCH declared, and MÂM Nãi assumed, that for people coming from other regions, the decision to arrest was always made by the Central Committee, which contacted the relevant zones, sectors or districts in order to remove persons implicated by confessions. DUCH specified that, with the exception of important prisoners, he generally had no grasp of the specific rationale behind the imprisonment of persons at S21.
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> 52. Moreover, DUCH insisted *"S21 had no right to arrest anyone"*, adding that, in general, he was merely informed by the "*upper echelon*" of the arrest of prisoners so as to be ready to receive them. In fact, it did appear that prisoners were most often brought in by their units.

[300] T., 1 April 2009 (Agreed Facts), pp. 87, 89; T., 16 June 2009 (Accused), pp. 24, 37-38; T., 22 June 2009 (Accused), pp. 101-102; T., 15 July 2009 (MAM Nai), pp. 19-22; *see also* "Statistics list of Special Branch S-21 – Politics, Ideology, Organization", E3/426; "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73; "S-21 Notebook by MAM Nai *alias* Chan", E3/231.

[301] *See* "Statistics list of Special Branch S-21 – Politics, Ideology, Organization", E3/426, ERN (English) 00182969.

[302] T., 27 April 2009 (Accused), pp. 88-90; *see also* T., 8 June 2009 (Accused), pp. 43-44; T., 16 June 2009 (Accused), p. 25; T., 29 April 2009 (Accused), pp. 9-10; T., 17 June 2009 (Accused), p. 91; T., 23 April 2009, p. 33; *see also* T., 16 July 2009 (HIM Huy), p. 76; T., 21 July 2009 (PRAK Khan), pp. 18-19.

> Nevertheless, there is evidence that S21 personnel did carry out arrests.[303]

167. The Accused agreed with these statements.[304]

168. As a general rule, the echelons above the Accused made decisions regarding whom to arrest and send to S-21.[305] The Accused also occasionally passed down orders to his S-21 staff to effect arrests outside the confines of S-21.[306] The Accused was notified when arrests were being made and alerted his subordinates to the arrival of detainees.[307]

169. There is nevertheless evidence indicating that the Accused played a more active role in initiating arrests and that his views were sought and acted upon by his superiors. During a meeting attended by SON Sen, in relation to implementing CPK policy, the Accused identified suspects and discussed and cooperated on methods of arrest.[308] The meeting further authorised direct cooperation between S-21 and units targeted for arrests. The Accused, while conceding his presence at the meeting, disputed that he was an integral member, entitled to express opinions, claiming instead that his role was simply to note names and forward them to the meeting for decision.[309]

170. Further, in letters personally addressed to the Accused, SOU Met (the commander of Division 502) requested certain actions in relation to detainees dispatched by him to S-21.[310] The Accused was adamant that there was no direct communication between him and SOU Met and that this correspondence did not breach the rule prohibiting direct

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[303] Amended Closing Order, paras 51-52 (footnotes omitted).
[304] T., 1 April 2009 (Agreed Facts), pp. 73-75; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 111-115.
[305] T., 28 April 2009 (Accused), pp. 14-15, 33-34; T., 29 April 2009 (Accused), p. 23; T., 15 June 2009 (Accused), pp. 15-16, 18-19; T., 6 August 2009 (David CHANDLER), pp. 101-102.
[306] T., 1 April 2009 (Agreed Facts), pp. 74-75; T., 20 July 2009 (HIM Huy), pp. 66, 68; T., 16 July 2009 (HIM Huy), pp. 100-101.
[307] T., 15 June 2009 (Accused), p. 19; T., 27 May 2009 (Accused), pp. 39-40; T., 16 July 2009 (HIM Huy), pp. 23-24.
[308] T., 21 May 2009 (Craig ETCHESON), pp. 58-59; "Minutes of the Meeting with Comrade Tal Division 290 and Division 170", E3/160, ERN (English) 00182792.
[309] T., 26 May 2009 (Accused), pp. 52-58.
[310] "Written record of Analysis by Craig ETCHESON", E3/32, ERN (English) 00146851; "Sou Met's letter to Duch – 2 June 1977", E3/40; "Sou Met's letter to Duch – 1 April 1977", E3/210; "Sou Met's letter to Duch – 30 May 1977", E3/211; "Sou Met's letter to Duch – 1 June 1977", E3/212; "Sou Met's letter to Duch – 28 July 1977", E3/213; "Sou Met's letter to Duch – 10 August 1977", E3/214; "Sou Met's letter to Duch – 3 October 1977", E3/215; "Sou Met's letter to Duch – 4 October 1977", E3/216.

communication between sections or units; all were written at the direction of his superiors SON Sen or NUON Chea and with their knowledge, as were any responses. The Accused claimed that SON Sen and later NUON Chea's names were excluded from the correspondence to hide their involvement, but that the communications were either known to them or directed by them, and were handed to the Accused by his superior. The explanation given by the Accused that these letters were given to him by SON Sen personally lacks credibility, as in some letters he is informed by SOU Met that detainees would be sent to him that evening.[311] The fact that he was expecting detainees and ready to receive them implies that the letters came to him personally, and that SOU Met and the Accused communicated directly with each other regarding arrests, even if this was with the acquiescence of their respective superiors.

171. In addition, the Accused had significant influence with regard to the arrest of S-21 staff. First, decisions as to whether to send S-21 staff to S-24 for re-education were made by the S-21 Committee, not by the Accused's superiors.[312] Second, while the ultimate decision as to whether to arrest a particular S-21 staff member may have rested with his superiors, the Accused acknowledged that they systematically acted upon his recommendations. As stated by the Accused, "those people that Comrade Hor and I had made agreement, I reported to the upper echelon. I cannot recall that there was anyone who survived, or that the upper echelon decided to not arrest them or not to approve all the reports that I made to them."[313] The Accused exercised a certain amount of discretion in the matter and indicated that he did not report certain staff members, or reported them but did not recommend their arrests.[314]

172. The Accused was also present during the arrest of certain notable detainees, including KOY Thuon (Minister of Commerce and former Secretary of the Northern Zone), CHHIM Sam-Ok *alias* Panng (former Secretary of Office 870), NEY Saran *alias*

311 T., 27 May 2009 (Accused), pp. 35-40.
312 T., 15 June 2009 (Accused), pp. 31-32.
313 T., 15 June 2009 (Accused), pp. 19-21.
314 T., 16 June 2009 (Accused), pp. 68-69.

MEN San or Ya (Secretary of the Northeastern Zone) and NUN Huy *alias* HUY Sre (member of the S-21 Committee), some of which took place at his home.[315]

173. Moreover, as detailed below, the Accused reviewed and passed on to his superiors the detainees' confessions and lists of "traitors", which informed and facilitated further arrests.

2.3.3.5.4 Role as regards confessions

174. The Amended Closing Order states:

> 43. […] In addition to executing prisoners condemned in advance as traitors, an overriding purpose of S21 was to extract confessions from prisoners in order to uncover further networks of possible traitors. DUCH stated that "*the content of the confessions was the most important work of S21*". Confessions seem typically to have taken the form of political autobiographies by the prisoners in which they were compelled to denounce themselves and others as traitorously serving the intelligence agencies of foreign powers considered to be enemies of the Cambodian revolution. Those intelligence agencies included the United States CIA, the Soviet KGB and organs of the Vietnamese Communist Party. These confessions, some many hundreds of pages long, contain detailed descriptions not simply of alleged traitorous activities, but also of the structure and operation of all levels of the Party and of all administrative units. DUCH meticulously read, analysed, annotated and summarised the majority of these confessions for his superiors. [….][316]

175. The Accused agreed with these statements.[317]

176. Acting on the orders of his superiors, the Accused saw his role as Chairman of S-21 as interrogating detainees in order to trace "traitorous activities during the past and present time [… I]n order to facilitate the reading of the confession the prisoner had to extract the names whom he implicated."[318] To that end, the Accused reviewed the detainees' confessions and provided continued instructions to the interrogators until he

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[315] *See, e.g.,* T., 28 April 2009 (Accused), p. 33; T., 15 June 2009 (Accused), pp. 15-16, 18, 20; T., 22 June 2009 (Accused), p. 31; T., 1 April 2009 (Agreed Facts), p. 76; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 127; *see also* T., 19 May 2009 (Craig ETCHESON), p. 56.

[316] Amended Closing Order, para. 43 (footnotes omitted).

[317] T., 1 April 2009 (Agreed Facts), pp. 69-70.

[318] T., 8 June 2009 (Accused), p. 80; *see also* T., 23 April 2009 (Accused), p. 33; T., 26 May 2009 (Craig ETCHESON), p. 60

considered a confession to be complete.[319] A confession was improper if it was deemed insufficiently detailed or it failed to name other "traitors".[320] As stated by the Accused, "[i]f the prisoners did not give satisfactory confessions, then I would annotate on the confessions that they had to use more torture in order to get the confessions, and I was the one to decide to order the interrogators to torture more."[321] In the case of the most important S-21 detainees, the Accused would await specific instructions from his superiors as to the extent of mistreatment permissible during the interrogation.[322]

177. The Accused's annotations on confessions put before the Chamber are illustrative of his instructions to interrogators. On the confession of detainee DANH Siyan, the Accused wrote "interrogate meticulously, serious but moderate torture in order to find the network. Hit until she stops saying she went to Vietnam with her grandfather to cure his cancer and the problem of menstruation."[323] His annotation on the confession of detainee UM Soeun reads, "Not yet confessed. To be tortured",[324] while his annotation on the confession of detainee PRUM Samneang states, "[t]his female spoke quite little! No need to summarize! I do not want you to explain to me, beat her 40 times with the rattan stick and force her to keep writing. This afternoon, should I be dissatisfied with the confession, I will request Bong that more interrogations be made and to force her to write again. She was ill at the moment."[325] Interrogators also used annotations to keep the Accused appraised of the progress of their interrogations and of the state of the detainees.[326]

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[319] T., 16 June 2009 (Accused), pp. 27-28, 41, 54, 85-86; T., 6 August 2009 (David CHANDLER), p. 49; T., 21 July 2009 (PRAK Khan), pp. 27-29, 63-64.
[320] T., 1 April 2009 (Agreed Facts), pp. 90-92.
[321] T., 16 June 2009 (Accused), pp. 85-86; s*ee also* T., 21 July 2009 (PRAK Khan), p. 32.
[322] T., 22 June 2009 (Accused), pp. 18, 22.
[323] *See* "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185500; *see also* "Excerpt of Confession of DANH Siyan", E3/368, ERN (English) 00225275; T., 22 June 2009 (Accused), p. 19.
[324] *See* "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185500; *see also* "Excerpts of Confession of UM Soeun", E3/24, ERN (English) 00234676.
[325] "Excerpt of Confession of PRUM Samneang", E5/2.3, ERN (English) 00283975; *see also* "Excerpt of Confession of SAR Phon", E5/2.1, ERN (English) 00283973; T., 22 June 2009 (Accused), pp. 21-22, 39-40; "S-21 Confession of San *alias* Ya", E3/372, ERN (English) 00290115.
[326] *See e.g.* "Excerpts of Confession of UM Soeun", E3/24, ERN (English) 00223146; "Excerpts of Confession of LI Phel *alias* LI Phen *alias* Samrit", E3/234, ERN (French) 00296036.

178. Following his review, the Accused was solely responsible for communicating the detainees' confessions and the list of those they had implicated to his superiors.[327] To facilitate his superiors' work, the Accused included his annotations and summaries with these documents.[328] According to Expert David CHANDLER, the Accused worked hard to be as efficient as he could in this regard, partly to demonstrate his professionalism but also "to inform the [Party] leadership, in as much detail as possible whether and in what way its suspicions were justified for certain prisoners and to uncover strings of traitors, Vietnamese agents, and so forth."[329]

179. The Accused was aware that much of the information in the confessions he passed along to his supervisors was fabricated.[330] S-21 confessions were nevertheless used to decide upon the arrest of those denounced as enemy agents and often led to the arrest of many others implicated as traitors.[331] The confessions served the political interest of those in control of the CPK by justifying arrests, and implicating the networks of those sent to S-21.[332]

2.3.3.5.5 Role in executions

180. Every individual detained within the S-21 complex was destined for execution.[333] According to Expert David CHANDLER,

> the mandate that the defendant had at S-21 was to see to it that everyone who came into that prison left it for execution; that was its mandate. That was never withdrawn by a higher authority and therefore I don't think he

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[327] T., 8 June 2009 (Accused), pp. 81-82; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 101, 124.
[328] T., 18 May 2009 (Accused), p. 51; T., 27 April 2009 (Accused), p. 50; T., 9 June 2009 (Accused), pp. 15-17; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 124.
[329] T., 6 August 2009 (David CHANDLER), p. 24.
[330] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 101; T., 28 April 2009 (Accused), p. 64; T., 16 June 2009 (Accused), pp. 28-29, 73.
[331] T., 1 April 2009 (Agreed Facts), p. 70; *see also* T., 23 April 2009 (Accused), p. 33; T., 27 April 2009 (Accused), p. 19; T., 18 May 2009 (Accused), p. 51; T., 15 June 2009 (Accused), p. 30; T., 16 June 2009 (Accused), pp. 48-49; T., 17 June 2009 (Accused), pp. 90-91; T., 6 August 2009 (David CHANDLER), pp. 12-13; T., 28 May 2009 (Craig ETCHESON), pp. 20, 91-92.
[332] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 98; T., 18 May 2009 (Accused), pp. 53-54; T., 8 June 2009 (Accused), p. 97; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, pp. 78, 154, ERN (English) 00192771, 00192847; T., 28 May 2009 (Craig ETCHESON), pp. 28-29, 91-92; T., 6 August 2009 (David CHANDLER), pp. 61-63.
[333] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 60.

> had to seek higher authority to supervise a system in which he had no choice about who got killed and who didn't. Everybody got killed, no matter what they'd done or who they were. […] Everybody who went there from the smallest child to the highest member of the Communist Party had the same fate.[334]

181. Initially, the Accused allowed KHIM Vak *alias* Hor to manage the timing of the detainees' executions. However, following an incident in which a detainee was killed before he provided a complete confession, the Accused insisted on personally acknowledging that the interrogation was complete before a detainee could be executed.[335] As stated by the Accused, whenever detainees were interrogated and the interrogation was completed, "then [Hor] would come and report to me and I would just give him a signal that the detainees would be able now to be taken away […]."[336] In some instances, mass executions occurred in which the Accused received and conveyed orders to execute without interrogations.[337] Following the Accused's assent, Hor would manage the execution of the S-21 detainees with the help of his subordinates.[338]

182. The Accused confirmed that documents put before the Chamber include his annotations ordering the execution of S-21 detainees. On a list containing the names of 17 prisoners (eight teenagers and nine children), the Accused wrote the order "Smash them to pieces."[339] On a longer list of detainees, the Accused's annotation reads "smash: 115; keep: 44 persons." The text below this annotation reads "Comrade Duch proposed to Angkar; Angkar agreed."[340] On a list of 20 female detainees, the Accused wrote annotations for each of them, ordering: "take away for execution," "keep for interrogation" or "medical experiment."[341]

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[334] T., 6 August 2009 (David CHANDLER), pp. 102-103.
[335] T., 17 June 2009 (Accused), pp. 7, 10-11, 22-24, 31, 65-66.
[336] T., 17 June 2009 (Accused), p. 31; *see also* T., 27 July 2009 (SUOS Thy), pp. 95-96.
[337] T., 1 April 2009 (Agreed Facts), pp. 94-96.
[338] T., 17 June 2009 (Accused), pp. 31, 37; T., 22 June 2009 (Accused), p. 64.
[339] T., 22 June 2009 (Accused), pp. 25-26; *see also* "S-21 Prisoner List of 30 May 1978", E3/367, ERN (English) 00001890.
[340] T., 22 June 2009, pp. 27-28; *see also* "List of names of prisoners – postponed in January 1977", E3/370, ERN (English) 00185356-00185357.
[341] T., 22 June 2009 (Accused), pp. 28-30; *see also* "List of female prisoners", E3/371, ERN (English) 00181789-00181790.

183. The Accused had the authority to delay the execution of detainees, including translators, mechanics and artists, who possessed valuable skills which could be used within S-21.[342]

2.3.3.6 Choeung Ek

184. The Amended Closing Order states:

> 29. Initially, prisoners were executed and buried in and around the S21 complex. At some time between 1976 and mid 1977, partly in order to avoid the risk of epidemic, DUCH decided to relocate the execution site to Choeng Ek, located approximately 15 km Southwest of Phnom Penh in Kandal province, and now the site of a memorial. The execution site consisted of a wooden house where prisoners were held until just before their execution, and a large area that consisted of pits for executions. However, even after Choeng Ek became the main killing site, certain executions and burials took place at or near S21.[343]

185. The Accused agreed with these statements.[344]

186. The Accused chose to relocate the S-21 execution and burial site to Choeung Ek of his own authority and informed his superiors of his decision.[345] Following the establishment of Choeung Ek, the Accused's superiors requested that the execution and burial site be moved to another pre-selected location. The Accused informed his superiors that he would be unable to do so for fear that others would find the remains of those already executed at Choeung Ek. His superiors acquiesced and the execution and burial site remained at Choeung Ek.[346]

187. A handful of guards were permanently stationed at Choeung Ek and were responsible for maintaining the site's secrecy, digging pits and burying the detainees' corpses.[347]

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[342] T., 17 June 2009 (Accused), pp. 18-19.
[343] Amended Closing Order, para. 29 (footnotes omitted).
[344] T., 1 April 2009 (Agreed Facts), pp. 61, 63.
[345] T., 28 April 2009 (Accused), p. 9; T. 17 June 2009 (Accused), pp. 29, 40; T., 29 April 2009 (Accused), p. 70.
[346] T., 28 April 2009 (Accused), pp. 9-10; T., 30 April 2009 (Accused), p. 7.
[347] T., 27 April 2009 (Accused), p. 25; T., 17 June 2009 (Accused), pp. 12, 34, 40-41; T., 16 July 2009 (HIM Huy), pp. 62-69, 95; T., 11 August 2009 (TAY Teng statement read), pp. 53-54.

188. S-21 detainees were transferred to Choeung Ek, handcuffed and blindfolded, in trucks by members of the Special Unit on the pretext that they were being relocated to a new house. Detainees who were too weak to walk were carried onto the trucks.[348] Upon their arrival at Choeung Ek, detainees were placed in a wooden hut and their names verified. The detainees were then individually led, still handcuffed and blindfolded, to the front of a freshly dug pit, where they were summarily executed.[349]

189. Following the establishment of Choeung Ek, certain individuals detained within the S-21 complex, including children, former S-21 staff members and important prisoners, continued to be executed and buried in or near the S-21 complex.[350] A number of individuals detained at S-24 were also sent directly to Choeung Ek for execution.[351]

2.3.3.7 S-24

190. The Amended Closing Order states:

> 30. DUCH recognised that S24 was part of S21. In principle, S24 was tasked with reforming and re-educating combatants and farming rice to supply Office S21 and its branches. […]
>
> 50. Regarding S24, too few records have been found to precisely determine the total number of people sent there. Nevertheless it appears that there were several hundred people working at any one time, an estimate which DUCH confirmed. Several witnesses state that men, women and children were all held there. According to DUCH, there were two main categories of persons at Prey Sâr: persons whose relatives were considered suspect, and subordinates of arrested cadre. There were also combatants from various units and personnel from numerous ministries and offices around Phnom Penh together with members of their families. […]
>
> 72. […] [S24] was staffed by S21 cadre and combatants. DUCH stated that these people were not in "prison" in the same sense as those imprisoned at Tuol Sleng, a view shared by SAOM Met, who was himself sent to S24 for re-education. DUCH added that detainees and

[348] T., 27 April 2009 (Accused), p. 18; T., 17 June 2009 (Accused), pp. 39-40; T., 16 July 2009 (HIM Huy), pp. 12, 62-69, 95; T., 20 July 2009 (HIM Huy), pp. 5-6; T., 28 July 2009 (MEAS Pengkry statement read), pp. 91-93.
[349] T., 17 June 2009 (Accused), pp. 43-44, 54; T., 16 July 2009 (HIM Huy), pp. 64-68; T., 11 August 2009 (TAY Teng statement read), pp. 53-55.
[350] T., 17 June 2009 (Accused), pp. 14-15; T., 16 July 2009 (HIM Huy), pp. 52-53, 70-71; T., 20 July 2009 (HIM Huy), pp. 66-67.
[351] T., 1 April 2009 (Agreed Facts), p. 84; T., 24 June 2009 (Accused), pp. 53-54; T., 25 June 2009 (Accused), pp. 9-10.

> staff at Prey Sâr could not move around freely without authorisation, and claimed this rule also applied to him – a fact which other witnesses corroborated.[352]

191. The Accused agreed with these statements.[353]

192. S-24, also known as Prey Sar, was located outside of Phnom Penh near the execution site of Choeung Ek in the area of Wat Kdol, in the Dangkao district of Kandal Province.[354] S-24 was used as a re-education camp during IN Lorn *alias* Nat's, chairmanship of S-21.[355] Following the Accused's appointment as Chairman of S-21, S-24 fell under his authority.[356] The Accused stated that while S-24 was under his "complete supervision", he assigned KHIM Vak *alias* Hor and NUN Huy *alias* HUY Sre, the two other members of the S-21 Committee, to report to him about its daily affairs.[357]

193. NUN Huy *alias* HUY Sre worked exclusively at S-24, where he directly oversaw its day-to-day operations. Following HUY Sre's arrest in December 1978, Phal was assigned to directly manage S-24 until its abandonment on 7 January 1979. Throughout, the Accused received regular reports regarding the operations of S-24, including on the detainees' work regimes and the identity of those sent from S-24 to S-21 or Choeung Ek. He also testified that he visited S-24 on four occasions.[358]

194. According to the Accused, SON Sen made decisions regarding which members of the armed forces should be sent to S-24, while the upper echelons of the CPK decided with respect to members of the civilian units. The S-21 Committee had the authority to send S-21 staff to S-24 for re-education.[359]

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[352] Amended Closing Order, paras 30, 50, 72 (footnotes omitted).
[353] T., 1 April 2009 (Agreed Facts), pp. 61, 63, 71, 73; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 173.
[354] T., 1 April 2009 (Agreed Facts), pp. 62-63.
[355] T., 27 April 2009 (Accused), p. 66; T., 24 June 2009 (Accused), pp. 4, 48-49.
[356] T., 25 June 2009 (Accused), p. 14; T., 24 June 2009 (Accused), pp. 3-4.
[357] T., 28 April 2009 (Accused), pp. 16-18; *see also* T., 19 May 2009 (Craig ETCHESON), p. 53; T., 12 August 2009 (PHAK Siek statement read), p. 60.
[358] T., 23 April 2009 (Accused), p. 32; T., 27 April 2009 (Accused), p. 40; T., 24 June 2009 (Accused), pp. 27-28, 35; T., 25 June 2009 (Accused), pp. 8, 16-18, 43.
[359] T., 15 June 2009 (Accused), pp. 31-32; T., 24 June 2009 (Accused), pp. 38-39, 62-63.

195. Individuals sent to S-24 were first registered near the S-21 complex, on Street 360, and taken by the Special Unit to S-24, where their biographies and photographs were taken and they were put to work.[360]

196. Detainees at S-24 were largely comprised of the relatives or subordinates of people detained at the S-21 complex, and of combatants and personnel from ministries or from other public institutions. Men and women were segregated, and children, sometimes unaccompanied, were also held at S-24. According to the Accused, no Vietnamese or Westerners were detained at S-24.[361] While S-24 guards supervised and worked alongside those detained, they were not themselves detainees, unless arrested and taken formally into detention for some breach of their duties.[362]

197. Detainees were known as "elements",[363] and were divided into three groups: the first level, known as "better elements", were subjected to so-called "light tempering"; level two, or "fair elements", required only "intermediate" tempering, and level three ("bad elements"), required the harshest tempering.[364] The Accused did not dispute any part of these assertions.[365]

198. According to Expert David CHANDLER, one of the characteristics that distinguished S-24 from S-21 was that individuals held at the former had the possibility of release.[366] The Accused stated, however, that S-24 detainees were seldom released and that all were generally destined for execution regardless of their classification. The Accused testified that he provided those running S-24 with a standing order to execute its detainees in accordance with CPK policy. S-24 detainees slated for execution whose

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[360] T., 24 June 2009 (Accused), pp. 14, 39-40; T., 25 June 2009 (Accused), pp. 36-37.
[361] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 109; T., 1 April 2009 (Agreed Facts), pp. 71-73; T., 24 June 2009 (Accused), pp. 9-12, 44; T., 25 June 2009 (Accused), pp. 2, 27; T., 9 July 2009 (CHIN Met), p. 89; T., 12 August 2009 (BOU Thon), p. 8; T., 12 August 2009 (PHAK Siek statement read), pp. 57, 62-63; T., 12 August 2009 (KAING Pan statement read), pp. 69-70.
[362] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 172-173, 181; T., 24 June 2009 (Accused), p. 20; T., 9 July 2009 (CHIN Met), pp. 15-16; "Written Record of Interview of Duch by CIJ on 27 March 2008", E3/380, ERN (English) 00194548.
[363] T., 24 June 2009 (Accused), p. 56 (using the French phrase "composant").
[364] T., 1 April 2009 (Agreed Facts), pp. 82-84; T., 24 June 2009 (Accused), pp. 16, 20-21, 36-37; T., 25 June 2009 (Accused), pp. 30-31, 43-44.
[365] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 175; T., 1 April 2009 (Agreed Facts), pp. 82-84.
[366] T., 6 August 2009 (David CHANDLER), p. 10; *see also* T., 19 May 2009 (Craig ETCHESON), p. 54.

confessions were needed were first sent to S-21, while those whose confessions were not required were sent directly to Choeung Ek for execution. The Accused typically made this decision, though his subordinates could send detainees directly to Choeung Ek when their confessions were clearly unnecessary, as was the case with children.[367]

199. The Accused did not task S-24 staff with interrogating detainees and obtaining their confessions. The Accused nonetheless acknowledged that S-24 staff interrogated detainees, though he claims they did so without his authorisation. The Accused further agreed that S-24 staff mistreated detainees during these interrogations, including by shaving their heads, flaying their skin through electrocutions, and beating and whipping them.[368]

200. The number of detainees at S-24 cannot be stated with any precision. It is clear from the evidence that there were large numbers of staff as well as detainees at S-24, but no surviving written material has been put before the Chamber to clarify the total number of those detained over the whole period from 17 April 1975 to 6 January 1979. The Amended Closing Order states that there were several hundred people working at S-24 at any one time, an estimate with which the Accused agreed.[369] A written summary of statistics of Armed Forces indicates that in March 1977, there were 2,327 staff at S-21 and 1300 "elements" at S-24. These numbers were confirmed by the Accused.[370] Others, such as Witness PHAK Siek who was herself detained at S-24 for two years spoke of "a total of 500 to 600 prisoners at Prey Sar, both men and women."[371] Witness TAY Teng, held at S-24 for two months immediately prior to the fall of Phnom Penh, said that there were "200 people living there divided into groups of 20-25."[372]

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[367] T., 24 June 2009 (Accused), pp. 15, 18, 30-33, 50-54, 64-67, 71-72; T., 25 June 2009 (Accused), pp. 9-10, 20-22, 35.
[368] T., 24 June 2009 (Accused), pp. 24-25, 40, 43; T., 25 June 2009 (Accused), p. 7; T., 1 April 2009 (Agreed Facts), p. 92.
[369] Amended Closing Order, para. 50; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 110; T., 1 April 2009 (Agreed Facts), p. 71.
[370] T., 24 June 2009 (Accused), p. 56; "Joint Statistics of Armed Forces dated 7 April 1977", E3/146, ERN (English) 00183956; *see also* T., 27 May 2009 (Craig ETCHESON), pp. 70-71.
[371] T., 12 August 2009 (PHAK Siek statement read), p. 60.
[372] T., 11 August 2009 (TAY Teng statement read), p. 52.

201. Although many detainees and arrested staff of S-24 were transferred to the S-21 complex, by inference for interrogation and execution, an examination of lists of prisoners compiled at S-21 shows that the numbers of this group are also unclear. The Accused conceded in his response to the allegation in the Amended Closing Order that "at least" 571 persons were transferred.[373] In the Revised S-21 Prisoner List, the total number of detainees sent to the S-21 complex from S-24 remains unclear (Section 2.3.3.4.2). Detainees sent directly from S-24 to Choeung Ek for execution included women and children.[374]

202. The Chamber finds that the isolated and fragmentary documentation placed before it presents an incomplete picture of the numbers of those held, sent for execution, or surviving detention at S-24. For these reasons, the Chamber finds that the cumulative total detained at S-24 was no fewer than 1,300.

2.3.3.8 Abandonment of S-21

203. Following the fall of Phnom Penh (Section 2.1), the Accused and his staff fled S-21 on 7 January 1979, along with the approximately 15 detainees who had been working within the S-21 complex.[375] Staff at S-24 also fled on 7 January 1979, along with the remaining S-24 detainees.[376]

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[373] T., 1 April (Agreed Facts), p. 84; *see also* "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 190.
[374] T., 24 June 2009 (Accused), p. 54; T., 1 April 2009 (Agreed Facts), p. 84; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 189; *see also* "Written Record of Interview of Duch by CIJ on 27 March 2008", E3/380, ERN (English) 00194550.
[375] T., 17 June 2009 (Accused), p. 19; T., 25 June 2009 (Accused), p. 24; T., 29 June 2009 (VANN Nath), p. 52; T., 30 June 2009 (CHUM Mey), p. 28; 1 July 2009 (BOU Meng), pp. 41, 80; T., 27 July 2009 (SUOS Thy), pp. 103-104.
[376] T., 24 June 2009 (Accused), p. 55; *see also* T., 30 June 2009 (Chum MEY), pp. 16-17.

2.4 Facts relevant to Crimes Against Humanity committed at S-21

204. During the course of the trial, evidence was put before the Chamber regarding the following crimes against humanity committed at S-21. Other facts which specifically concern Vietnamese prisoners of war and civilians, as well as Vietnamese sympathisers detained at S-21, have also been addressed by the Chamber in relation to grave breaches of the Geneva Conventions of 1949 (Section 2.6).

2.4.1 Murder and extermination

205. The Amended Closing Order states:

> 138. At S21, personnel, both directly and indirectly, caused the death of a large number of detainees. In many instances prisoners were deliberately killed through a variety of means. In other instances the perpetrators may not have intended to kill, but were aware that death could occur as a result of their conduct, for example when they beat or tortured prisoners.
>
> 139. The living conditions imposed at S21 were calculated to bring about the deaths of detainees. These conditions included but were not limited to the deprival of access to adequate food and medical care.
>
> 140. The unlawful deaths of over 12,380 detainees which occurred as a result of murder or the imposition of living conditions calculated to bring about death, constituted the mass killing of members of a civilian population, evidenced by documentary records, eye-witness accounts and the discovery of large numbers of bodies in mass graves.[377]

206. None of the detainees held within the S-21 complex were to be released as they were all due to be executed in accordance with the CPK policy to "smash" all enemies.[378] As stated by the Accused, "the main task of the [S-21] Committee was to detain the people who were sent by the Standing Committee in order to interrogate [torture], to get the confessions, and to smash them."[379]

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[377] Amended Closing Order, paras 138-140.
[378] T., 15 June 2009 (Accused), pp. 68-72; T., 17 June 2009 (Accused), pp. 20-24; T., 23 June 2009 (Accused), pp. 30-33; *see also* T., 16 July 2009 (HIM Huy), pp. 45-46; T., 21 July 2009 (PRAK Khan), p. 48; T., 6 August 2009 (David CHANDLER), pp. 25-28; T., 27 July 2009 (SUOS Thy), p. 98; T., 28 July 2009 (SUOS Thy), p. 48; *see also* Section 2.2.5.2.
[379] T., 17 June 2009 (Accused), p. 21; *see also* T., 15 June 2009 (Accused), pp. 35-36.

207. In addition to those who were executed, many detainees within the S-21 complex and at S-24 died as a result of their detention conditions.[380] The Accused indicated that detainees were deliberately fed starvation rations and given limited medical treatment.[381] Detainees also died as a result of interrogation and torture.[382]

208. The Accused agreed with the general accuracy of the information contained in the Revised S-21 Prisoner List, but acknowledged that the number of detainees who died or were executed was greater than the listed number (as amended) of 12,273.[383]

2.4.1.1 Execution of foreign nationals

209. The Accused confirmed that foreign nationals from various nations including Vietnam, Thailand, Pakistan, Laos, India, China, France, the United Kingdom, the United States, New Zealand and Australia were detained within the S-21 complex, where they died or were executed.[384] Although there were allegations that some of these foreign nationals were burned alive,[385] the Chamber is not satisfied that this has been proven to the required standard.

210. Numerous Vietnamese nationals and individuals believed to be Vietnamese spies were executed at S-21, particularly from 1977 until January 1979. The Chamber is satisfied that the execution of these individuals, many of whom were captured during the armed conflict with Vietnam, formed part of the CPK policy to eliminate all of its enemies.

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[380] T., 15 June 2009 (Accused), p. 92; T., 21 July 2009 (PRAK Khan), p. 48; T., 3 August 2009 (SEK Dan), p. 16; T., 28 July 2009 (SUOS Thy), pp. 14, 22.
[381] T., 15 June 2009 (Accused), pp. 84-85, 92; T., 27 April 2009 (Accused), p. 23; *see also* T., 6 August 2009 (David CHANDLER), pp. 87-89; T., 11 August 209 (MAKK Sithim statement read), pp. 38-41; T., 3 August 2009 (SEK Dan), pp. 9-10; T., 28 July 2009 (SUOS Thy), pp. 14, 22; T., 1 July 2009 (BOU Meng), p. 15.
[382] T., 17 June 2009 (Accused), p. 13; T., 28 July 2009 (SUOS Thy), p. 22; T., 11 August 2009 (HAN Iem statement read), p. 106; *see also* Section 2.4.4.
[383] T., 17 June 2009 (Accused), p. 6; "Written Record of Interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185503; T., 8 July 2009 (Defence), p. 3; *see also* Section 2.3.3.4.2.
[384] T., 15 June 2009 (Accused), pp. 51-55; T., 20 July 2009 (Accused), p. 12; *see also* "Some files on foreigners who were detained or killed by the Khmer rouge at S-21", E52/4.62.
[385] Amended Closing Order, para. 122; *see also* T., 17 June 2009 (Accused), pp. 20, 27-28, 36-37; T., 5 August 2009 (Accused), pp. 52-53; T., 21 July 2009 (PRAK Khan), p. 50; T., 16 July 2009 (HIM Huy), pp. 59-61, 90-91; T., 5 August 2009 (CHEAM Sour), pp. 14-19, 40-42, 50-51.

2.4.1.2 Execution of high-ranking detainees

211. One of the defining characteristics of S-21 within the Santebal security apparatus was that it interrogated and executed high ranking CPK cadres, who were typically detained in the Special Prison.[386] Amongst these high ranking cadres were KOY Thuon (Minister of Commerce and Member of the Central and of the Standing Committees), CHAN Chakrei (Secretary of Sector 24 in the East Zone), MEN San *alias* Ya (Secretary of the Northeast Zone), SUOS Neou *alias* Chhouk (Vice Chairman of the General Staff), VORN Vet *alias* PENH Touk (Member of the Central and of the Standing Committees), CHHAI Kim Hour *alias* Hok (Chairman of the Energy Committee), KONG Sophal (Secretary of the Northwest Zone), Pang *alias* SOUR Sophan (Member of the Central Committee), as well as IN Lorn *alias* Nat (former Chairman of S-21).[387]

2.4.1.3 Execution of S-21 staff

212. A number of S-21 staff died or were executed after being detained for failing to perform their duty or being implicated by detainees' confessions.[388] S-21 staff lived in constant fear of being detained and executed. A number of former S-21 staff testified about their colleagues simply disappearing for no apparent reason.[389]

213. HUY Sre, as well as at least 21 members of the Medical Unit, 48 members of the Defence Unit and 34 members of the Interrogation Unit, including all of its female interrogators, were amongst the former S-21 staff who were detained and killed.[390] Their

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[386] T., 1 April 2009 (Agreed Facts), pp. 65-66; T., 19 May 2009 (Craig ETCHESON), p. 45; T., 27 May 2009 (Craig ETCHESON), p. 69; T., 15 June 2009 (Accused), pp. 45-46.

[387] *See, e.g.,* T., 15 June 2009 (Accused), pp. 15-16, 18, 25, 27-29, 45-46; T., 17 June 2009 (Accused), pp. 76-77, 80-83, 93-95; T., 16 July 2009 (HIM Huy), pp. 29-30, 51; T., 10 August 2009 (SAOM Met), pp. 76-86; T., 22 June 2009 (Accused), pp. 30-42; T., 18 August 2009 (Accused), p. 109; "Written Record of Interview of DUCH by CIJ on 29 November 2007", E3/17, ERN (English) 00154194.

[388] T., 15 June 2009 (Accused), pp. 19-20; T., 16 July 2009 (HIM Huy), pp. 70-73, 93-99; T., 20 July 2009 (HIM Huy), pp. 51-53; "S-21 Personnel Imprisoned at S-21", E68.40; *see also* T., 11 August 2009 (SAOM Met), pp. 16-17; T., 4 August 2009 (KHIEU Ches statement read), p. 69.

[389] T., 27 July 2009 (SUOS Thy), pp. 99-103; T., 28 July 2009 (SUOS Thy), pp. 64-65; T., 11 August 2009 (SAOM Met), pp. 16-17; T., 16 July 2009 (HIM Huy), pp. 97-99; T., 3 August 2009 (LACH Mean), p. 69; T., 4 August 2009 (LACH Mean), p. 52; T., 4 August 2009 (NHEM En statement read), pp. 106-108.

[390] T., 24 June 2009 (Accused), pp. 27-29; T., 3 August 2009 (Accused), pp. 23-24; T., 12 August 2009 (KAING Pan), pp. 73-74; T., 4 August 2009 (NHEM En statement read), pp. 107-108, 120-121; T., 21 July 2009 (PRAK Khan), pp. 20-21; T., 22 July 2009 (PRAK Khan), pp. 58-59; T., 16 July 2009 (HIM Huy),

family members were, in some instances, also detained and executed along with them. Notably, many of the S-21 staff who were executed, including IN Lorn *alias* Nat, were previously attached to Division 703 of the RAK, which was progressively purged throughout the period of S-21's operation.[391]

2.4.1.4 Execution of children

214. Children taken to S-21 were executed within the S-21 complex and at Choeung Ek. Children of a young age were typically executed immediately after being separated from their parents, though some were kept for a short period of time before being executed. The Accused indicated that an S-21 staff member known as Peng was responsible for their executions.[392]

215. Older children who could care for themselves were sent to S-24. Some of these children were then sent to Choeung Ek for execution. In one recorded instance, confirmed by the Accused, about 160 children held at S-24 were executed at Choeung Ek in July 1977, together with 18 adults.[393] Witness KAING Pan was the Chairwoman of a unit of 12 detainees at S-24, which cared for about 70 to 80 eight to ten year old children who had been separated from their parents. She stated that "the children were dumped there" and that more than 30 disappeared around the time the DK regime fell.[394] Witness BOU Thon observed ten babies at a child care centre at S-24, whose mothers were not permitted to care for them. Some were sick and some died.[395]

216. Although the Amended Closing Order alleges that in one instance, the Vietnamese son of a female prisoner was dropped from a three-story building in the vicinity of the

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pp. 72-74. For an indicative breakdown per unit of the S-21 staff who were detained, *see* "S-21 Personnel Imprisoned at S-21", E68.40.

[391] T., 16 July 2009 (HIM Huy), pp. 41-45, 74-75, 97-99; T., 11 August 2009 (SAOM Met), pp. 16-17; T., 21 July 2009 (PRAK Khan), pp. 35-36.

[392] T., 22 June 2009 (Accused), pp. 12, 26; T., 17 June 2009 (Accused), pp. 14-16, 24-25; T., 24 June 2009 (Accused), pp. 54, 67-68; T., 16 July 2009 (HIM Huy), p. 90; T., 20 July 2009 (HIM Huy), p. 59; T., 21 July 2009 (PRAK Khan), pp. 33-34; T., 28 July 2009 (SUOS Thy), pp. 18-19, 42.

[393] "Prisoners' names smashed by Brother Huy Sre", E3/405; T., 24 June 2009 (Accused), pp. 67-68; T., 25 June 2009 (Accused), pp. 8-10; T., 16 July 2009 (Accused), pp. 92-93; T., 16 July 2009 (HIM Huy), pp. 89-90.

[394] T., 12 August 2009 (KAING Pan statement read) pp. 69-73.

[395] T., 12 August 2009 (BOU Thon), p. 32.

S-21 complex,[396] the Chamber is not satisfied that this allegation has been proven to the required standard.

2.4.1.5 Mass executions

217. The mass executions of detainees were ordered by the Party Centre and took place on several occasions. These executions took place at Choeung Ek over the course of several days. Due to the large number of victims, the executions were often undertaken almost immediately after the detainees' arrival at the S-21 complex, with no interrogations taking place.[397]

218. Some of the mass executions were the result of purges within the CPK and RAK. According to the Accused, in early 1977, large numbers of cadres from the North Zone, Phnom Penh and the East Zone were executed. Shortly thereafter members of Division 920 of the RAK were executed. In early 1978, cadres from the West Zone were executed, followed by cadres from the Northwest Zone. One of the largest purges occurred towards the end of 1978, involving cadres from the East Zone.[398]

219. In January 1979, almost all remaining detainees within the S-21 complex were executed following an order by the Accused's superiors. Very few living detainees remained within the S-21 complex when Phnom Penh fell on 7 January 1979.[399]

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[396] Amended Closing Order, para. 127; *see also* T., 21 July 2009 (PRAK Khan), pp. 12, 51, 81-82; T., 22 July 2009 (PRAK Khan), pp. 5-6; T., 17 June 2009 (Accused), pp. 24-25; T., 22 July 2009 (Accused), p. 34.

[397] T., 15 June 2009 (Accused), pp. 32-33; T., 25 June 2009 (Accused), pp. 8-9; T., 17 June 2009 (Accused), pp. 16-18, 45-49; T., 16 July 2009 (HIM Huy), pp. 62-68, 101-105; T., 20 July 2009 (HIM Huy), pp. 34, 59-61, 69-70; T., 5 August 2009 (KUNG Phai statement read), p. 91; *see also* "Statistics of prisoners interrupted to interrogate in January 1977", E3/370; "Names of female prisoners, namely from the cement factory and K-15", E3/371.

[398] T., 17 June 2009 (Accused), pp. 16-17, 45-50, 83-86; *see also* T., 6 August 2009 (David CHANDLER), pp. 20-22; T., 20 July 2009 (HIM Huy), p. 34; T., 28 July 2009 (SUOS Thy), pp. 22-23. The Revised S-21 Prisoner List indicates 1,165 entries as having been arrested from the East Zone, 360 entries as having been arrested from the North and Central Zone, as well as 1,211 entries as having been arrested from the Northwest Zone; *see* "S-21 Prisoners coming from the East Zone", E68.45; "S-21 Prisoners coming from the Old North Zone/Central Zone", E68.47; "S-21 Prisoners coming from the Northwest Zone", E68.49.

[399] T., 2 July 2009 (Accused), pp. 83-85; T., 21 July 2009 (PRAK Khan), pp. 58-59; T., 22 July 2009 (PRAK Khan), p. 27; T., 28 July 2009 (SUOS Thy), pp. 12-13; T., 2 July 2009 (NORNG Chanphal), pp. 32-40. The last S-21 detainees to be executed were presumably members of the YO8 Unit who had been

2.4.1.6 Methods of execution

220. Detainees were typically executed by being struck at the base of the neck with a metal bar or another available object. Their throats or stomachs were then generally slit and their bodies pushed into pits, their blindfold and handcuffs removed, and the pits covered.[400]

221. In certain instances, mainly involving the execution of important detainees, their stomachs were split open and photographs were taken to prove their death to the Accused's superiors.[401]

222. During IN Lorn *alias* Nat's chairmanship, detainees were executed by being stabbed at the base of their throat. Regardless of the method of execution employed, the Accused indicated that the only thing that mattered was to "make sure that the prisoners were smashed."[402] Asked by the Chamber whether he taught S-21 staff how to execute detainees, the Accused, citing a Khmer saying, replied: "I do not need to teach crocodiles how to swim, because the crocodiles already know how to swim."[403]

223. The Accused confirmed that at least 100 S-21 detainees died after having their blood drawn by the S-21 Medical Unit.[404] Witness PRAK Khan testified that detainees would be made to lie on their back on a bed, their handcuffs removed and their legs shackled. They would be blindfolded while a needle was inserted into their veins and their blood drawn until they died.[405] The blood was given to the General Staff Hospital

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previously detained in connection with the death of Malcom CALDWELL. According to the Accused, they were killed with a bayonet while shackled to their beds; *see* T., 23 June 2009 (Accused), pp. 8-9.

400 T., 16 July 2009 (HIM Huy), pp. 54-55; T., 11 August 2009 (TAY Teng statement read), pp. 54-57; *see also* T., 16 July 2009 (HIM Huy), pp. 67-68; T., 17 June 2009 (Accused), p. 45.

401 T., 17 June 2009 (Accused), pp. 76-83; T., 22 June 2009 (Accused), p. 110. Photographs were also taken of detainees who died while in detention at S-21 as proof that they had not been released; *see* T., 4 August 2009 (NHEM En statement read), p. 111; T., 5 August 2009 (NHEP Hau statement read), pp. 73-75.

402 T., 17 June 2009 (Accused), pp. 12, 76.

403 T., 17 June 2009 (Accused), p. 12.

404 T., 16 June 2009 (Accused), pp. 81-83, 95; *see also* T., 27 July 2009 (SUOS Thy), pp. 86-90; T., 28 July 2009 (SUOS Thy), pp. 36-37.

405 T., 21 July 2009 (PRAK Khan), pp. 36-37.

for transfusions for RAK soldiers wounded during the conflict with the Vietnamese.[406] The Accused initially stated that this practice was initiated by IN Lorn *alias* Nat, and that he did not know of it. However, he subsequently clarified that it was initiated upon the order of SON Sen and that it ceased when all S-21 medics were themselves executed.[407]

224. The Accused also indicated that surgical operations were performed on detainees upon the order of SON Sen. The purpose of these operations was to train medical staff. It is unclear whether the detainees were still alive prior to these operations.[408] The Chamber is therefore not satisfied to the required standard that the death of detainees occurred as a direct consequence of surgical operations.

2.4.2 Enslavement

225. The Amended Closing Order states:

> 135. Certain detainees at S21 and Prey Sar were forced to work. Strict control and constructive ownership was exercised over all aspects of their lives by: limiting their movement and physical environment; taking measures to prevent and deter their escape; and subjecting them to cruel treatment and abuse. As a result of these acts, detainees were stripped of their free will.[409]

226. The Amended Closing Order characterised the main purpose of S-24 as to "reform and re-educate combatants and farming rice to supply Office S-21 and its branches."[410] The work was also described as "punitive hard labour" or "tempering." The Accused agreed with or did not dispute these descriptions.[411] He described the main purpose of the work undertaken by detainees at S-24 as "to have them work hard for the benefit of the Party, for the production of rice. And they had to learn to follow the superior and not to

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[406] T., 16 June 2009 (Accused), pp. 81-83; T., 22 June 2009 (Accused), pp. 112-115; T., 21 July 2009 (PRAK Khan), pp. 36-39.
[407] T., 16 June 2009 (Accused), pp. 81, 91-93; T., 17 June 2009 (Accused), p. 27; T., 22 June (Accused), pp. 112-114; *see also* T., 27 July 2009 (SUOS Thy), pp. 86-90; 28 July 2009 (SUOS Thy), pp. 36-37; T., 22 July 2009 (Accused), pp. 37-39.
[408] T., 16 June 2009 (Accused), pp. 81, 93-95; T., 22 June 2009 (Accused), pp. 112-115.
[409] Amended Closing Order, para. 135.
[410] Amended Closing Order, para. 30 (footnotes omitted).
[411] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 55-57, 172-173.

be rude or not to oppose the Party in any case whatsoever."[412] The Accused also agreed that S-24 was a place of enslavement where "elements" performed "forced labour."[413]

2.4.2.1 Living and working conditions at S-24

227. The Accused agreed that for the CPK, the term "element" meant detainee, and was applied to those who the Party suspected of being enemies. They were then detained and subjected to forced labour "like [an] animal so that they cannot oppose or fight against the Party."[414] They were also obliged to participate in self-criticism meetings, also called "tempering."[415]

228. Witness BOU Thon was detained at S-24 after the disappearance of her husband. She was not free to talk to other people (including children) working there, and was too frightened to criticise or to complain about issues such as the adequacy of food or health care. She was obliged to work long hours and was shut in at night. She described her conditions as being "like a prison without walls." She had no rights or freedom and was not permitted to make any decision by herself. She was told where to work, and was obliged "to abide by their orders", with "no right to contest or challenge anything."[416]

229. Witness MEAS Pengkry, arrested and sent to S-24 in 1977, spoke of the extremely long working hours and the arduous physical work involved in digging dykes and canals, and transplanting rice, and noted that the quantity of food for people expected to work under these conditions was inadequate.[417]

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[412] T., 24 June 2009 (Accused), p 17.
[413] T., 1 April 2009 (Agreement on Facts), pp. 82-84; T., 24 June 2009 (Accused), pp. 36-37, 59, 70-71; T., 25 June 2009 (Accused), pp. 31-32.
[414] T., 24 June 2009 (Accused), pp. 56-58.
[415] T., 24 June 2009 (Accused), pp. 36-37, 76; T., 8 July 2009 (CHIN Met), p. 86; T., 5 August 2009 (CHEAM Sour), p. 44; s*ee also* T., 11 August 2009 (TAY Teng statement read), pp. 47, 52; T., 12 August 2009 (KAING Pan statement read), p. 71; *see also* T., 15 July 2009 (MAM Nai), p. 59.
[416] T., 12 August 2009 (BOU Thon), pp. 3, 13, 33-34; *see also* T., 12 August 2009 (Accused), pp. 46-47.
[417] T., 28 July 2009 (MEAS Pengkry statement read), pp. 93-94; *see also* T., 12 August 2009 (PHAK Siek statement read), p. 58; T., 12 August 2009 (KAING Pan statement read), p. 72; T., 1 April 2009 (Agreed Facts), p. 83.

230. Civil Party CHIN Met was arrested in November 1977 aged 19 years.[418] After a period of detention she was sent to S-24 for re-education. She described long hours of work strictly supervised to ensure that work targets were met. Using hoes and baskets, she planted rice, built dams and dug canals. In her testimony, she described being forced to pull a plough with three others, being beaten when she fell and when exhausted, being warned to "try to do [her] best" or she would disappear.[419] This was reinforced when one of her co-workers became ill and disappeared. She spoke of her hopelessness, causing her to try to commit suicide, and of her constant fear, exhaustion, weakness due to overwork, and ill-health, all of which have left her with emotional problems and physical scarring. She noted that children were also forced to work and that "[i]t was pitiful to look at those children", the majority of whom died from hunger and sickness.[420]

231. In general, the Accused agreed that the conditions at S-24 were as described. He confirmed that detainees could not move freely around S-24 without authorisation, and that bad elements were shackled at night and were not permitted to live in ordinary houses. All detainees were strictly guarded day and night, and at work were closely supervised by the guards who by using force and insult, required them to work very hard.[421] The Accused described the extremely long hours of work which included early mornings and moonlit nights, as well as the harsh working conditions, agreeing that there might have been some cases where detainees were used in place of farm animals for ploughing.[422]

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[418] T., 8 July 2009 (CHIN Met), p. 42; T., 9 July (CHIN Met), p. 15; T., 9 July 2009 (Accused), p. 20; "Annex 2: Biography of Khim [Chin] Met", E2/80/4.2, ERN (English) 00347466; "Annex 1: Photograph of Chin Met", E2/80/4.1, ERN (English) 00343199; "Annex 1: Khmer Identification Card of CHIN Met, 14 February 2001", E2/80.1, ERN (English) 00322281.
[419] T., 8 July 2009 (CHIN Met), pp. 62-63.
[420] T., 8 July 2009 (CHIN Met), pp. 54, 60-61, 74, 89-90.
[421] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 55-57, 172-173, 176, 181-182; T., 1 April 2009 (Agreed Facts), pp. 82-84; s*ee also* T., 24 June 2009 (Accused), p. 20; T., 12 August 2009 (BOU Thon), pp. 32-34.
[422] T., 24 June 2009 (Accused), pp. 19-20, 42.

2.4.2.2 Enslavement of detainees within the S-21 complex

232. A very limited number of detainees were forced to work within the S-21 complex.[423] They included Witness VANN Nath and Civil Parties BOU Meng and CHUM Mey, all of whom were first arrested, shackled and imprisoned at S-21, before being selected to work within the complex. All described the terrible conditions of their capture and detention, the physical and mental abuse, torture and ever-present fear. When each was selected to work "temporarily",[424] they began working in the artists' or mechanics' workshops.[425] Both BOU Meng and VANN Nath were then able to sleep in or near their work area, guarded, locked in, but unshackled.[426] By contrast, CHUM Mey was returned each night to a room where he was shackled alongside other detainees.[427]

233. All worked very long hours under constant guard, with no freedom of movement. All knew that if they did not produce work of the standard required, they would be punished in some unspecified way.[428] BOU Meng was threatened that if he did not produce a good likeness of POL Pot, he would be punished.[429] The Accused came to view the artists work regularly, and on one occasion VANN Nath witnessed him forcing BOU Meng to fight another detainee, IM Chan, with black plastic tubes.[430] All were given better food, and conditions generally were a little better than when they were first detained. Nonetheless, under guard, effectively imprisoned and able to observe some of the treatment of other detainees, all lived in a state of constant terror.[431]

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[423] T., 17 June 2009 (Accused), pp. 18-19, 49. The Accused calculated a total of fifteen "people who had been used temporarily at S-21."
[424] VANN Nath saw the annotation "Keep for use temporarily" against his name on a list containing about ten names, dated during February 1978; *see* T., 29 June 2009 (VANN Nath), p. 68.
[425] T., 29 June 2009 (VANN Nath), pp. 24-26; T., 1 July 2009 (BOU Meng), pp. 34-35; T., 30 June 2009 (CHUM Mey), p. 14.
[426] T., 29 June 2009 (VANN Nath), pp. 34-35; T., 1 July 2009 (BOU Meng), p. 36.
[427] T., 30 June 2009 (CHUM Mey), p. 31.
[428] T., 29 June 2009 (VANN Nath), p. 26; T., 30 June 2009 (CHUM Mey), pp. 48-49.
[429] T., 1 July 2009 (BOU Meng), p. 64; *see also* T., 29 June 2009 (VANN Nath), pp. 56-58.
[430] T., 1 July 2009 (BOU Meng), p. 37; *see also* T., 29 June 2009 (VANN Nath), pp. 56-57; T., 1 April 2009 (Agreed Facts), pp. 88-89.
[431] T., 29 June 2009 (VANN Nath), pp. 66, 97; T., 1 July 2009 (BOU Meng), pp. 35, 84; T., 30 June 2009 (CHUM Mey), pp. 15, 77-78.

2.4.3 Imprisonment

234. The Amended Closing Order states:

> 134. There were no reasonable grounds and no legal basis justifying the arrest of the large number of individuals intentionally imprisoned at S-21. Moreover, prisoners were clearly deprived of basic rights such as being informed of the reason for their arrest. There is no evidence that any legal or judicial system was established or functioned in Cambodia between 17 April 1975 and 6 January 1979. There were no procedural safeguards, whether judicial or administrative, whereby detainees could challenge their imprisonment.[432]

2.4.3.1 Arbitrary deprivation of liberty

235. The Accused conceded that at least 12,273 men, women and children were detained at S-21. Some destined for S-21 were arrested by stealth, others simply handcuffed, blindfolded, processed and taken ultimately to a cell or large room where they would be shackled alongside other prisoners.[433]

236. S-24 also detained several hundred men, women and children at any one time. Most S-24 detainees were taken to the site and put to work. Only the bad elements were shackled and physically restrained. Those free of such physical restraints nonetheless had no freedom of movement and were guarded day and night.[434]

237. Detainees were transported from the S-21 complex to Choeung Ek handcuffed and blindfolded. Following their arrival at Choeung Ek, detainees were held briefly in a wooden hut and then led individually, or in small groups, to ditches to be executed.[435]

238. Among the detainees were young children and babies, as well as others who objectively, could not have been guilty of any offence. Also included were the family

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[432] Amended Closing Order, para. 134.
[433] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 102, 108; T., 1 April 2009 (Agreed Facts), pp. 75, 77; T., 15 June 2009 (Accused), pp. 15-16, 79-83; T., 16 July 2009 (HIM Huy), pp. 20-23.
[434] T., 1 April 2009 (Agreed Facts), p. 71.
[435] T., 17 June 2009 (Accused), pp. 43-44, 54; T., 16 July 2009 (HIM Huy), pp. 65-68; T., 11 August 2009 (TAY Teng statement read), p. 54.

members and subordinates of arrested persons, taken into custody because of their relationship to a detained person.[436]

2.4.3.2 Without due process of law

239. The common feature of all three sites was the absence of a formal process at any point in the arrest or detention informing the detainee of the reason for detention.[437] There was no trial,[438] access to legal advice, or ability to challenge the arrest, detention or ultimate execution. With rare exceptions, none would be released.[439] The Accused conceded that the practice of arrest, detention and execution without recourse to trial was "[…] not compatible with the existence of tribunals and procedural safeguards."[440] The absence of a legal or judicial procedure that enabled the detainees to challenge their detention was an egregious breach of their rights and one that led inevitably to fundamental miscarriages of justice.

2.4.4 Torture, including rape

240. The Amended Closing Order states:

> 136. The vast majority of persons interrogated at S21 were repeatedly and intentionally subjected to severe interrogation methods, which often resulted in serious physical injuries and severe mental harm. These methods were designed for the specific purpose of obtaining information or extracting confessions from the prisoners. Even if there were a requirement that perpetrators act in an official capacity, it is clear that in this case they acted in accordance with their defined roles within a clear command structure.
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> 137. There is evidence of at least one coercive sexual penetration committed at S21, when an interrogator inserted a stick into a female prisoner's genitals.[441]

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[436] T., 1 April 2009 (Agreed Facts), p. 65.
[437] T., 1 April 2009 (Agreed Facts), p. 77; T., 24 June 2009 (Accused), p. 69; T., 1 July 2009 (BOU Meng), pp. 11, 17-18.
[438] T., 1 July 2009 (BOU Meng) pp. 30-31.
[439] "Written Record of Interview of Duch by CIJ on 27 March 2008", E3/380, ERN (English) 00194552; T., 24 June 2009 (Accused), p. 30.
[440] T., 1 April 2009 (Agreed Facts), p. 70; *see also* T., 6 August 2009 (David CHANDLER), p. 34.
[441] Amended Closing Order, paras. 136-137.

2.4.4.1 The use of torture within the S-21 complex

2.4.4.1.1 Torture techniques

241. A variety of torture techniques were applied within the S-21 complex, resulting in severe physical pain and/or mental suffering. The Accused admitted that interrogators were permitted to use four violent interrogation techniques: beating, electrocution, asphyxiation with a plastic bag and "water-boarding."[442] The Accused has acknowledged that beating was the most common interrogation technique at S-21.[443] Beatings which in the view of the Chamber amounted to torture were of sufficient force or duration or were accompanied by other acknowledged torture techniques. Such beatings resulted in bleeding and multiple injuries such as broken limbs, loss of hearing, loss of teeth, scars and sometimes death.[444] Another common interrogation technique was electrocution,[445] which caused the detainees to lose consciousness – and in certain cases to become impotent, delirious or to die.[446] Placing a plastic bag over the detainees' head induced a sensation of suffocation and made them believe that they were dying. Death ensued in at least one instance. The Accused acknowledged that detainees were subjected to water-boarding, which entailed pouring water into their nose to induce a sensation of suffocation and drowning.[447]

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[442] T., 16 June 2009 (Accused), pp. 14, 44; "Written Record of Interview of Duch by the Co-Investigating Judges on 21 January 2008", E3/11, ERN (English) 00159557.

[443] T., 1 April 2009 (Agreed Facts), p. 90; T., 16 June 2009 (Accused), pp. 14, 54-56; T., 29 April 2009 (Accused), p. 19; s*ee also* T., 5 August 2009 (KUNG Phai statement read), p. 91; T., 1 July 2009 (BOU Meng), p. 12; T., 10 August 2009 (SAOM Met), p. 85.

[444] T., 1 July 2009 (BOU Meng), pp. 13, 32-33, 62, 72; T., 30 June 2009 (CHUM Mey), p. 11; "Two photographs of Civil Party Bou Meng's back (scars), taken after his hearing on 1 July 2009", E174; T., 16 June 2009 (Accused), p. 67; T., 17 June 2009 (Accused), p. 13.

[445] T., 29 April 2009 (Accused), p. 18; T., 16 June 2009 (Accused), pp. 14, 44; T., 5 August 2009 (KUNG Phai statement read), p. 91; T., 10 August 2009 (SAOM Met), pp. 85, 93-94; "Written Record of Interview of Prak Khan", E3/413, ERN (English) 0161554.

[446] T., 30 June 2009 (CHUM Mey), p. 27; T., 1 July 2009 (BOU Meng), pp. 30, 73; T., 22 July 2009 (PRAK Khan), p. 40; T., 11 August 2009 (SAOM Met), p. 25; T., 8 June 2009 (Accused), p. 109; T., 16 June 2009 (Accused), p. 59; T., 3 August 2009 (Accused), pp. 50-51; annotations on the "Confession of KE Kim Huot", E3/369, ERN (English) 00183290; *see also* "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 132, ERN (English) 00192825.

[447] T., 16 June 2009 (Accused), pp. 14, 22 27, 44-45, 52-54; T., 17 June 2009 (Accused), p. 13; "Defence Position on the Facts contained in the Closing Order", E5/11/6.1, para. 218; T., 10 August 2009 (SAOM Met), pp. 93-94; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161554.

242. In addition to the four authorised methods listed above, the Accused has acknowledged that a number of additional techniques were carried out by interrogators. Pliers were used to remove finger and toe nails, needles were inserted under them, and nails were punctured.[448] According to the Accused, these practices were a violation of his rules relating to the use of torture and he requested that the interrogators cease when he became aware of them.[449] Cigarette burns were also used, although this was not directed or authorised by the Accused.[450]

243. The practice of forcing detainees to pay homage to images of dogs, one with the head of Ho Chi Minh and the other with the head of Lyndon B. Johnson, caused the victims extreme humiliation and severe emotional distress.[451] The Accused has admitted that he encouraged this practice, which he considered very effective in obtaining confessions.[452] This technique caused severe mental suffering in the Cambodian cultural context.[453] The Accused believes that detainees were also made to kneel down and pay homage to objects such as tables and chairs, but opined that this was less humiliating and severe.[454]

244. The Accused has acknowledged that force-feeding of excrement was used as an interrogation technique.[455] He stated however that such treatment was a violation of his rules relating to the use of torture, although he failed to punish the interrogator who

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[448] T., 30 June 2009 (CHUM Mey), pp. 25-27, 68; T., 16 June 2009 (Accused), pp. 77-79; T., 22 June 2009 (Accused), pp. 86-87; T., 21 July 2009 (PRAK Khan), pp. 67-68; T., 10 August 2009 (SAOM Met), p. 93-94; T., 28 May 2009 (Craig ETCHESON), pp. 6-7; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161554.
[449] T., 16 June 2009 (Accused), pp. 77-78; T., 22 June 2009 (Accused), p. 88.
[450] T., 22 June 2009 (Accused), pp. 87, 105.
[451] T., 16 June 2009 (Accused), pp. 58-59; T., 22 June 2009 (Accused), p. 88; T., 1 July 2009 (BOU Meng), p. 37; T., 21 July 2009 (PRAK Khan), pp. 70-71; "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73, ERN (English) 00184496; "Voices from S-21 – Terror and History in Pol Pot's Secret Prison", (book) by David CHANDLER, E3/427, pp. 132-134, ERN (English) 00192825-00192827.
[452] T., 1 April 2009 (Agreed Facts), p. 90; T., 22 June 2009 (Accused), p. 88.
[453] *See* T., 25 August 2009 (CHHIM Sotheara), pp. 8-9, 30, 45, 48.
[454] T., 16 June 2009 (Accused), pp. 87-88.
[455] T., 16 June 2009 (Accused), p. 87; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 222.

applied it to his former teacher KE Kim Huot *alias* Sot.[456] Certain detainees were also forced to drink urine.[457]

245. Additional methods were used to threaten detainees, to break their resistance and to keep them in a state of constant fear in order to facilitate their confessions. The Accused and interrogators used "propaganda", bluff and threats to scare detainees and induce them into confessing.[458] They were treated as enemies and addressed in a contemptuous manner.[459] Interrogators were also taught to exploit the fears of detainees and make threats concerning family members.[460] Techniques to scare detainees also included the display of torture instruments such as clamps, sticks, knives and axes in the interrogation room.[461]

246. The Amended Closing Order also alleges that there is evidence of at least one incident of rape at S-21.[462] The Accused acknowledged that an S-21 staff member inserted a stick into the vagina of a detainee during an interrogation.[463] He stated that he had a strong emotional reaction to this incident, but that he did not want to show his anger to his superiors and subordinates. He further stated that he did not know that this constituted a crime and treated the incident as any other violation of the regulation of torture. He reported the incident to his superior but did not get any response.[464] As a result, he reassigned the interrogator, who was no longer allowed to interrogate female detainees, and established a female interrogators team.[465] No sanction was otherwise

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[456] T., 22 June 2009 (Accused), pp. 21, 88; T., 16 June 2009 (Accused), p. 87; *see also* "Confession of KE Kim Huot", E3/369, ERN (English) 00183285, 00183288-00183289.
[457] T., 16 June 2009 (Accused), p. 87.
[458] *See* "Statistics list of Santebal S-21", E3/426, ERN (English) 00225392-00225393, 00225403.
[459] T., 16 June 2009 (Accused), p. 88; T., 15 June 2009 (Accused), p. 86; T., 21 July 2009 (PRAK Khan), p. 70.
[460] "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73, ERN (English) 00184511; T., 22 June 2009 (Accused), pp. 36-37.
[461] T., 16 June 2009 (Accused), p. 22; T., 21 July 2009 (PRAK Khan), p. 73.
[462] Amended Closing Order, para. 137.
[463] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 231; T., 16 June 2009 (Accused), pp. 78-79; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161555.
[464] T., 16 June 2009 (Accused), pp. 68-69, 79; T., 22 June 2009 (Accused), p. 42.
[465] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 231; T., 23 April 2009 (Accused), p. 35; T., 16 June 2009 (Accused), pp. 17, 79-80; T., 22 June 2009 (Accused), p. 42; T., 21 July 2009 (PRAK Khan), pp. 20-21.

taken against the perpetrator.[466] The Chamber is satisfied that this allegation of rape has been proved to the required standard.

247. Although the Accused stated that there was only one incident of rape at S-21,[467] several witnesses spoke about what appears to be a separate incident where Touch, an interrogator, raped a female detainee.[468] Touch was subsequently arrested and detained at S-21.[469] However, the Chamber is not satisfied that this allegation has been proved to the required standard.

248. The Accused acknowledged that detainees at S-24 were also subject to acts of violence during interrogations, though these were carried out without his authorisation.

2.4.4.1.2 Specific incidents of torture

249. Civil Party BOU Meng testified that he was tortured twice a day over two consecutive weeks. He was shackled by the ankles and forced to lie face-down on the ground, whilst derogatory language was used against him. His interrogators showed him the torture equipment and asked him to select the device he preferred. They took turns beating him on the back with a rattan stick and a whip, causing him to bleed all over the floor. He was also electrocuted, causing him to lose consciousness. BOU Meng still has scars as a result of these beatings. Every time he was beaten, he was asked questions regarding his involvement with the CIA and the KGB. The Accused did not dispute these facts.[470]

250. Civil Party CHUM Mey stated that he was interrogated for twelve days and nights. During these interrogations, he was shackled and insulted. He was repeatedly beaten and

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[466] T., 16 June 2009 (Accused), pp. 68-69; T., 22 June 2009 (Accused), p. 42; "Written Record of interview of Duch by CIJ on 30 April 2008", E3/378, ERN (English) 00185502.
[467] T., 16 June 2009 (Accused), pp. 78-79; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 231.
[468] T., 22 July 2009 (PRAK Khan), pp. 43-44; T., 21 July 2009 (PRAK Khan), pp. 79-80; T., 4 August 2009 (LACH Mean), pp. 40-41.
[469] T., 22 July 2009 (PRAK Khan), p. 43; T., 21 July 2009 (PRAK Khan), p. 79; T., 4 August 2009 (LACH Mean), p. 41.
[470] T., 1 April 2009 (Agreed Facts), p. 91; T., 16 June 2009 (Accused), p. 86; T., 1 July 2009 (BOU Meng), pp. 12-13, 27-30, 32, 73-77; *see also* "Two photographs of Civil Party BOU Meng's back (scars), taken after his hearing on 1 July 2009", E174.

lashed with sticks, and broke one of his fingers trying to defend himself against the beatings. When he persisted in denying any involvement with the CIA or KGB, an interrogator pulled out toenails from both his feet, causing him to tremble in pain. Afterwards, he could hardly walk. He was also electrocuted on two occasions and fell unconscious each time. The interrogation only stopped after he "confessed" to having joined both the CIA and the KGB. The Accused has acknowledged these facts.[471] The Chamber finds that the allegations of torture by BOU Meng and CHUM Mey have been proved to the required standard.

251. The Accused has denied the use of techniques such as plunging detainees in a water jar or suspending them by their hands tied behind their back,[472] as shown in one of Witness VANN Nath's paintings.[473] The Chamber finds however that the testimony of Witness VANN Nath, who saw and painted this scene, is consistent and reliable and meets the standard required to prove torture.

2.4.4.2 Purpose of torture

252. According to the Accused, the purpose of torture at S-21 was

> the infliction of suffering, of additional suffering, to the victims to force them to confess. Therefore it was both the force physically, the physical pain, and with the scolding, with the verbal abuse, it contributed to the psychological suffering upon the confessors so that they would give in to confession.[474]

253. Similarly, the interrogator's notebook entitled "Statistics List" states that "[t]he objective of torturing is to get their answers; it is not done for fun. Therefore, we must make them feel pain so that they will respond quickly. Another objective is to make them

[471] T., 1 April 2009 (Agreed Facts), p. 91; T., 16 June 2009 (Accused), p. 86; T., 30 June 2009 (CHUM Mey), pp. 11, 13-14, 22-27 29, 67-68, 73.
[472] T., 16 June 2009 (Accused), pp. 89-90, "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 225, 227.
[473] "Painting of S-21 prisoner Vann Nath depicting torture in the yard of Office S-21", E3/260; T., 29 June 2009 (VANN Nath), pp. 33-34, 47 ("painting number 12").
[474] T., 16 June 2009 (Accused), p. 51.

afraid."[475] This is confirmed by the so-called Pon-Tuy notebook, which advises that beatings are meant to inflict pain.[476]

254. The use of these various interrogation techniques, whether resulting in physical pain or mental suffering, were designed to obtain confessions,[477] which detailed the detainee's biography, the nature of the crimes and "traitorous" activities, his or her personal involvement in them, as well as network of "traitors".[478] The interrogation would end only when the confession was deemed adequate and complete. The confessions were then examined by the upper echelon and used for two main purposes: first to justify the decision to arrest the particular detainee who wrote the confession, and second to obtain information to investigate and eventually arrest the people implicated in the confessions.

255. A further purpose of torture at S-21 was punishment.[479] Torture at S-24 was also used to punish prisoners who failed to follow discipline or did not work according to the standards imposed, to prevent detainees from rebelling or escaping, and during the more limited interrogations carried out at S-24.[480]

2.4.4.3 Official capacity of the perpetrators

256. S-21 and S-24 staff, including interrogators, acted under a clearly-established hierarchy, under the orders or delegated authority of the Accused, who himself acted on the orders of the Standing Committee. Given their position in the State apparatus, the Chamber concludes that the S-21 interrogators and S-24 staff who perpetrated acts of torture acted in an official capacity.

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[475] "Statistics list of Santebal S-21", E3/426, ERN (English) 00225393.
[476] "S-21 Notebook by Tuy and HOEUNG Song Huor *alias* Pon dated 12 April 1978 – 17 December 1978", E3/73, ERN (English) 00184496.
[477] T., 16 June 2009 (Accused), p. 55; T., 3 August 2009 (LACH Mean), p. 90; "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161559; "Statistics list of Santebal S-21", E3/426, ERN (English) 00225406.
[478] T., 16 June 2009 (Accused), pp. 25, 48; T., 21 July 2009 (PRAK Khan), pp. 19, 27, 64-66; T., 29 June 2009 (VANN Nath), pp.17-18; "Statistics list of Santebal S-21", E3/426, ERN (English) 00225380.
[479] T., 29 June 2009 (VANN Nath), pp. 33-34, 47, 66 with reference to "Painting of S-21 prisoner Vann Nath depicting torture in the yard of Office S-21" ("Painting number 12"), E3/260; T., 15 June 2009 (Accused), p. 92.
[480] T., 24 June (Accused), pp. 24-43; T., 25 June (Accused), pp. 5-7; T., 1 April 2009 (Agreed Facts), p. 92; T., 8 July 2009 (CHIN Met), p. 73.

2.4.5 Other inhumane acts

257. The Amended Closing Order states:

> 143. Prisoners at S-21 suffered serious bodily and mental harm from inhumane acts which included deliberate deprivation of adequate food, sanitation and medical treatment. Prisoners were beaten and subjected to stringent restrictions during detention. These severe conditions, individually or collectively, depressed, degraded, and dehumanised detainees ensuring that they were always afraid.[481]

258. The Accused agreed that the living conditions, combined with the detention, interrogation and disappearance of detainees, severely impaired their physical and psychological health and that they lived in a permanent climate of fear.[482]

259. All detainees held at S-21 and S-24 were deemed to be enemies and deprived of their basic rights. The Accused indicated that, as everyone was destined for execution, there was no need to treat detainees humanely.[483] Expert David CHANDLER expanded on the conditions of the detainees and stated that "when they arrived in trucks [they were] already non-humans. The objective was to keep them in that condition and, yes, to break them down and mercy would have had no place in the prison."[484]

2.4.5.1 Detention conditions within the S-21 complex

260. With the exception of certain important detainees, detainees entering the S-21 complex were stripped of their clothes and other belongings and left to wear their underwear or short trousers.[485] They were then detained in either individual cells or in collective cells in groups of at least 20 to 30 or more.[486] The individual cells were small makeshift rooms and lacked windows or adequate lighting, while collective cells were larger rooms with bars mounted on the windows. Detainees were chained and shackled to

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[481] Amended Closing Order, para. 143.
[482] "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 169-171; T., 15 June 2009 (Accused), p. 91; *see also* T., 22 June 2009 (Accused), p. 86.
[483] T., 15 June 2009 (Accused), pp. 35-36; T., 22 June 2009 (Accused), p. 86.
[484] T. 6 August 2009 (David CHANDLER), pp. 41-42, 88-89.
[485] T., 10 August 2009 (CHHUN Phal), pp. 22-23; T., 28 July 2009 (SUOS Thy), pp. 28-29; T., 29 June 2009 (VANN Nath), pp. 29, 94-95; T., 30 June 2009 (CHUM Mey), p. 43; T., 15 June 2009 (Accused), p. 35; T., 20 July 2009 (HIM Huy), p. 46; T., 15 June 2009, (Accused), pp. 45-46.
[486] T., 1 July 2009 (BOU Meng), p. 21; T., 30 June 2009 (CHUM Mey), p. 47.

a metal bar in their cells.[487] The cells had no bedding, mattresses or mosquito nets. All detainees were required to sleep on the concrete floor and kept under constant armed guard.[488]

261. Husbands, wives and family members were separated and not allowed any contact. Women, some of whom were pregnant, were held together in specific common cells, but were not chained or shackled. Children were also separated from their parents or family relatives.[489]

262. From their cells or the workshops, detainees could hear screaming and crying coming from the S-21 complex.[490]

263. When moved from their cells, detainees were consistently handcuffed and blindfolded, leaving them disoriented and afraid.[491] Witness VANN Nath described his shock at the sight of a malnourished detainee carried by young guards with his hands and feet tied to a wooden pole. The detainee was blindfolded but still alive and talking when he was loaded onto a truck and taken away.[492]

264. Detainees saw that other detainees returning from interrogations showed signs of severe beating, mutilation, bruises and cuts. Some detainees died in their cells due to such abuses or as a consequence of the conditions of detention and their bodies could be left lying there for hours.[493] In many cases, detainees removed from the common cells never

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[487] T., 30 June 2009 (CHUM Mey), p. 72; T., 1 July 2009 (BOU Meng), p. 22; T., 15 June 2009 (Accused), pp. 39-42; T., 10 August 2009 (CHHUN Phal), pp. 21-22; T., 20 July 2009 (HIM Huy), p. 36; T., 21 July 2009 (PRAK Khan), pp. 43-45.

[488] T., 15 June 2009 (Accused), p. 45; T.,10 August 2009 (SAOM Met), pp. 81-82; T., 4 August 2009 (KHIEU Ches statement read), p. 73.

[489] T., 15 June 2009 (Accused), pp. 43-44, 64, 88; T., 17 June 2009 (Accused), p. 25; T., 22 June 2009 (Accused), p. 12; T., 24 June 2009 (Accused), pp. 68, 74; T., 21 July 2009 (PRAK Khan), p. 46; T., 27 July 2009 (SUOS Thy), pp. 97-98; T., 1 July 2009 (BOU Meng), pp. 50, 78; T., 10 August 2009 (CHHUN Phal), p. 21.

[490] T. 29 June 2009 (VANN Nath), pp. 83-84; T. 30 June 2009 (CHUM Mey), pp. 30, 55, 78; T., 1 July 2009 (BOU Meng), pp. 81-82; *see also* T., 11 August 2009 (TAY Teng statement read), p. 51.

[491] T., 1 July 2009 (BOU Meng) pp. 26-27; T., 14 July 2009 (MAM Nai), pp. 31-32; T., 21 July 2009 (PRAK Khan), p. 26; T., 10 August 2009 (SAOM Met), p. 80.

[492] T., 29 June 2009 (VANN Nath), p. 48; *see also* T., 1 July 2009 (BOU Meng) p. 48.

[493] T., 4 August 2009 (KHIEU Ches statement read), p. 73; T., 11 August 2009 (HAN Iem statement read), pp. 105-106; T., 16 July 2009 (HIM Huy), p. 47; T., 20 July 2009 (HIM Huy), pp. 47-48; T., 21 July 2009 (PRAK Khan), p. 45; T., 30 June 2009 (CHUM Mey), p. 78; T. 15 June 2009 (Accused), pp. 42-43;

returned. The conditions of detention imposed upon detainees left them in constant fear of being removed, beaten, tortured and executed.[494]

265. The impact of the conditions of detention upon the detainees was such that some detainees attempted suicide. Witness VANN Nath described how he saw a female detainee elude a guard and kill herself by jumping off the upper floor of the building where they were detained.[495]

266. Former detainees and S-21 survivors Witness VANN Nath and Civil Parties CHUM Mey and BOU Meng described the harsh conditions endured by all detainees and how they were treated like "animals."[496] Civil Party CHUM Mey provided the following account of being held in an individual cell:

> "[W]hen I entered that room and cell I could not expect that I would survive. At that time I only lay down on my back waiting just to be killed. It was the first time that I lay down directly on the floor, first time in my life, and it was the first time in my life that I was hosed with water

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T., 11 August 2009 (MAKK Sithim statement read), pp. 38-41; *see also* T., 29 June 2009 (VANN Nath), pp. 22-23.

[494] T., 30 June 2009 (CHUM Mey), pp. 45, 78-79; T., 1 July 2009 (BOU Meng), p. 77; T., 29 June 2009 (VANN Nath), p. 63-64 ("from the feeling that I had at the time that I came across three prisons and when I arrived at S-21, while I was being photographed I had a feeling that that was a detention centre closer to the senior leadership and I had a slim hope that there might be justice and that because we did not do anything wrong, and if Angkar found that we didn't make any offence, then we would be released. That was the feeling I had at the time. However, after I entered the second floor of the D building two days later, my hope just died. It's gone. That was also based on the behaviours of the young prison guards, so I completely lost my hope. They degraded us. It's indescribable, the way they treated us, the prisoners. Sometimes when we laid down, when they woke us up sometimes while it was just -- while we were asleep they suddenly woke us up and if we could not sit up on time then they used their rubber -- their tyre thongs to kick our heads. So with such a view for the last few days when I was there, I lost my hope and when I compared my detentions to the sector and the zone prison, I could not have any hope. The situation, the security was tight. We were forbidden [not] to talk to any other inmates and that at S-21 is where I really had the real test of being detained in the prison conditions. My hope was zero.")

[495] T., 29 June 2009 (VANN Nath), pp. 101-102; *see also* T., 21 July 2009 (PRAK Khan), p. 48. The Accused acknowledged being aware of these situations and, particularly in the case of important detainees such as KOY Thuon, he put in place measures to ensure that detainees could not commit suicide before completing the interrogation; *see* T., 15 June 2009 (Accused), pp. 87-88.

[496] T., 29 June 2009 (VANN Nath), pp. 20-21; *see also* pp. 90-91 ("It is only the comparison of our life during that time because we were entitled the status as human beings although we were detained, then we would be treated different from animals because even animals, domestic animals, would be fed or would be given food and would never been kicked days and nights like that. When human being was deprived of their movement and we were inflicted with tortures, physically and mentally, and that's why I could l presume that we were between animals and human beings."); *see also* T., 1 July 2009 (BOU Meng), p. 76; T., 30 June 2009 (CHUM Mey), pp. 34-35; T., 15 June 2009 (Accused), p. 86.

> when I was detained there. Even if you raise a pig you have to give food to the pig, but for me I only got a spoonful of very thin gruel."[497]

267. These S-21 survivors all spoke of the severe physical and mental harm suffered by all the detainees while in detention and its continuing impact throughout their lives.[498] Civil Party CHUM Mey described how he continues to suffer because of his detention:

> Whenever the word Tuol Sleng prison comes to my mind I could not hold my tears. It drops automatically. Every single day when I have heard about S-21, about Tuol Sleng, about torture, then my tears just keep flowing. And in my mind I do not know what's going to happen to me in the future, as I could not control my tears when I have heard such words. […] I was told [by the Trans-Cultural Psychosocial Organisation ("TPO")] that because of the anger of the trauma I suffered during the Khmer Rouge regime that I need to keep my mind free from those feelings. However hard I try, my tears still drop.[499]

2.4.5.2 Deprivation of adequate food

268. Food rations were extremely scarce and usually consisted of rice gruel, rice soup or banana stalk served twice a day. Guards would scoop the food from a bowl into mugs or plates and order the detainees in the common rooms to distribute it among themselves.[500] Due to the scarcity of food, detainees resorted to eating insects that fell on the floor, for

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[497] T., 30 June 2009 (CHUM Mey), pp. 64-65.

[498] T., 29 June 2009 (VANN Nath), pp. 54-55 ("Q. We have seen that you […] returned not too long after you left S-21, back to where S-21 was set up, to paint paintings. Your also partook in documentary films and I believe you also wrote a book. Can you tell us why it is so important for you to testify in this way? A. Your Honour, Mr. President, this is what I have thought since I was detained at S 21. I determined if one day I survived and had freedom and that I could leave that location, I would compile the events to reflect on what happened so that the younger generation knew - would know of our suffering […]. So I had to reveal, I had to write, I had to compile, and it can be served as a mirror to reflect to the younger generation of the lives of those who were accused with no reason, who committed no wrong, and that they were punished that way. That was the very suffering that we received and the suffering that we had because we told them the truth and they did not believe it. There was nothing else more than that. That's why I determined, I attempted, and I tried to explain to the younger children through various programs, through them, so that the younger generation would understand the experience so that they would consider and that they would try to avoid the repeat of such historical events."); T., 1 July 2009 (BOU Meng), pp. 61-62, 71-74, 85-86.

[499] T., 30 June 2009 (CHUM Mey), pp. 68-70.

[500] T., 29 June 2009 (VANN Nath), pp. 20, 28; T., 1 July 2009 (BOU Meng), pp. 15, 23; T., 3 August 2009 (LACH Mean), pp. 73-74; T., 5 August 2008 (NHEP Hau statement read), pp. 69-71; T., 10 August 2009 (CHHUN Phal), pp. 23, 55-56; T., 11 August 2009 (HAN Iem statement read), p. 105; T., 16 July 2009 (HIM Huy), p. 47.

which they could be beaten if a guard saw them.[501] Witness VANN Nath described being so hungry that if he had been offered human flesh, he would have eaten it.[502]

269. Consequently, detainees suffered severe weight loss and became extremely weak.[503] The Accused acknowledged that the deprivation of adequate and sufficient food was deliberate and meant to debilitate the detainees in order to maintain control over the prison population, prevent riots and facilitate the generation of confessions.[504]

2.4.5.3 Lack of sanitation and hygiene

270. Detainees were not permitted to wash in hygienic conditions. They were washed at irregular intervals when their cells were cleaned, by hosing water from a window or door. The detainees were allowed to stand up, but due to the chains and shackles they had difficulty removing their clothes completely, which became soaked with water. Civil Party BOU Meng recalled that when naked, detainees would be mocked and insulted by the guards who would comment on their physical appearance.[505]

271. Male detainees had beards and long hair, and many detainees developed skin rashes from lying on the wet floor. They were constantly bitten by mosquitoes and other insects.[506]

272. Detainees had to defecate and urinate in the cells, using ammunition boxes or other plastic containers.[507] Civil Party CHUM Mey described this as an extremely degrading

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[501] T., 29 June 2009 (VANN Nath), pp. 22, 69; T., 1 July 2009 (BOU Meng), p. 66; *see also* T., 22 June 2009 (Accused), pp. 13-14;
[502] T., 29 June 2009 (VANN Nath), p. 23.
[503] T., 1 July 2009 (BOU Meng), p. 15; T., 28 July 2009 (SUOS Thy), pp. 14, 22.
[504] T., 15 June 2009 (Accused), pp. 84-85, 92; T., 27 April 2009 (Accused), p. 23; *see also* T., 6 August 2009 (David CHANDLER), pp. 87-88.
[505] T., 29 June 2009 (VANN Nath), pp. 22, 30; T., 1 July 2009 (BOU Meng), pp. 25-26, 75-76; *see also* T., 15 June 2009 (Accused), pp. 40-41; T., 10 August 2009 (CHHUN Phal), pp. 23-25; T., 4 August 2009 (KHIEU Ches statement read), p. 68; T., 3 August 2009 (LACH Mean), pp. 74-75; T., 10 August 2009 (SAOM Met), p. 83.
[506] T., 29 June 2009 (VANN Nath), p. 22; T., 1 July 2009 (BOU Meng), pp. 21, 76.
[507] T., 1 July 2009 (BOU Meng), p. 22; T., 15 June 2009 (Accused), p. 42; T., 3 August 2009 (LACH Mean), p. 75; T., 5 August 2009 (NHEP Hau statement read), pp. 60-61; T.,10 August 2009 (SAOM Met), p. 83.

experience because of having to ask for the containers, and as it was done where they slept and ate and in the presence of the guards and other detainees.[508]

2.4.5.4 Deprivation of medical treatment

273. Detainees were provided with minimal or no medical treatment. Cuts, bruises and other injuries following torture were treated with salty water, inadequate medication or other locally-produced medicines of scant or no effectiveness. Due to the harsh conditions of detention, detainees developed skin rashes, malaria, diarrhoea and severe dehydration, which were generally left unattended or given insufficient treatment.[509] After the S-21 Medical Unit was purged, no medical treatment was provided to the detainees.[510]

274. The Accused indicated that the sole purpose of any medical treatment provided was to keep the detainees alive for their interrogations.[511]

2.4.5.5 Blood drawing and medical experiments

275. The Chamber has noted the practice of forced blood-drawing at S-21 (Section 2.4.1.6). The Accused has conceded that detainees were subjected to medical experiments, which frightened them since they were unaware of the nature of the medication given to them.[512] The Chamber finds that these acts caused the detainees serious mental suffering, in addition to any physical suffering they experienced.

2.4.5.6 Treatment of detainees at Choeung Ek and S-24

276. The Chamber has noted the conditions under which S-21 detainees were transported to and kept at Choeung Ek prior to their executions (Section 2.3.3.6), which would have

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[508] T., 30 June 2009 (CHUM Mey), pp. 34-35, 71.
[509] T., 3 August 2009 (SEK Dan), pp. 9-10, 17-19; T., 11 August 2009 (MAKK Sithim statement read), p. 41; T., 21 July 2009 (PRAK Khan), p. 45; T., 30 June 2009 (CHUM Mey), p. 27.
[510] T., 15 June 2009 (Accused), p. 93; T., 3 August 2009 (SEK Dan), pp. 6-7; T., 11 August 2009 (MAKK Sithim statement read), p. 37.
[511] T., 15 June 2009 (Accused), pp. 39, 92-93; T., 27 April 2009 (Accused), p. 23.
[512] In fact the paracetamol had been substituted by the Accused, who knew the medication to be harmless. T., 16 June 2009 (Accused), pp. 96-98.

caused them severe anguish. The Chamber further notes that it appears some detainees were aware of the reason for which they were being taken to Choeung Ek.[513]

277. The Chamber has noted the working conditions of detainees at S-24 (Sections 2.3.3.7 and 2.4.2.1). Former S-24 detainees also testified to the mistreatment they endured there. Witness BOU Thon was beaten, resulting in facial scarring, and felt "dehumanized because my life was in the hands of them and they could make any decision to kill me any time they wished to do so."[514] Witness PHAK Siek was detained at S-24 in March 1977 after her superior officer had been arrested. She was told that if the "leaders are traitors […] the subordinates are too"[515] but that "if you build yourself well, you will stay alive. If not, you will die."[516] She understood clearly that any offence such as eating crabs, snails, sugar palm or fruit would result in harsh punishment. On one occasion she observed a woman who emerged from overnight detention with a swollen face and was paraded as an enemy. Witness PHAK Siek was assigned weekly to burn the clothing of those who had been taken away and did not return.[517]

278. Other detainees were noticeably thin and fearful. Although they harvested rice and corn in abundance, they were not permitted to eat the produce.[518] Food, consisting of rice or thin gruel, was provided twice a day, but so-called bad elements received even less.[519] The Accused acknowledged that beatings were practiced on detainees placed in a detention room for failing to follow the discipline. Interrogation and torture also took place at S-24 but without his direct authorisation.[520] The Accused noted that starvation was a deliberate CPK policy applied at S-24, acknowledging that he delivered "surplus"

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513 T., 17 June 2009 (Accused), p. 43; T., 30 June 2009 (CHUM Mey), pp. 43-45, 79.
514 T., 12 August 2009 (BOU Thon), pp. 33-34.
515 T., 12 August 2009 (PHAK Siek statement read), p. 61.
516 T., 12 August 2009 (PHAK Siek statement read), p. 56.
517 T., 12 August 2009 (PHAK Siek statement read), p. 59.
518 T., 12 August 2009 (BOU Thon), pp. 28, 34; T., 8 July 2009 (CHIN Met), pp. 62-63.
519 "Written Record of Interview of Witness of BOU Thon", E3/493, ERN (English) 00163763; "Defence Position on the Facts Contained in the Closing Order, E5/11/6.1, para. 177; T., 1 April 2009 (Agreed Facts), p. 83; T., 8 July 2009 (CHIN Met), pp. 62-63.
520 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 232-234; T., 1 April 2009 (Agreed Facts), p. 92; T., 24 June (Accused), pp. 24-25, 40-41, 43; T., 25 June 2009 (Accused), p. 7; *see also* Section 2.3.3.7.

rice grown at S-24 to the Central Committee.[521] Nonetheless, he compared the food and medical care at S-24 favourably to that available to detainees at S-21.[522]

2.4.6 Persecution on political grounds

279. The Amended Closing Order states:

> 141. The judicial investigation demonstrated that detainees at S21 were denied fundamental rights including: life; liberty; security of person; due process; and freedom of movement. These fundamental rights were denied or infringed from the moment of their arrest and throughout their detention, interrogation, re-education or execution. Detainees were denied these fundamental rights based upon their real or perceived political beliefs or political opposition to those in power in the CPK. Detainees were subject to arbitrary and unlawful detention, torture, enslavement, murder, and other inhumane acts.
>
> 142. DUCH was aware of the discriminatory policies by which S21 operated, and his intent to discriminate in accordance with these policies can be inferred from his actions, his positions at S21, his status as a CPK Party member, and his relationships with the CPK leadership.[523]

280. The denial of fundamental rights to detainees at S-21 which the Amended Closing Order indicates amount to persecution comprises the discrete crimes against humanity of murder, extermination, enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts. The Chamber has already described the nature of these offences committed at S-21 and makes findings on whether they amount to persecution in Section 2.5.3.14.

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521 "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 177 – 178.
522 T., 24 June 2009 (Accused), pp. 22-24.
523 Amended Closing Order, paras 141-142.

2.5 Applicable Law and Findings on Crimes against humanity

281. The Chamber has subject-matter jurisdiction over crimes against humanity pursuant to Article 5 of the ECCC Law.[524] Article 5 of the ECCC Law provides:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.
>
> Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:
>
> - murder;
> - extermination;
> - enslavement;
> - deportation;
> - imprisonment;
> - torture;
> - rape;
> - persecutions on political, racial, and religious grounds;
> - other inhumane acts.

282. The Amended Closing Order charges the Accused with the following crimes against humanity: (i) murder; (ii) extermination; (iii) enslavement; (iv) imprisonment; (v) torture; (vi) rape; (vii) persecution on political grounds;[525] and (viii) other inhumane acts.[526]

283. As a preliminary matter, and in accordance with the principle of legality (Section 1.5), the Chamber must establish that these offences constituted crimes under national or international law during the 17 April 1975 to 6 January 1979 period.

284. Cambodian law contained no provisions relevant to crimes against humanity, nor was Cambodia between 1975 and 1979 a party to any international treaty relevant to these crimes. The Chamber must therefore consider whether crimes against humanity as defined in Article 5 of the ECCC Law formed part of customary international law during this period.

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[524] *See* ECCC Agreement, Article 2.2.
[525] The Amended Closing Order indicts the Accused for persecution only on political grounds, which is narrower than the offence of persecution as envisaged by Article 5 of the ECCC Law.
[526] Amended Closing Order, pp. 44-45.

285. The notion of crimes against humanity as an independent juridical concept, and the imputation of individual criminal responsibility for their commission, was first recognised in Article 6(c) of the Charter of the International Military Tribunal for the Trial of the Major War Criminals annexed to the London Agreement of 8 August 1945 ("Nuremberg Charter" and "Nuremberg Tribunal"),[527] which granted the Nuremberg Tribunal jurisdiction over this crime. Crimes against humanity were included as a distinct category of crime in the Nuremberg Charter so that acts by perpetrators against their fellow nationals, which might not otherwise have been covered by traditional formulations of war crimes, would not escape prosecution by the Nuremberg Tribunal.[528]

286. Jurisdiction over crimes against humanity was also included in Article 5(c) of the Charter of the International Military Tribunal for the Far East of 19 January 1946 ("Tokyo Charter")[529] and in Law No. 10 of the Control Council for Germany ("Control Council Law No. 10"),[530] which were utilised for additional prosecutions for atrocities committed during the Second World War.

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[527] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945 (82 UNTS 279). Article 6(c) of the Nuremberg Charter described crimes against humanity as: "murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war[,] or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of [the] domestic law of the country where perpetrated"; *see also* Protocol Rectifying Discrepancy in Text of Charter, 6 October 1945, reprinted in *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946*, Vol. 1, pp. 17-18.

[528] *See Prosecutor v. Tadić*, Opinion and Judgment, ICTY Trial Chamber (IT-94-1-T), 7 May 1997 ("*Tadić* Trial Judgement"), paras 618-619.

[529] Annexed to the Special Proclamation of 19 January 1946 by the Supreme Commander of the Allied Powers in the Far East. Article 5(c) of the Tokyo Charter described crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

[530] Control Council Law No. 10 (1945), reprinted in *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. I, pp. XVI-XIX. Article II of Control Council Law No. 10 described crimes against humanity as: "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

287. The prohibition of crimes against humanity was subsequently affirmed by the General Assembly[531] and by the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal ("Nuremberg Principles"), adopted by the International Law Commission in 1950 and submitted to the General Assembly.[532] The General Assembly further proclaimed the need for international cooperation in the detection, arrest, extradition and punishment of persons guilty of crimes against humanity.[533]

288. Following the Nuremberg-era tribunals, codifications of international law on genocide and apartheid, two of crimes against humanity's most egregious manifestations, confirmed the customary status of the prohibition of crimes against humanity.[534] Criminal prosecutions for crimes against humanity also continued domestically in the decades after the Second World War.[535]

289. More recently, jurisdiction over crimes against humanity was provided for in the Statutes of the ICTY,[536] the International Criminal Tribunal for Rwanda ("ICTR"),[537] the Special Court for Sierra Leone ("SCSL")[538] and the ICC.[539] These international criminal

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[531] Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, UNGA Res. 95 (I) of 11 December 1946.
[532] International Law Commission Report on the Nuremberg Principles, 5 UN GAOR, Supp. No. 12, UN Doc. A/1316 (1950).
[533] Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, UNGA Res. 3074 (XXVIII) of 3 December 1973; *see also* UNGA Res. 2712 (XXV) of 15 December 1970.
[534] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 1; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article I.
[535] *See e.g.,* the *Attorney-General of the Government of Israel v. Adolph Eichmann* (1962), 36 ILR 277.
[536] Article 5 of the ICTY Statute ("The [ICTY] shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.")
[537] Article 3 of the ICTR Statute ("The [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.")
[538] Article 2 of the SCSL Statute ("The [SCSL] shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape,

tribunals have reaffirmed the continued customary status of crimes against humanity under international law.[540] As stated by the Trial Chamber of the ICTY in its *Tadić* judgment, "since the [Nuremberg] Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned."[541]

290. While consistently forming part of customary international law since the Nuremberg Charter, crimes against humanity have been variously defined and its elements have been refined throughout the years. This reflects both the crime's customary nature and the fact that the tribunals' jurisdictions over the crime were not always co-extensive with the full scope permitted under customary international law.[542] The principle of legality prevents neither a reliance on unwritten custom nor a determination through a process of interpretation and clarification as to the elements of a particular crime. As detailed below, the formulation of crimes against humanity adopted in Article 5 of the ECCC Law comports with that existing under customary international law during the 1975 to 1979 period.

291. In particular, the Chamber notes that Article 5 of the ECCC Law does not require a link between crimes against humanity and armed conflict. Although Article 6(c) of the Nuremberg Charter required a nexus between crimes against humanity and armed conflict,[543] such a nexus was not included in the 1945 Control Council Law No. 10,[544] the

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sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecution on political, racial, ethnic or religious grounds; (i) Other inhumane acts.")

[539] Article 7 of the ICC Statute ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […].")

[540] *Tadić* Trial Judgement, para. 623; *Akayesu* Appeal Judgement, paras 465-466; *Prosecutor v. Sesay et al.,* Judgement, SCSL Trial Chamber (SCSL-04-15-T), 2 March 2009 ("*Sesay* Trial Judgement"), paras 57-59; *see also* Article 7 (Crimes against humanity) Introduction, of the ICC's "Elements of Crimes" (ICC-ASP/1/3 (part II-B), entry into force 9 September 2002), para. 1.

[541] *Tadić* Trial Judgement, para. 623.

[542] *See e.g., Prosecutor v. Akayesu*, Judgment, ICTR Appeals Chamber (ICTR-96-4-A), 1 June 2001 ("*Akayesu* Appeal Judgement"), para. 465 (noting that the discriminatory grounds requirement in Article 3 of the ICTR Statute and the armed conflict requirement in Article 5 of the ICTY Statute were jurisdictional in nature and not part of the customary international law definition of crimes against humanity).

[543] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Article 6(c) (stating that crimes against humanity must be carried out "in execution of or in connection with [a war crime or a crime against peace].")

1948 Convention on the Prevention and Punishment of the Crime of Genocide,[545] the 1954 International Law Commission's Draft Code of Offenses against the Peace and Security of Mankind,[546] the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[547] and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.[548] The notion of armed conflict also does not form part of the current-day customary definition of crimes against humanity.[549]

292. International tribunals that have subsequently considered the issue have also found that the notion of crimes against humanity existed independently from that of armed conflict under customary international law prior to 1975. The ICTY Appeals Chamber has stated that the armed conflict requirement in Article 6(c) of the Nuremberg Charter was a jurisdictional issue, thus implying that it was not required under customary international law even in 1945.[550] The Grand Chamber of the European Court of Human Rights has noted that, while the nexus with armed conflict initially formed part of the customary definition of crimes against humanity, this nexus may no longer have been relevant as of 1956.[551] The Group of Experts for Cambodia appointed pursuant to General Assembly Resolution 52/135 similarly concluded that "[t]he bond between crimes against

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[544] *See Ohlendorf and Others Case ('Einsatzgruppen case')*, Judgment of 8-9 April 1948, *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. IV, p. 499 (finding that Control Council Law No. 10 was not limited to offences committed during or in connection with the war); *see, however, Flick and Others Case*, Judgment of 22 December 1947, *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. VI, pp. 1212-1214.

[545] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 1.

[546] UN Doc A/2693 (1954); *see also* the 1991 and 1996 versions of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (UN Docs A/46/10 (1991) and A/51/10 (1996), respectively), which also do not contain an armed conflict nexus.

[547] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UNGA Res. 2391 (XXVIII) of 26 November 1968, Annex, Article I(b) (concerning crimes against humanity "whether committed in time of war or in time of peace.")

[548] International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article I.

[549] *See Prosecutor v. Tadić*, Judgement, ICTY Appeals Chamber (IT-94-1-A), 15 July 1999 ("*Tadić* Appeal Judgement"), para. 249; *see also* the Statutes of the ICTR, SCSL and of the ICC, none of which link crimes against humanity to armed conflict.

[550] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 140.

[551] *Korbely v. Hungary*, Judgement, ECtHR Grand Chamber (no. 9174/02), 19 September 2008, para. 82.

humanity and armed conflict appears to have been severed by 1975."[552] The Chamber therefore considers that the lack of any nexus with armed conflict in Article 5 of the ECCC Law comports with the customary definition of crimes against humanity during the 1975 to 1979 period.

293. Further, the underlying offences with which the Accused is charged pursuant to Article 5 of the ECCC Law have been recognised since the Nuremberg-era tribunals as constituting crimes against humanity and prosecuted as such where the crime's *chapeau* requirements are otherwise satisfied. The offences of murder, extermination, enslavement, other inhumane acts and persecution on political grounds were explicitly included as constituting crimes against humanity in Article 6(c) of the Nuremberg Charter, Article 5(c) of the Tokyo Charter and Article II of Control Council Law No. 10. The offences of imprisonment, torture and rape were also explicitly included as constituting crimes against humanity in Article II of Control Council Law No. 10 and were subsumed as other inhumane acts in Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter. The Statutes of the ICTY, ICTR, SCSL and of the ICC include all of these underlying offences as crimes against humanity.

294. It was thus foreseeable during the 1975 to 1979 period that the Accused could be held criminally liable for the offences with which he is charged pursuant to Article 5 of the ECCC Law. The law providing for the Accused's criminal responsibility was also sufficiently accessible considering its international customary basis.

295. In addition, the appalling nature of the offences charged pursuant to Article 5 of the ECCC Law helps to refute any claim that the Accused would have been unaware of their criminal nature.[553]

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[552] Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 (annexed to document A/53/850-S/1999/231), 18 February 1999, para. 71.

[553] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Odjanović's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 42 (noting that the immorality or appalling character of an act may play a role in refuting any claim that its perpetrator did not know of its criminal nature).

296. The Chamber finds that, at all times relevant to the Amended Closing Order, offences charged against the Accused pursuant to Article 5 of the ECCC Law constituted crimes under international law.

2.5.1 Chapeau requirements for Article 5 of the ECCC Law

297. Offences listed in Article 5 of the ECCC Law can constitute crimes against humanity only if the following *chapeau* prerequisites are established to the required standard: (i) there must be an attack; (ii) it must be widespread or systematic; (iii) it must be directed against any civilian population; (iv) it must be on national, political, ethnical, racial or religious grounds; (v) there must be a nexus between the acts of the accused and the attack; and (vi) the accused must have the requisite knowledge.[554]

2.5.1.1 Attack

298. An attack is a course of conduct involving the multiple commission of acts of violence.[555] The acts which constitute an attack need not themselves be punishable as crimes against humanity. They will nevertheless often be of the kind of mistreatment listed as an underlying offence in Article 5 of the ECCC Law. The accused does not have to commit all of the acts of violence that make up the attack – the accused's acts need only be part of the broader attack. There may exist, within a single attack, a combination of acts of violence, for example acts of murder, rape and torture.[556]

299. Although the notion of an attack is distinct from that of armed conflict, an attack on a civilian population may precede, outlast or continue through an armed conflict.[557]

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[554] Article 5 of the ECCC Law also requires that crimes against humanity be committed during the period of 17 April 1975 to 6 January 1979 (Section 1.4.1).
[555] *Prosecutor v. Nahimana et al.,* Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 918.
[556] *Nahimana* Appeal Judgement, para. 917-918, *citing Prosecutor v. Kayishema et al.,* Judgement, ICTR Trial Chamber (ICTR-95-1-T), 21 May 1999 ("*Kayishema et al.* Trial Judgement"), para. 122.
[557] *Prosecutor v. Kunarac et al.,* Judgement, ICTY Appeals Chamber (IT-96-23 & IT-96-23/1-A), 12 June 2002, para. 86 ("*Kunarac* Appeal Judgement"); *Sesay* Trial Judgement, paras 77, 949.

2.5.1.2 Widespread or systematic

300. In accordance with customary international law, the attack must be either widespread *or* systematic.[558] The term "widespread" refers to the large-scale nature of the attack and the number of victims, while the term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[559] While the requirements are alternatives, in practice these criteria may often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. A widespread attack may refer either to the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[560]

301. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, or any identifiable patterns of crimes may be taken into account to determine whether the attack satisfies either or both of the "widespread" or "systematic" requirements.[561] While the existence of a policy or plan may be evidentially relevant in establishing the widespread or systematic nature of the attack, it does not constitute an independent legal element of the crime.[562] Only the attack, not the underlying acts, need be widespread or systematic.[563]

2.5.1.3 Directed against any civilian population

302. The attack must be directed against any civilian population. The "population" element is intended to imply crimes of a collective nature and excludes single or isolated

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[558] *Tadić* Trial Judgement, paras 646-648; *Prosecutor v. Akayesu,* Judgement, ICTR Trial Chamber (ICTR-96-4-T), 2 September 1998 ("*Akayesu* Trial Judgement"), para. 579 fn. 144.
[559] *Kunarac* Appeal Judgement, para. 94; *Nahimana* Appeal Judgement, para. 920; *Sesay* Trial Judgement, para. 78.
[560] *Blaškić* Trial Judgement, para. 206.
[561] *Kunarac* Appeal Judgement, para. 95.
[562] *Kunarac* Appeal Judgement, para. 98 fn. 114; *Gacumbitsi* Appeal Judgement, para. 84; *Sesay* Trial Judgement, para. 79.
[563] *Kunarac* Appeal Judgement, para. 96; *Gacumbitsi* Appeal Judgement, para. 102; *Sesay* Trial Judgement, para. 89.

acts, which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.[564]

303. The use of the term "population" does not mean that the entire population of the geographical entity in which the attack took place must be subjected to that attack. It is "sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population' as opposed to a limited and randomly-selected number of individuals."[565]

304. Civilian status is defined through the provisions of the law of armed conflict, particularly Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention, which establish that members of the armed forces and other combatants (militias, volunteer corps and members of organized resistance groups) cannot claim civilian status. The civilian population therefore includes all persons who are not members of the armed forces or otherwise recognised as combatants.[566] Members of the armed forces are not considered "civilians" merely because they were not engaged in combat at the time of their arrests. Accordingly, soldiers *hors de combat* do not qualify as civilians for the purposes of Article 5 of the ECCC Law.[567] As a general presumption, the armed law enforcement agencies of a State are considered to be civilians for purposes

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564 *Tadić* Trial Judgement, paras 644 and 648.

565 *Kunarac* Appeal Judgement, para. 90; *Prosecutor v. Sesay et al.*, Judgement, SCSL Appeals Chamber (SCSL-04-15-A), 26 October 2009 ("*Sesay* Appeal Judgement"), para. 719.

566 *Prosecutor v. Blaškić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004 ("*Blaškić* Appeal Judgement"), paras 110-113; *Sesay* Trial Judgement, para. 82.

567 *Prosecutor v. Mrkšić et al.*, Judgement, ICTY Appeals Chamber (IT-95-13/1-A), 5 May 2009 ("*Mrkšić* Appeal Judgement"), para. 35 (reversing the Trial Chamber's more expansive definition of civilians on the basis of accepted principles of customary international law); *see also Blaškić* Appeal Judgement, para. 110. *See however* Common Article 3 of the Geneva Conventions, which provides that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." That these persons are protected in armed conflicts reflects a principle of customary international law (*ibid.,* para. 113, footnote 220).

of international humanitarian law.[568] A person shall be considered to be a civilian for as long as there is doubt as to his or her status.[569]

305. The jurisprudence of the *ad hoc* Tribunals has stressed that this population must be "predominantly civilian" and "the primary object of the attack."[570] This does not imply that the population shall be comprised only of civilians. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[571] The civilian status of the victims, the number of civilians, and the proportion of civilians within a population are factors relevant to the determination of whether the requirement that an attack be directed against a "civilian population" is fulfilled.[572]

306. For the purposes of this *chapeau* requirement, the *ad hoc* Tribunal jurisprudence has evaluated situations in which civilians and soldiers co-exist within the same geographical area subjected to an attack, and where victims of alleged crimes against humanity comprise both civilians and military personnel.[573] The ICTY Appeals Chamber has noted that when discussing "whether a population is civilian based on the proportion of civilians and combatants within it, that is, [where] the status of the population has yet to be determined or may be changing due to the flow of civilians and military personnel", it is inevitable in wartime conditions that combatants may become intermingled with the civilian population. However, "provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population."[574]

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[568] *Sesay* Trial Judgement, para. 87 (noting that this same presumption will not exist for forces that operate under the control of the military.)
[569] *Blaškić* Appeal Judgement, para. 111.
[570] *Kunarac* Appeal Judgement, para. 91.
[571] Article 50(3) of Additional Protocol I; *see also Mrkšić* Appeal Judgement, para. 25; *Sesay* Trial Judgement, para. 87.
[572] *Mrkšić* Appeal Judgement, paras 32-33 and 36 (finding that of the 194 persons taken from the Vukovar hospital and later executed by Serb forces on 20 November 1991, 181 were known to be active in the Croatian forces in Vukovar and were thus predominantly non-civilian).
[573] *See e.g., Prosecutor v. Dragomir Milošević,* Judgement, ICTY Appeals Chamber (IT-98-29/1-A), 12 November 2009 ("*Dragomir Milošević* Appeal Judgement"), paras 50, 139 (determining the population of Sarajevo to have preserved its civilian status despite the stationing of approximately 40,000 to 45,000 Bosnian Army troops within the city and the continual flow of civilians and combatants due to wartime conditions).
[574] *Prosecutor v. Galić,* Judgement, ICTY Appeals Chamber (IT-98-29-A), 30 November 2006, para. 137.

307. Although this jurisprudence has not directly considered a situation in which the entire population of a territory – including both civilian and military elements – is encompassed within an attack, the Chamber finds that the following relevant principles may be distilled from this jurisprudence when determining whether such an attack may be considered to have been "directed against" a civilian population for the purposes of Article 5 of the ECCC Law.

308. When considering the general requirements of crimes against humanity, the laws of armed conflict play an important role in the assessment of the legality of the acts committed in the course of a conflict and whether the civilian population may be described as having been targeted as such.[575] The relevant jurisprudence has accordingly emphasised that in the context of a crime against humanity, the civilian population must be the primary object of an attack.[576] In this regard, the expression "directed against" a civilian population serves to clarify that "customary international law obliges parties to the conflict to distinguish at all times between the civilian population and combatants, and obliges them not to attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage anticipated."[577]

Consequently, "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined" (*Blaškić* Appeal Judgement, para. 115); *see also Prosecutor v. Mrkšić et al.*, Judgement, ICTY Trial Chamber (IT-95-13/1-T), 27 September 2007 ("*Mrkšić* Trial Judgement"), paras 468-472 (although no exact count of the number of civilian and combatant casualties was possible, the attack by Serb forces was described as an attack against the Croat and other non-Serb civilian population in the wider Vukovar area, given its clearly unlawful character, extensive damage caused to civilian property, and the number of civilians killed, wounded or displaced).

575 *Prosescutor v. Galić,* Judgement, ICTY Trial Chamber (IT-98-29-T), 5 December 2003 ("*Galić* Trial Judgement"), para. 144 (noting that in the context of an armed conflict, the determination that an attack is unlawful in light of the law of armed conflict is critical in determining whether the general requirements of crimes against humanity have been met. Otherwise, unintended civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity and lawful combat would, in effect, become impossible).

576 *Kunarac* Appeal Judgement, para. 91 ("to the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."); *see also Mrkšić* Appeal Judgement, para. 23.

577 *Prosecutor v. Kunarac,* Judgement, ICTY Trial Chamber (IT-96-23-T and IT-96-23/1-T), 22 February 2001 ("*Kunarac* Trial Judgement"), para. 426.

309. The factors relevant to determining whether the attack was so directed include: the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, and the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[578]

310. The prohibition against targeting the civilian population does not exclude the possibility of civilian casualties incidental to an attack aimed at legitimate military targets. However, indiscriminate attacks, that is attacks that affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians.[579] Where the civilian population is the intended target of an attack, this jurisprudence has not, however, required that the civilian population be the *sole or exclusive* object of that attack.

311. Where the civilian population is the object of an attack, the ICTY Appeals Chamber has further clarified that "there is no requirement nor is it an element of crimes against humanity that the *victims* of the underlying crimes be civilians."[580] Thus, a soldier who is *hors de combat* may be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met.[581]

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[578] *Mrkšić* Appeal Judgement, para. 25.

[579] *Prosecutor v. Martić*, Judgement, ICTY Appeals Chamber (IT-95-11-A), 8 October 2008 ("*Martić* Appeal Judgement"), paras 255, 259-261 (endorsing the Trial Chamber's finding that the shelling of Zagreb to amount to a widespread attack directed against a civilian population "due to the characteristics of the weapon used and the large-scale nature of the attack"); *see also Galić* Trial Judgement, para. 60 ("certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack"); *Prosecutor v. Strugar*, Judgement, ICTY Appeals Chamber (IT-01-42-A), 17 July 2008 ("*Strugar* Appeal Judgement"), para. 275 ("the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population").

[580] *Mrkšić* Appeal Judgement, para. 32 (emphasis added); *see also Dragomir Milošević* Appeal Judgement, para. 96 (where finding that attacks were directed against the civilian population, a Chamber is not required to find that all victims of individual crimes were civilians).

[581] *Martić* Appeal Judgement, paras 309-313; *see also Sesay* Trial Judgement, para. 82 (affirmed in *Sesay* Appeal Judgement, para. 1069); *cf. Mrkšić* Appeal Judgement, paras 36, 42-43 (acquittals for crimes against humanity upheld as the crimes in question were directed against a specific group of individuals selected on the basis of their perceived involvement in the Croatian armed forces. As such, they were treated differently from the civilian population of Vukovar and these crimes were not intended to form part of the broader attack against the civilian population. There was accordingly no nexus between the acts of

312. The reference to "any" civilian population ensures that the nationality or ethnicity of the population is immaterial. Provided the victims were targeted as part of an attack against a civilian population, it is unnecessary to demonstrate that they were linked – politically, ethnically, or otherwise – to any particular group.[582] Crimes against humanity may therefore include a State's attack on its own population.[583]

2.5.1.4 On national, political, ethnical, racial or religious grounds

313. Article 5 of the ECCC Law further requires that the acts be "committed as part of a widespread or systematic attack directed against any civilian population, *on national, political, ethnical, racial or religious grounds*."[584] The Chamber interprets Article 5 of the ECCC Law as an added jurisdictional requirement which goes to the nature of the attack, not to the underlying offences.[585] The Chamber notes that any discriminatory basis requirement under the Nuremberg Charter, the Tokyo Charter and Control Council Law No. 10 was limited to the underlying offence of persecution, for which a discriminatory intent was specifically required. All other offences as crimes against humanity in these instruments existed independently of any discriminatory basis.

314. Aside from the ECCC Law, the sole other instance of where a discriminatory requirement has been required in relation to the *chapeau* requirements of crimes against humanity is the ICTR Statute.[586] Despite differences in wording of both provisions, the

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the accused and the attack itself or between the crimes committed against the prisoners at Ovčara and the widespread or systematic attack against the civilian population of Vukovar).

[582] *Kunarac* Trial Judgement, para. 423; *see also Attorney-General of the State of Israel v. Enigster,* District Court of Tel Aviv, 4 January 1952. *See further Prosecutor v. Semanza,* Judgement and Sentence, ICTR Trial Chamber (ICTR-97-20-T), 15 May 2003 ("*Semanza* Trial Judgement"), para. 330 ("victim[s] of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack").

[583] *Mrkšić* Trial Judgement, para. 441 (noting that historically, one of the main distinguishing factors between war crimes and crimes against humanity was that the former could only be committed against enemy nationals, whereas crimes against humanity could also be committed against the state's own population).

[584] Emphasis added; *cf.* French and Khmer versions of Article 5 of the ECCC Law

[585] *See also* Article 9 of Agreement (referring to "crimes against humanity as defined in the 1998 Rome Statute of the ICC", whose definition of crimes against humanity also limits any discriminatory requirement to the underlying offence of persecution).

[586] Article 3 of ICTR Statute provides that "[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or

discriminatory grounds contained in the *chapeau* provisions of Article 5 of the ECCC are similar to those listed in Article 3 of the ICTR Statute. They constitute a jurisdictional requirement that narrows the scope of the ECCC's jurisdiction over crimes against humanity further than would otherwise have been necessary under customary international law during the 1975 to 1979 period. Subsequent jurisprudence from international criminal tribunals, as well as the ICC Statute, has since clarified that except in the case of persecution, a discriminatory intent is not required by customary international law as a legal ingredient for all crimes against humanity.[587] A contrary interpretation would add a requirement of discriminatory intent with respect to all crimes against humanity, rendering redundant the express reference to discrimination within the offence of persecution in Article 5 of the ECCC Law.[588]

315. The required discriminatory grounds have been interpreted broadly and have also included negatively-defined groups or individuals such as victims of acts which "were manifestly part of the generalised and systematic attack [by Serb forces] launched against the non-Serb civilian population of the Foča municipality."[589]

316. The *Josef Altstötter and Others* case identified opposition to political ideas as the relevant discriminatory basis in relation to the specific offence of persecution. In addressing generally the notion of discrimination on political grounds, the Nuremberg Tribunal noted as follows:

> Coming into the category of cases upon political grounds, we must remember that "political" in Law No. 10, written to apply in the Third Reich, cannot be read in the sense of "political" as it is known in countries which enjoy a two or more party system. "Political" as all Nazi

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systematic attack against any civilian population *on national, political, ethnic racial or religious grounds*: …." (emphasis added).

[587] *See Tadić* Appeal Judgement, para. 305; *Prosecutor v Bagosora et al.,* Judgement, ICTR Trial Chamber (ICTR-98-41-T), 18 December 2009 ("*Bagosora* Trial Judgement"), paras 2166, 2208 (noting that the additional *chapeau* requirement that crimes against humanity have to be committed "on national, political, ethnic, racial or religious grounds" does not mean that a discriminatory intent must be established) and Article 7(1)(h) of the ICC Statute.

[588] The *chapeau* in Article 5 of the ECCC Law refers to discrimination on "national, political, ethnical, racial or religious grounds" while the offence of persecution listed thereunder refers to discrimination on "political, racial, and religious grounds".

[589] *Prosecutor v. Krnojelac,* Judgement, ICTY Trial Chamber (IT-97-25-T), 15 March 2002 ("*Krnojelac* Trial Judgement"), para. 50.

> judges construed it – and the defendant Cuhorst construed it – meant any person who was opposed to the policies of the Third Reich, and being opposed to the policies of the Third Reich was in turn construed as meaning the doing of an act which was contrary to the successful conduct of the war.[590]

317. ICTY Trial Chambers have subsequently found that the targeted group may include persons who are "defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group," on grounds that "it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status."[591] Persons "suspected of being members of these [religious, political or ethnic] groups are also covered as possible victims of discrimination", and the required element of discrimination is met "even if the suspicion proves inaccurate."[592] Where the perception of the perpetrator provides the basis of the discrimination in question, the consequences are real for the victim even if the perpetrator's classification may be incorrect under objective criteria.[593]

2.5.1.5 Nexus between the acts of the accused and the attack

318. The acts of the accused must, by their nature or consequences, objectively be a part of the attack, such that they are not wholly divorced from the context of the attack.[594] A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. The crime

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[590] *Judgement of Josef Altstotter and others*, Law Reports of Trials of War Criminals, vol. 6, p. 81, fn. 1 (noting that the death sentence against a 65 year old senile man for taking cigarettes from postal packages was an act of extermination on political grounds, noting that the victim "was a rather useless eater, and for this reason, he would constitute a person in the community who should be exterminated by Cuhorst's standards …. [I]n addition, his taking of cigarettes that were allegedly intended for soldiers certainly constituted political opposition to the aims of the Reich as Cuhorst saw it, and justified his death sentence on that ground.")

[591] *Prosecutor v. Naletilić et al.,* Judgement, ICTY Trial Chamber (IT-98-34-T), 31 March 2003 ("*Naletilić* Trial Judgement"), para. 636.

[592] *Prosecutor v. Kvočka,* Judgement, ICTY Trial Chamber (IT-98-30/1-T), 2 November 2001, para. 195 ("*Kvočka* Trial Judgement").

[593] *Naletilić* Trial Judgement, para. 636, fn. 1572: "[T]his interpretation [is] consistent with the underlying ratio of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. … [I]n such cases, a factual discrimination is given as the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator."

[594] *Kunarac* Appeal Judgement, para. 99.

must not, however, be an isolated act. A crime would be regarded as an isolated act when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[595]

2.5.1.6 Knowledge requirement

319. It may be inferred from Article 5 of the ECCC Law that, in order to convict, an accused must have known that there is an attack on the civilian population and that his acts are a part thereof.[596] The accused needs to understand the overall context in which the acts took place, but need not know the details of the attack or share the purpose or goal behind the attack.[597] It is irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim.[598] Evidence of knowledge depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary according to the circumstances.[599]

2.5.2 Findings on chapeau requirements for Article 5 of the ECCC Law

2.5.2.1 Attack

320. The Chamber has described the broader events in Cambodia, and hence the fate that befell the entire Cambodian population, between April 1975 and January 1979. Against the backdrop of an international armed conflict (Section 2.1), this included the KPNLAF entry into Phnom Penh and seizure of power on 17 April 1975, the forcible transfer of residents of Phnom Penh and other "Khmer Republic strongholds" to the countryside, enforced labour under extremely difficult conditions, dismantling of the judiciary and other organs of state, and the parallel construction of institutions and structures designed

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[595] *Kunarac* Appeal Judgement, para. 100; *Mrkšić* Appeal Judgement, para. 41; *Semanza* Trial Judgement, para. 326.
[596] *See Blaškić* Appeal Judgement, para. 126; *Prosecutor v. Gacumbitsi,* Judgement, ICTR Appeals Chamber (ICTR-2001-64-A), 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), para. 86; *Sesay* Trial Judgement, para. 90.
[597] *Kunarac* Appeal Judgement, paras 102-103; *Sesay* Trial Judgement, para. 90.
[598] *Kunarac* Appeal Judgement, para. 103.
[599] *Blaškić* Appeal Judgement, para. 126.

to consolidate and reinforce total control of the country by the CPK (Section 2.2). It was squarely within this context that S-21 was created and operated (Section 2.3).

2.5.2.2 Widespread or systematic

321. Paragraph 132 of the Amended Closing Order characterised the crimes committed at S-21 as constituting a "discrete widespread or systematic attack against the civilian population detained therein." The Chamber agrees with the Co-Investigating Judges that the magnitude and number of the crimes committed at S-21, and their organized and prolonged character ensure that taken as a whole, they were sufficient to meet the requirements of scale or systematicity for the purposes of crimes against humanity.

2.5.2.3 Directed against any civilian population

322. Although the attack on the Cambodian population occurred in parallel with an international armed conflict between Cambodia and Vietnam, in fact the CPK primarily targeted its own nationals. This attack, which was mirrored within S-21, was against "enemies" of the regime, whether they were civilians or members of the former LON Nol or RAK military personnel (Sections 2.2.5.2, 2.2.6, 2.3.3.4.2 and 2.5.3.14.1).

323. The Chamber has found that those detained at S-21 were drawn from all parts of the country and from all sectors of Cambodian society (Section 2.3.3.4.2). The testimony of an extremely small number of survivors and an examination of the prisoner lists confirm that Cambodian nationals detained and executed at S-21 included officials from DK government offices, as well as ordinary citizens such as farmers, teachers, professors, students, doctors, lawyers and engineers. The relatives and subordinates of these nationals were also detained. Ordinary citizens who testified at trial and confirmed much of this analysis included Witnesses VANN Nath, and NORNG Chanphal, and Civil Parties BOU Meng and CHUM Mey.[600]

324. Although there were significant numbers of Cambodian military personnel among the detainees, their approximate numbers and exact percentages were unable to be

[600] *See generally* T., 29 June 2009 (VANN Nath); T., 30 June 2009 (CHUM Mey); T., 1 July 2009 (BOU Meng); T., 2 July 2009 (NORNG Chanphal).

determined (Section 2.3.3.4.2). Former LON Nol military personnel (and their subordinates and family members) were assumed to oppose the CPK. The RAK soldiers were targeted not as part of any military offensive but as the result of internal purges directed at both civilian and military perceived as "enemies" of the regime (Sections 2.2.5.2 and 2.5.3.14.1).

325. The Chamber finds that the attack was directed at the entire Cambodian population and did not differentiate between military and civilian personnel. Crimes against humanity were therefore committed against a collectivity of persons at S-21, and were all-encompassing, engulfing both civilian and military elements without distinction. The attack can accordingly be said to have been directed against a civilian population.

2.5.2.4 On national, political, ethnical, racial or religious grounds

326. Vietnamese prisoners of war and civilians as well as their family members and a limited number of other foreign nationals were also detained at S-21 (Sections 2.3.3.4.2 and 2.4.1.1). The Vietnamese detainees were considered to be external enemies who threatened the CPK regime by reason of the armed conflict between Vietnam and Cambodia (Section 2.1), while some of the other nationals appear to have been detained on suspicion of spying for foreign governments as members of the CIA or KGB (Section 2.5.3.14.1).

327. There is no evidence that enables the Chamber to conclude that there was a common linking factor among those detained, other than their perceived opposition to the CPK (Section 2.5.3.14.1). They were all classified as "enemies" by the CPK, even if in fact, they were not opposed to the regime (Section 2.5.3.14.2). The justification for the attack was ideologically-driven, seeking to detain, and either reform or eliminate, all real or perceived adversaries of the CPK (Sections 2.2.5.2 and 2.2.6). The Chamber accordingly finds that the attack in question was carried out, at a minimum, on political grounds.

2.5.2.5 Nexus between the acts of the Accused and the attack

328. The evidence satisfies the Chamber that S-21 was an integral part of the CPK political and military structure, and was considered vital to achieving the Party's political

objectives (Sections 2.2.5 and 2.3.3.1). It implemented CPK policies such as the "smashing" of CPK enemies (Section 2.2.5.2). The Accused's role as Chairman of S-21, reporting directly to members of the Standing Committee, gave him a unique vantage-point from which to implement this policy. The Chamber infers that he was aware of the objectives of this policy and that S-21 was an important component in implementing it.

2.5.2.6 The Accused's knowledge

329. The Accused was also aware of the wider attack against the Cambodian civilian population and that politically-motivated or arbitrary extra-judicial killings were committed by military units throughout Cambodia and were continued in security centres, of which S-21 was an important example (Section 2.2.5.2). He implemented the procedures introduced at M-13 to detain, interrogate, and execute every person who came through the gates of S-21 (Sections 2.3.2 and 2.2.5.2). He was familiar with the accusations against the detainees, knew that a significant proportion were false, yet strictly implemented the policy of detention and execution (Sections 2.4.1, 2.4.3 and 2.5.3.14.1). The Chamber accordingly finds that the Accused knew the purposes that S-21 served in supporting and implementing the attack, and intended his actions to contribute to that purpose.

2.5.3 Law and findings on offences as crimes against humanity

330. The Amended Closing Order charges the Accused with the following crimes against humanity: (i) murder; (ii) extermination; (iii) enslavement; (iv) imprisonment; (v) torture; (vi) rape; (vii) persecution on political grounds; and (viii) other inhumane acts.

2.5.3.1 Murder and extermination

331. Murder, a well-established crime under customary international law,[601] requires the death of the victim resulting from an unlawful act or omission by the perpetrator.[602] The

[601] *Prosecutor v. Vasiljević,* Judgement, ICTY Trial Chamber (IT-98-32-T), 29 November 2002 ("*Vasiljević* Trial Judgement"), para. 205; *Sesay* Trial Judgement, para. 137; *Akayesu* Trial Judgement, para. 587.
[602] *Prosecutor v. Fofana et al.*, Judgement, SCSL Trial Chamber (SCSL-04-14-T), 2 August 2007 ("*Fofana* Trial Judgement"), para. 143; *Prosecutor v. Kvočka et al.,* Judgement, ICTY Appeals Chamber

conduct of the perpetrator must have contributed substantially to the death of the victim.[603]

332. The elements of murder can be satisfied whether or not it is shown that a victim's body has been recovered.[604] The fact of a victim's death can be inferred circumstantially, including from proof of the following: incidents of mistreatment directed against the victim, patterns of mistreatment and disappearances of other individuals, a general climate of lawlessness at the place where the acts were allegedly committed, the length of time that has elapsed since the person disappeared, and the fact that the victim has failed to contact other persons that he or she might have been expected to contact, such as family members.[605] The victim's death as a result of the perpetrator's act or omission must be the only reasonable inference that can be drawn from the evidence.[606]

333. It must be shown that the act or omission of the perpetrator was undertaken with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death.[607]

334. Extermination, whose customary status is also undisputed,[608] is characterized by an act, omission or combination of each that results in the death of persons on a massive scale.[609]

(IT-98-30/1-A), 28 February 2005 ("*Kvočka* Appeal Judgement"), para. 261; *Akayesu* Trial Judgement, para. 589.

[603] *Brdjanin* Trial Judgement, para. 382.

[604] *Tadić* Trial Judgement, para. 240 (observing that a feature of the Balkan conflict was widespread killings, as well as the indifferent and callous treatment of the dead. Since these were not times of normalcy, it would be inappropriate to apply rules of some national systems that require the production of a body as proof of death. However, there must be evidence to link injuries received to a resulting death).

[605] *Krnojelac* Trial Judgement, para. 327.

[606] *Krnojelac* Trial Judgement, para. 326; *Kvočka* Appeal Judgement, para. 260; *Fofana* Trial Judgement, para. 144.

[607] *Blagojević* Trial Judgement, para. 556.

[608] *Prosecutor v. Krstić,* Judgement, ICTY Trial Chamber (IT-98-33-T), 2 August 2001 ("*Krstić* Trial Judgement"), para. 492.

[609] *Blagojević* Trial Judgement para. 572; *Prosecutor v. Seromba*, Judgement, ICTR Appeals Chamber (ICTR-01-66-A) 12 March 2008 ("*Seromba* Appeal Judgement"), para. 189.

335. The perpetrator's role in the death of persons on a massive scale may be remote or indirect.[610] Actions constituting extermination include creating conditions of life that are aimed at destroying part of a population, such as withholding food or medicine.[611]

336. There is no minimum threshold for the number of victims targeted.[612] Rather, the question of whether the requirement of scale has been met is assessed on a case-by-case basis against all relevant circumstances.[613] Nonetheless, it has been suggested that one or a limited number of killings would not be sufficient to constitute extermination.[614]

337. Extermination contemplates acts or omissions that are collective in nature rather than directed towards specific individuals.[615] There is however no requirement that the perpetrator intended to destroy a group or part of a group to which the victims belong.[616] Knowledge of a "vast scheme of collective murder" is not an element of extermination.[617]

338. It must be shown that the perpetrator acted with "the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons."[618]

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610 *Sesay* Trial Judgement para. 130; *Seromba* Appeal Judgement, para. 189.

611 *Prosecutor v. Brdjanin*, Judgement, ICTY Trial Chamber (IT-99-36-T), 1 September 2004 ("*Brdjanin* Trial Judgement"), para. 389; *Krstić* Trial Judgement, para. 498.

612 *Prosecutor v. Ntakirutimana et al.*, Judgement, ICTR Appeals Chamber, (ICTR-96-10-A and ICTR-96-17-A), 13 December 2004, para. 516; *Prosecutor v. Stakić*, Judgement, ICTY Appeals Chamber (IT-97-24-A), 22 March 2006 ("*Stakić* Appeal Judgement"), para. 260.

613 *Prosecutor v. Stakić*, Judgement, ICTY Trial Chamber (IT-97-24-T), 31 July 2003 ("*Stakić* Trial Judgement"), para. 640; *Blagojević* Trial Judgement, para. 573.

614 *Vasiljević* Trial Judgement, para. 227.

615 *Vasiljević* Trial Judgement, para. 227; *Stakić* Trial Judgement, para. 639.

616 *See Vasiljević* Trial Judgement, para. 227; *Prosecutor v. Musema,* Judgement, ICTR Appeals Chamber (ICTR-96-13-A), 16 November 2001, para. 366; *Prosecutor v. Stakić*, Judgement, ICTY Trial Chamber (IT-97-24-T), 31 July 2003, para. 639.

617 *Stakić* Appeal Judgement, para. 259.

618 *Bagosora* Trial Judgement, para. 2191. An earlier ICTR Judgement held that extermination may encompass intentional, reckless, or grossly negligent acts or omissions: *Kayishema et al.* Trial Judgement, para. 146. The ICTY later held intent cannot be a lower threshold than that required for murder as a crime against humanity, and therefore proof of recklessness or gross negligence was not sufficient to hold an accused criminally responsible for extermination: *Stakić* Trial Judgement, para. 642.

2.5.3.2 Findings on murder and extermination

339. The Chamber finds that during the period of S-21's operation, as the result of deliberate and unlawful acts, S-21 and S-24 detainees were executed by S-21 staff within the S-21 complex and at Choeung Ek (Section 2.4.1). The Chamber further finds that S-21 and S-24 detainees died as the result of unlawful omissions known to be likely to lead to their death and as a consequence of the conditions of detention imposed upon them (Sections 2.4.5.1-2.4.5.4).

340. Due to the inaccuracy of the existing record, the Chamber finds that it is not possible to quantify the precise number of the detainees who died and were executed. On the basis of the Revised S-21 Prisoner List, the Chamber quantifies this number to be no fewer than 12,272 detainees.[619]

341. Due to their massive scale, the Chamber finds that the deaths and executions which were illegally perpetrated upon the entire S-21 detainee population amount to both murder and extermination.

2.5.3.3 Enslavement

342. The prohibition against slavery is unambiguously part of customary international law.[620] Enslavement is characterised by the exercise of any or all powers attaching to the right of ownership over a person.[621] Indicia of enslavement include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[622]

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[619] The Chamber notes that the Revised S-21 Prisoner List includes the name of Civil Party CHUM Mey who survived his detention at S-21, amongst the 12,273 individuals listed as having been detained and thus, with very few exceptions, executed; *see* "Revised S-21 Prisoner List", E68.1, entry No. 1583; *see also* Section 2.3.3.4.2

[620] *Krnojelac* Trial Judgement, para. 353.

[621] *Kunarac* Appeal Judgement, para. 116.

[622] *Kunarac* Appeal Judgement, para. 119.

343. Proof that the victim did not consent to being enslaved is not required, as enslavement is characterised by the perpetrator's exercise of power.[623] The question of whether the victim has consented may however be relevant to determining if the perpetrator exercised these powers over the victim.[624] The absence of consent may be presumed in situations where the expression of consent is impossible.[625]

344. Forced or involuntary labour may also constitute enslavement.[626] The ICTY Trial Chamber has noted that "[w]hat must be established is that the relevant persons had no real choice as to whether they would work."[627] A Chamber shall decide if the labour is forced or involuntary on the basis of the recognised factors outlined above.[628] The elements of the crime of enslavement may be satisfied without evidence of additional ill-treatment.[629]

345. It must be shown that the perpetrator intentionally exercised any or all of the powers attaching to the right of ownership.[630]

2.5.3.4 Findings on enslavement

346. The Chamber finds that S-21 staff deliberately exercised total power and control over the S-24 detainees and over a small number of detainees assigned to work within the S-21 complex. These detainees had no right to refuse to undertake the work assigned to them, and did not consent to their conditions of detention (Section 2.4.2). The Chamber therefore finds that their forced or involuntary labour, coupled with their detention, amounted to enslavement.

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623 *Kunarac* Appeal Judgement, para. 120.
624 *Kunarac* Appeal Judgement, para. 120.
625 *Kunarac* Appeal Judgement, para. 120.
626 *Sesay* Trial Judgement, para. 202.
627 *Krnojelac* Trial Judgement, para. 359; *Sesay* Trial Judgement, para. 202.
628 *See Sesay* Trial Judgement, para. 202.
629 *Pohl and Others Case,* Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10,* Vol. 5, p. 970*, cited in Kunarac* Appeal Judgement, para. 123: *see also Sesay* Trial Judgement, para. 203.
630 *Kunarac* Appeal Judgement, para. 116.

2.5.3.5 Imprisonment

347. Imprisonment refers to the arbitrary deprivation of an individual's liberty without due process of law.[631] The customary status of the prohibition of arbitrary imprisonment under international law initially developed from the laws of war and is supported by human rights instruments.[632]

348. An initial deprivation of liberty will be arbitrary if no legal basis exists to justify it.[633] If national law is relied upon as a justification in this regard, it must be established that the relevant provisions do not violate international law.[634] If a legal basis for the initial deprivation does exist, it must continue to exist throughout the period of imprisonment.[635] Where a lawful basis of imprisonment ceases to apply, continued imprisonment may be considered arbitrary.[636]

349. Not every minor infringement of liberty forms the material element of imprisonment as a crime against humanity; the deprivation of liberty must be of similar gravity and seriousness as the other crimes enumerated as crimes against humanity in Article 5 of the ECCC Law.[637]

350. It must be shown that the perpetrator intended to arbitrarily deprive the individual of liberty, or that he acted in the reasonable knowledge that his or her actions were likely to cause the arbitrary deprivation of physical liberty.[638]

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631 *Prosecutor v. Simić et al.,* Judgement, ICTY Trial Chamber (IT-95-9-T), 17 October 2003, para. 64; *Prosecutor v. Kordić et al.,* Judgement, ICTY Trial Chamber (IT-95-14/2-T), 26 February 2001 ("*Kordić* Trial Judgement"), para. 302; *Krnojelac* Trial Judgement, para. 113.

632 *Krnojelac* Trial Judgement, para. 109; *Kordić* Trial Judgement, paras 299-300.

633 *Krnojelac* Trial Judgement, para. 113-114.

634 *Krnojelac* Trial Judgement, para. 114; *Prosecutor v. Ntagerura*, Judgement, ICTR Trial Chamber (ICTR-99-46-T), 25 February 2004 ("*Ntagerura* Trial Judgement"), para. 702.

635 *Krnojelac* Trial Judgement, para. 114.

636 *Krnojelac* Trial Judgement, para. 114.

637 *See Ntagerura* Trial Judgement, para. 702. This finding contrasts with the earlier judgement of Krnojelac, where the ICTY Trial Chamber held that "any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5(e) of the [ICTY] Statute as long as the other requirements of the crime are fulfilled''; *Krnojelac* Trial Judgement, para 112.

638 *Simić et al.* Trial Judgement, para. 64; *Krnojelac* Trial Judgement, para. 115.

2.5.3.6 Findings on imprisonment

351. The Chamber finds that detainees at S-21 were intentionally and arbitrarily imprisoned with no legal basis. There was no legal or judicial system and therefore those imprisoned had no access to the procedural safeguards enabling them to challenge their arrest, detention or ultimate execution (Section 2.4.3). The imprisonment of the very large numbers of detainees at all sites was a serious breach of their rights to liberty, on a similar scale of gravity to other crimes against humanity.

2.5.3.7 Torture

352. The prohibition on torture has acquired the status of a peremptory or non-derogable principle of international law.[639] As such, it is not possible to authorize torture via a legislative, administrative or judicial act.[640]

353. The crime of torture is proscribed and defined by numerous international instruments, including the 1975 United Nations General Assembly Declaration on Torture, adopted by consensus,[641] and the 1984 Convention against Torture.[642] The definition in the 1984 Convention against Torture,[643] which closely mirrors that of the 1975 General Assembly Declaration, has been accepted by the ICTY as being declaratory of customary international law.[644] The Chamber accordingly finds that this definition had in substance been accepted as customary by 1975.

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[639] *Prosecutor v. Furundzija,* Judgement, ICTY Trial Chamber (IT-95-17/1), 10 December 1998 ("*Furundzija* Trial Judgement"), paras 151-153; *Krnojelac* Trial Judgement, para. 182.
[640] *Furundzija* Trial Judgement, paras 155-156.
[641] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 3452 (XXX), of 9 December 1975.
[642] Convention Against Torture, 10 December 1984, 1465 UNTS 85; *see also* The Universal Declaration of Human Rights, UNGA Res. 217 (III), of 10 December 1948, Article 5.
[643] Article 1 of the 1984 Torture Convention defines torture in the following terms: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."
[644] *Prosecutor v. Delalić et al.,* Judgement, ICTY Trial Chamber (IT-96-21-T), 16 November 1998 ("*Čelebići* Trial Judgement"), para. 459; *Kunarac* Appeal Judgement, para. 146; *Prosecutor v. Furundzija,*

354. Torture comprises the infliction, by an act or omission, of severe pain or suffering, whether physical or mental.[645]

355. In determining whether an act or omission constitutes severe pain or suffering, the Chamber is required to consider all subjective and objective factors.[646] Objective factors include the severity of the harm inflicted. Subjective criteria may include the age, sex, state of health of the victim, or the physical or mental effect of treatment on a particular victim.[647] In addition, the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim have all been considered relevant factors.[648] The consequences of the act or omission need not be visible on the victim to constitute torture,[649] and nor is there a requirement that the injury be permanent.[650] Further, there is no exhaustive classification of the acts that may constitute torture.[651] Acts that have been considered sufficiently severe as to constitute torture may arise from conditions imposed upon detention and have included beating, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, to rape or to kill relatives.[652] Certain acts are considered by their nature to constitute severe pain and suffering.[653] These acts include rape[654] and the mutilation of body parts.[655]

Judgement, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000 ("*Furundzija* Appeal Judgement"), para. 111; *Furundzija* Trial Judgement, paras 160-161; *see also* Decision on Appeal against the Closing Order, paras 66-67.

645 *Kunarac* Appeal Judgement, para. 142; *Ntagerura* Trial Judgement, para. 703.
646 *Kvočka* Trial Judgement, para. 143.
647 *Kvočka* Trial Judgement, para. 143.
648 *Krnojelac* Trial Judgement, para. 182.
649 *Kunarac* Appeal Judgement, para. 150.
650 *Kvočka* Trial Judgement, para. 148; *Brdjanin* Trial Judgement,, para. 484.
651 *Čelebići* Trial Judgement, para. 469.
652 *Čelebići* Trial Judgement, para. 467; *see also Kvočka* Trial Judgement, para. 151.
653 *Kunarac* Appeal Judgement, para. 150.
654 *Brdjanin* Trial Judgement, para. 485; *Kunarac* Appeal Judgement, para. 150.
655 *Kvočka* Trial Judgement, para. 144.

356. The crime of torture requires that the act or omission is inflicted in order to attain a certain result or purpose.[656] Such purposes include obtaining information or a confession, or punishing, intimidating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.[657] These purposes do not constitute an exhaustive list under customary law and are instead representative.[658] There is no requirement that the act is committed exclusively for a particular purpose.[659] A particular purpose must be "part of the motivation behind the conduct, and it need not be the predominant or sole purpose"[660]

357. The 1984 Convention Against Torture requires that the act of torture is undertaken at the instigation of a public official or "other person acting in an official capacity", or with that person's consent or acquiescence.[661] The ICTY has since clarified that there is no requirement under contemporary international humanitarian law for the involvement of a State official in acts constituting torture,[662] although the fact that a perpetrator acted in an official capacity may be an aggravating factor relevant to sentencing.[663] The Chamber finds, however, that in 1975, the involvement of a State official was a requirement for an act to constitute torture under customary international law.

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[656] *Krnojelac* Trial Judgement, para. 180. Under the ICC Statute, there is no requirement that the perpetrator acted with any specific purpose: Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), 2187 UNTS 90, Article 7(1)(f), (7)(2)(e).

[657] *Kunarac* Trial Judgement, para. 485; *see also Krnojelac* Trial Judgement, para. 184. The particular purpose of coercing the individual or a third person "for any reason based on discrimination of any kind" appears in the 1984 Convention Against Torture while it is not contained in the 1975 General Assembly Declaration: Convention Against Torture, 10 December 1984, 1465 UNTS 85, Article 1(1).

[658] *Čelebići* Trial Judgement, para. 472.

[659] *Kunarac* Trial Judgement, para. 486.

[660] *Kunarac* Trial Judgement, para. 486.

[661] Convention Against Torture, 10 December 1984, 1465 UNTS 85, Article 1(1).

[662] *Kunarac* Trial Judgement, paras. 470, 496 (noting the different aims of human rights law (as restraining the excesses of the State) and humanitarian law (as a means to reduce violence during hostilities) and finding that there is no requirement under international humanitarian law for the involvement of a State official in acts constituting torture, even if this may be required under human rights law); *see further Kunarac* Appeal Judgement, para. 147 ("the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, but does not wholly reflect customary international law regarding the meaning of the crime of torture generally"). Earlier judgements held that at least one actor must be a public official or be acting in a non-private capacity (*see e.g. Furundzija* Appeal Judgement, para. 111; *Akayesu* Appeal Judgement, para. 593).

[663] *Kunarac* Trial Judgement, para. 494.

358. The pain and suffering amounting to torture must be inflicted intentionally.[664]

2.5.3.8 Findings on torture

359. The Chamber finds that staff at S-21 and S-24 used interrogation techniques on detainees, with the intention of causing severe pain and suffering (Section 2.4.4.1.1). These techniques were applied in an environment of extreme fear where threats were routinely put into practice and caused detainees severe pain and suffering, both physical and mental. Given their position in the State apparatus, the Chamber finds that the S-21 interrogators and S-24 staff who perpetrated acts of torture acted in an official capacity.

360. The Chamber finds that the following interrogation techniques, as applied at S-21, inflicted severe physical pain or mental suffering for the purpose of obtaining a confession or of punishment, and constituted torture: severe beating, electrocution, suffocation with plastic bags, water-boarding, puncturing, inserting needles under or removing finger and toe nails, cigarette burns, forcing detainees to pay homage to images of dogs or objects, forced feeding of excrement and urine, direct or indirect threats to torture or kill the detainees or members of their family, the use of humiliating language, plunging detainees' heads in a water jar and lifting by the hands tied in the back, and one proven instance of rape. The Chamber further finds that this list is not exhaustive and that other torture techniques may have been carried out.

2.5.3.9 Rape

361. Rape has long been prohibited in customary international law and has been described as "one of the worst suffering a human being can inflict upon another."[665]

362. Rape is the sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of

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[664] *Krnojelac* Trial Judgement, para. 130; *Furundzija* Trial Judgement, para. 162.

[665] *Kunarac* Trial Judgement, para. 655; *Sesay* Trial Judgement, para. 144; Article II(1)(c) of Control Council Law No. 10 (1945), reprinted in *Trials of War Criminal Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. I*, p. 7; *Article 44 of the Instructions for the Government of Armies of the United States in the Field* (Lieber Code), 24 April 1863; Article 27 of Geneva Convention IV.

the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.[666]

363. Most cases of rape as a crime against humanity will be committed in coercive circumstances in which true consent will not be possible.[667] Absence of consent may be evidenced by the use of force. Neither force nor threat of force by the perpetrator is an element *per se* of rape, as there are factors other than force which would render an act of sexual penetration non-consensual, and there is no requirement of resistance on the part of the victim.[668]

364. The social stigma attaching to rape victims in certain societies might render any proof of this crime difficult. The international jurisprudence has therefore accepted that circumstantial evidence may be used to demonstrate rape.[669]

365. The requisite intention for rape is that the perpetrator acted with the intent to "effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[670]

2.5.3.10 Findings on rape as torture

366. While rape comprises a separate and recognized offence both within the ECCC Law and international criminal law, it is undisputed that rape may also constitute torture where all other elements of torture are established (Section 2.5.3.7). The Chamber considers that the conduct alleged in the Amended Closing Order to constitute rape clearly satisfy

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[666] *Kunarac* Appeal Judgement, para. 127; *Semanza* Trial Judgement, paras 344-345. *Sesay* Trial Judgement, paras 145-146. An alternative conceptual definition was propounded by the ICTR Trial Chamber in *Akayesu*, being "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive": *Akayesu* Trial Judgement, para. 598. However, the ICTY Trial Chamber in *Furundžija* decided a more precise definition would better accord with the "criminal law principle of specificity" and so adopted the more technical definition also employed above: *Furundzija* Trial Judgement, para. 177. The *Furundžija* formulation has been applied frequently and adopted by the ICTY Appeals Chamber. The ICTR Trial Chamber in *Muhimana* found the two formulations were "not incompatible or substantially different in their application": *Prosecutor v. Muhimana*, Judgement and Sentence, ICTR Trial Chamber (ICTR-95-1B-T), 28 April 2005, para. 550.

[667] *Kunarac* Appeal Judgement, para. 130; *Kvočka* Trial Judgement, para 178.

[668] *Kunarac* Appeal Judgement, paras 128-129.

[669] *Prosecutor v. Muhimana*, Judgement, ICTR Appeals Chamber, (ICTR-95-1B-A), 21 May 2007, para. 49; *Sesay* Trial Judgement, para. 149.

[670] *Kunarac* Appeal Judgement, paras 127-129; *Bagosora* Trial Judgement, para. 2200.

the legal ingredients of both rape and also of torture.[671] It has further evaluated the evidence in support of this charge to be credible (Section 2.4.4.1.1). The Chamber considers this instance of rape to have comprised, in the present case, an egregious component of the prolonged and brutal torture inflicted upon the victim prior to her execution and has characterized this conduct accordingly.

2.5.3.11 Other inhumane acts

367. Other inhumane acts comprise a residual offence which is intended to criminalise conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.[672] The act or omission must be "sufficiently similar in gravity to the other enumerated crimes" to constitute an inhumane act.[673] The customary status of this crime is also well established.[674]

368. For an inhumane act to be established, it must be proved that the victim suffered serious harm to body or mind, and that the suffering was the result of an act or omission of the perpetrator.[675]

369. The seriousness of the act is to be assessed on a case-by-case basis, taking account of individual circumstances.[676] These circumstances may include "the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim."[677] There is no requirement that the suffering have long term effects, although this may be relevant to the determination of the seriousness of the act.[678]

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671 Amended Closing Order, paras 136, 137.
672 *Kordić* Appeal Judgement, para. 117; *Bagosora* Trial Judgement, para. 2218.
673 *Naletilić* Trial Judgement, para. 247; *Prosecutor v. Niyitegeka*, Judgement, ICTR Trial Chamber (ICTR-96-14-T), 16 May 2003 ("*Niyitegeka* Trial Judgement"), para. 460.
674 *Čelebići* Trial Judgement, para. 517; *Prosecutor v. Brima et al*., Judgement, SCSL Appeals Chamber (SCSL-04-16-A), 22 February 2008 ("*Brima* Appeal Judgement"), para. 183.
675 *Kordić* Appeal Judgement, para. 117.
676 *Kordić* Appeal Judgement, para. 117; *Kayishema et al.* Trial Judgement, paras 148-151.
677 *Prosecutor v. Vasiljević*, Judgement, ICTY Appeals Chamber (IT-98-32-A), 25 February 2004 ("*Vasiljević* Appeal Judgement"), para. 165.
678 *Vasiljević* Appeal Judgement, para. 165; *Blagojević* Trial Judgement, para. 627.

370. Examples of inhumane acts which have been found to constitute crimes against humanity include forcible displacement and forcible transfer,[679] severe bodily harm,[680] detention in brutal and deplorable living conditions,[681] as well as beatings and other acts of violence.[682]

371. The requisite intention to inflict inhumane acts is satisfied when the perpetrator had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or knew that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon the human dignity.[683] This intention must be found to have existed at the time of the act or omission.[684]

2.5.3.12 Findings on other inhumane acts

372. The Chamber finds that S-21 detainees suffered serious bodily and mental harm from the deplorable conditions of detention deliberately imposed upon them by S-21 staff. These conditions included shackling and chaining, blindfolding and handcuffing when being moved outside the cells, severe beatings and corporal punishments, detention in overly small or overcrowded cells, lack of adequate food, hygiene and medical care (Section 2.4.5). Detainees were also subjected to blood drawing and medical tests (Section 2.4.5.5).

373. These acts and omissions routinely degraded and dehumanized the detainees, leaving them in a state of constant fear. They have the same gravity as the other underlying offences of crimes against humanity and qualify as separate acts that fall within the category of other inhumane acts.

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[679] *Prosecutor v. Blagojević et al.*, Judgement, ICTY Trial Chamber (IT-02-60-T), 17 January 2005 ("*Blagojević* Trial Judgement"), paras. 629-630; *Krstić* Trial Judgement, para. 523; *Stakić* Trial Judgement, para. 723.
[680] *Kvočka* Trial Judgement, para. 208
[681] *Krnojelac* Trial Judgement, para. 133.
[682] *Kvočka* Trial Judgement, para. 208.
[683] *Niyitegeka* Trial Judgement, para. 460; *Kordić* Appeal Judgement, para. 117.
[684] *Blagojević* Trial Judgement, para. 628; *Krnojelac* Trial Judgement, para. 132; *Fofana* Trial Judgement, para. 150.

2.5.3.13 Persecution on political grounds

374. Persecution has long been proscribed as a crime under customary international law.[685] The crime of persecution has in the case law of the *ad hoc* Tribunals come to describe large-scale and discriminatory offending in situations involving massive criminality but which may not entail the necessary physical destruction or exterminatory intent required for genocide.[686]

375. Whilst an offence charged before the Nuremberg and Tokyo Tribunals, the elements of this offence received limited elaboration prior to the establishment of the *ad hoc* Tribunals.[687] It has instead fallen to the international jurisprudence post-1992 to outline the contours of this offence. As the *Kordić* Trial Judgement notes:

> Neither international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice systems. The Trial Chamber agrees […] that the crime of persecution needs careful and sensitive development in light of the principle of *nullum crimen sine lege*.[688]

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[685] *See e.g.,* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Article 6(c); Tokyo Charter, Annexed to the Special Proclamation of 19 January 1946 by the Supreme Commander of the Allied Powers in the Far East, Article 5(c); Control Council Law No. 10 (1945), Article 5(c) *reprinted* in Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. I, pp. XVI-XIX.

[686] *See Prosecutor v. Kupreškić et al.,* Judgement, ICTY Trial Chamber (IT-95-16-T), 14 January 2000 ("*Kupreškić et al*. Trial Judgement"), para. 636 ("persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate […]. While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea,* genocide is an extreme and most inhuman form of persecution.")

[687] *See e.g., Judgement of Josef Altstotter et al.,* Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950), Vol. VI, p. 954. For a review of the relevant Nuremberg-era jurisprudence as well as subsequent jurisprudence from national courts, see *Tadić* Trial Judgement, paras 699-710; *Kupreškić et al*. Trial Judgement, paras 586-614.

[688] *See Kordić* Trial Judgement, para. 192 (noting that the international crime of persecution "has never been comprehensively defined" and citing *inter alia Tadić* Trial Judgement, para. 694).

376. The Chamber finds that as early as 1975, persecution nonetheless clearly included 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."[689]

377. This act or omission must actually discriminate: a discriminatory intention is not sufficient, the act or omission must have discriminatory consequences.[690] An act is discriminatory when a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds, namely on a political, racial or religious basis.[691] In this case, the Accused has been indicted only for persecution on political grounds.[692]

378. Persecutory acts include (but are not limited to) the other underlying offences for crimes against humanity,[693] for example murder, extermination, enslavement, imprisonment and torture.[694] While no comprehensive enumeration of other acts constituting persecution is possible, relevant examples include harassment, humiliation and psychological abuse, confinement in inhumane conditions, cruel and inhumane treatment, deportation, forcible transfer and forcible displacement, and forced labour assignments.[695] Such acts must be of "equal gravity or severity" to the specified

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[689] *Bagosora* Trial Judgement, para. 2208; *Prosecutor v. Ruggiu*, Judgement and Sentence, ICTR Trial Chamber (ICTR-97-32-1), 1 June 2000, para. 21; *Prosecutor v. Simic et al.,* Judgment, ICTY Appeals Chamber (IT-95-9-A), 28 November 2006 ("*Simić et al.* Appeal Judgement)", para. 177.

[690] *Blagojević* Trial Judgement, para. 583.

[691] *Blagojević* Trial Judgement, para. 583; *see also Kvočka* Trial Judgement, para. 195 and *Kvočka* Appeal Judgement, para. 363 ("The Trial Chamber found that all the detainees in the Omarska camp were non-Serbs or persons suspected of sympathizing with non-Serbs. …. [T]here is no doubt that the underlying crimes were committed upon discriminatory grounds, and had discriminatory effects.")

[692] Amended Closing Order, para. 141.

[693] *Semanza* Trial Judgement, paras 347-349; *see also Kupreškić et al*. Trial Judgement, paras 609-614 (concluding that the notion of persecution before the Nuremberg Tribunal included acts others than those offences specifically enumerated as crimes against humanity).

[694] *Blagojević* Trial Judgement, paras 583, 585; *Kordić* Appeal Judgement, para. 114 and *Kupreškić et al*. Trial Judgement, para. 615.

[695] *Kvočka* Appeal Judgement, paras. 325 and 335; *Blagojević* Trial Judgement, para. 586; *Blaškić* Appeal Judgement, para. 153; *Simić et al.* Trial Judgement, para. 85. For a general discussion on the acts encompassing persecution and a review of the relevant Nuremberg-era jurisprudence as well as subsequent jurisprudence from national courts, *see Tadić* Trial Judgement, paras 699-710; *Kupreškić et al*. Trial Judgement, paras 586-615.

underlying offences to constitute persecution[696] and must be evaluated not in isolation but in context, by looking at their cumulative effect.[697] Not every denial of a human right may constitute a crime against humanity, and to reach the level of gravity required the act or omission generally needs to be a gross or blatant denial of a fundamental human right.[698]

379. The perpetrator must have carried out the act or omission "deliberately with the intention to discriminate on one of the listed grounds."[699] This requires "evidence of a specific intent to discriminate on political, racial or religious grounds."[700] There is no requirement in law that the perpetrator possess a "persecutory intent" over and above a discriminatory intent. The existence of a "specific intent to cause injury to a human being because he belongs to a particular community or group" is sufficient to establish the intent required for the crime of persecution.[701] This specific intent is not a legal element of the other underlying crimes against humanity.[702]

380. The requisite discriminatory intent may not be inferred directly from the general discriminatory nature of an attack, but may be inferred from this context if "in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent."[703]

2.5.3.14 Findings on persecution on political grounds

381. The offences charged as persecution in the current case are all recognized international crimes of significant gravity, which violated the fundamental rights of the S-21 detainees and which have comprised before other international tribunals the

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[696] *Kordić* Appeal Judgement, para. 671; *Blaškić* Appeal Judgement, para. 131; *Prosecutor v. Krnojelac*, Judgement, ICTY Appeals Chamber (IT-97-25-A), 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 199.
[697] *Kupreškić et al*. Trial Judgement, para. 622; *Semanza* Trial Judgement, para. 349; *Blaškić* Appeal Judgement, para. 135.
[698] *Blagojević* Trial Judgement, para. 580; *Prosecutor v. Ruggiu*, Judgement and Sentence, ICTR Trial Chamber (ICTR-97-32-1), 1 June 2000, para. 21.
[699] *Bagosora* Trial Judgement, para. 2208; *Blaškić* Appeal Judgement, para. 131; *Kordić* Appeal Judgement, para. 101.
[700] *Kvočka* Appeal Judgement, para. 460.
[701] *Blaškić* Appeal Judgement, para. 165.
[702] *Tadić* Appeal Judgement, para. 305.
[703] *Krnojelac* Appeal Judgement, para. 184; *Blaškić* Appeal Judgement, para. 164.

ingredients of the offence of persecution (Section 2.5.3.13). They are alleged in this case to cumulatively amount to persecution on grounds that the Accused's criminal conduct in relation to them was accompanied by a specific intent to discriminate on political grounds.

2.5.3.14.1 The discriminatory policies underlying these offences

382. The Accused admitted that anyone sent to S-21 and perceived as a political opponent of the Party was singled out as an enemy and destined for execution.[704] He further stated that the Party Centre decided who were its enemies and had to be eliminated, irrespective of whether or not this assessment was correct.[705] It has been shown that S-21 sought to unearth any conspiracy against the CPK and then to provide material to confirm the leadership's suspicions. S-24 was similarly tasked with "re-educating" the detainees, particularly concerning their stance towards the CPK.[706]

383. Regarding the basis of the policies implemented at S-21, the Chamber notes that the first detainees at S-21 were former LON Nol officials and soldiers arrested immediately after the Khmer Rouge took power and executed because of their allegiance with the previous regime.[707] Intellectuals, students and diplomatic staff living abroad who were recalled to Cambodia were on arrival sent to re-education camps or to S-21. According to Expert David CHANDLER, they were suspected by the Party of having been in contact with foreigners or of having formed alliances with foreign powers.[708] Other intellectuals within Cambodia were also initially sent to the North West Zone and subsequently purged at S-21.[709]

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[704] T., 1 July 2009 (Accused), pp. 90-91.
[705] T., 22 June 2009 (Accused), pp. 82-83; *see also "Photograps",* E3/379; T., 10 June 2009 (Accused), p. 56; T., 22 June 2009 (Accused), p. 103*; see also* T., 6 August 2009 (David CHANDLER) p. 24.
[706] T., 6 August 2009 (David CHANDLER), pp. 22, 24, 45. T., 17 June (Accused), p. 21; T., 24 June 2009 (Accused), p. 17.
[707] T., 15 June 2009 (Accused), p. 7.
[708] T., 12 August 2009 (Accused), pp. 41-43; T., 16 July 2009 (HIM Huy), pp. 20-22; T., 20 July 2009 (HIM Huy), pp. 7-8; T., 12 August 2009 (BOU Thon), p. 36-38; *see also* T., 27 May 2009 (Craig ETCHESON), p. 66.
[709] T., 6 August 2009 (David CHANDLER), pp. 18-19.

384. Fundamental to the implementation of DK policies was the "30 March 1976 Directive", which provided authority to execute those suspected of being enemies of the Party (Section 2.2.6). As the revolution progressed, the Party Centre began to perceive enemies everywhere and became more concerned about internal rather than external enemies.[710] At S-21, the word "enemy" became synonymous with anyone suspected of betraying the Party.[711]

385. From 1976 onwards, a large number of S-21 detainees were combatants and cadres of DK and CPK suspected because of their biographies or relationship with other perceived Party enemies.[712] Staff of S-21 were also increasingly detained and purged upon being accused of sabotaging the Party, after being implicated in confessions or simply for committing mistakes while working.[713] Prominent individuals, mainly high-ranking CPK members, were arrested or executed upon the direct order of the Standing Committee.[714]

386. Foreigners, including Vietnamese nationals, as well as some Buddhist monks and members of Cambodian ethnic minorities, were also detained at S-21 as a real or perceived threat to the Party. Although some Vietnamese nationals were arrested and detained initially due to the armed conflict with Vietnam, the Accused indicated that the CPK policy concerning Vietnamese nationals, as well as religious and other minorities, was to regard all such individuals as "spies" acting against the Party.[715] Conversely, in a rare departure from its policies, members of a delegation of FULRO were released from S-21 upon the order of the Party Centre once they were instead deemed to be political supporters.[716] Individuals mistakenly arrested and detained were otherwise executed to preserve the secrecy of S-21 operations.[717]

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[710] T., 6 August 2009 (David CHANDLER), p. 14.
[711] T., 4 August 2009 (LACH Mean), p. 20.
[712] T., 15 June 2009 (Accused), pp. 7-8.
[713] T., 11 August 2009 (SAOM Met), pp. 16-17; T., 22 July 2009 (PRAK Khan), pp. 49-51; T., 20 July 2009 (HIM Huy), pp. 49-52; T., 15 June 2009 (Accused), pp. 8-9.
[714] T., 22 June 2009 (Accused), p. 28; *see also* T., 23 June 2009 (Accused), p. 29; T., 21 July 2009 (PRAK Khan), p. 65.
[715] T., 10 June 2009 (Accused), pp. 23-27, 52-57.
[716] T., 10 June 2009 (Accused), pp. 27-30.
[717] T., 6 August 2009 (David CHANDLER), pp. 26-29, 113-114.

387. Detainees were typically accused of involvement with the CIA or KGB intelligence agencies or with the Vietnamese government.[718] However, these expressions were eventually used at S-21 as catch-all phrases for enemies of the Party.[719] It was important only that detainees admitted to being enemies and name "strings of traitors".[720]

388. By the end of the regime, all individuals not supportive of the regime were considered to be its political enemies and were guilty simply by virtue of having been accused.[721] The process of elimination of Party enemies turned into paranoia and eventually contributed to the destruction of the CPK itself.[722] Expert David CHANDLER agreed that S-21 operations were vital to the CPK objective of controlling its enemies.[723] It was also his view that the revolution required "headlong enthusiasm" and did not provide any opportunity to hesitate or contradict its leadership.[724]

2.5.3.14.2 Discriminatory consequences of these policies

389. The Chamber has in essence found that any individual detained at S-21, considered rightly or wrongly to be connected to any political group other than the CPK and typically with some class background to which it objected, was a target of discrimination. The Chamber has previously found the motivation behind CPK policy at S-21 to be akin to that identified by other international tribunals as amounting to discrimination on political grounds (Section 2.5.1.4).

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[718] T., 16 June 2009 (Accused), pp. 71-74; T., 30 June 2009 (CHUM Mey), p. 24; T., 1 July 2009 BOU Meng), pp. 27-28.
[719] T., 30 June 2009 (Accused), p. 76; T., 16 June 2009 (Accused), pp. 70-73*; see also* T., 6 August 2009 (David CHANDLER), pp. 16, 28-29.
[720] T., 6 August 2009 (David CHANDLER), pp. 33, 51-54.
[721] T., 6 August 2009 (David CHANDLER), pp. 21-23, 27, 113-114.
[722] "Voices from S-21 - Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 75, ERN (English) 00192754: "Reigns of terror and continuous revolutions (in Democratic Kampuchea the two phenomena overlapped) require a continuous supply of enemies. When these enemies are embedded in a small, inexperienced political party, ethnically indistinguishable from the majority of the population, attempting to purge all its enemies can have disastrous effects. As Duch and his colleagues did what they were told, they undermined Cambodia's military effectiveness, dismantled the administrative structure of the country, and destroyed the Party. The killing machine at S-21 had no brakes because the paranoia of the Party Centre had no limits"; *see also* T., 6 August 2009 (David CHANDLER), p. 22.
[723] T., 6 August 2009 (David CHANDLER), p. 22 (*citing* "Voices from S-21 - Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 75, ERN (English) 00192754,).
[724] T., 6 August 2009 (David CHANDLER), pp. 75-76; *see also* T., 2 September 2009 (Accused), pp. 76-77, 79.

390. It was the Party Centre which defined the nature and composition of the targeted groups, encapsulating all real or perceived political opponents, including their close relatives or affiliates (Sections 2.2.5.2, 2.2.6 and 2.5.3.14.1). While many of these offences were perpetrated against individuals merely perceived to be enemies of the CPK, the Chamber finds that all victims suffered the same grave discriminatory consequences of acts perpetrated in furtherance of this specific discriminatory intent.

2.5.3.14.3 The Accused's specific intent

391. The Chamber must determine whether, in relation to these acts, the Accused possessed the specific discriminatory intent required to support conviction for persecution.

392. The Chamber finds by a majority (Judge CARTWRIGHT dissenting) that the Accused shared the intent motivating CPK policy to eliminate all political enemies as identified by the Party Centre, and to imprison, torture, execute and otherwise mistreat S-21 detainees on political grounds.

2.5.3.14.4 Opinion of the majority

393. The evidence at trial showed, and the Accused himself admitted, that he consciously, willingly and zealously sought to implement the CPK policy to eliminate all political enemies as identified by the Party Centre and to imprison, torture, execute and mistreat S-21 detainees on political grounds.[725]

394. The Accused knew that not all those held at S-21 were in fact enemies of the Party, but that they were in any event detained, interrogated and executed.[726] Despite this, he unquestioningly carried out all tasks required of him, and managed S-21 operations in a way which ensured that all detainees, including those merely perceived to be enemies of the CPK, suffered the same grave consequences of acts perpetrated in furtherance of this specific discriminatory intent.

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[725] T., 16 September 2009 (Accused), pp. 42-43 (admission of having implemented "in a devoted and merciless fashion" the persecution by the CPK of detainees at S-21); *see also* T., 1 April 2009 (Agreed Facts), pp. 64-65; T., 23 June 2009 (Accused), pp. 24, 48-49.

[726] T., 22 June 2009 (Accused), p. 102; T., 4 August 2009 (LACH Mean), pp. 35-36; T., 6 August 2009 (David CHANDLER), pp. 25-29.

395. Using all possible means, including torture, the Accused strove assiduously to implement CPK ideology. He continuously provided to his superiors the names of all persons whom he well understood would then inevitably be considered as traitors and political enemies. In so doing, he not only implemented discriminatory CPK policies but influenced the definition of the groups subjected to them. The Accused acknowledged that he instructed his staff to regard persons arrested by Angkar as enemies[727], and described his role as "eradicat[ing] their proper vision and … indoctrinat[ing] them with criminal ideology."[728] He also, without mercy, ordered the execution of all the detainees once they confessed to his satisfaction their guilt as opponents of the Revolution. He was well aware that these confessions would be used to arrest still more political enemies, and for propaganda purposes. He used his discretion, as Secretary of the S-21 Committee to order the transfer of his staff to S-24 for re-education, and as Chairman of S-21 to influence and facilitate his superiors' decisions to arrest and smash S-21 staff whom he perceived as enemies on the basis of their behaviour, their biography or their implication in a detainee's confession. He also recruited young and impressionable individuals with suitable political characteristics, namely poor and uneducated peasants who were easier to indoctrinate.[729]

396. The majority of the Chamber finds that the Accused's conduct demonstrates his specific intent to target his victims because they belonged to the group targeted on the basis of the discriminatory CPK policy implemented at S-21. The overwhelming inference from the totality of evidence at trial is therefore that the Accused possessed the specific intent required for the offence of persecution. The Chamber recalls that there is no requirement in law that the perpetrator possess a persecutory intent over and above this necessary discriminatory intent (Section 2.5.3.13).

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[727] T., 2 September 2009 (Accused), pp. 80-81; T., 27 June 2009 (Accused), p. 17; *see also* T., 16 September 2009 (Accused), pp. 37-38*; see also* T., 21 July 2009 (PRAK Khan), p. 18; T., 4 August 2009 (LACH Mean), p. 20.
[728] T., 2 September 2009 (Accused), pp. 81-82.
[729] T., 27 April 2009 (Accused), pp. 82-83 (admitting that only M-13 staff or those who were recruited by him and who had good biographies were not affected by the purges); *see also* Section 2.3.3.5.1.

2.5.3.14.5 Dissenting opinion of Judge Cartwright

397. I agree with my colleagues in the analysis of the law and in the factual analysis of the context within which the Accused as Chairman of S-21 managed its operations. I differ when considering the inferences to be drawn from his implementation of CPK policies at S-21.

398. I am in complete agreement that the Accused assiduously implemented CPK policies to detain, interrogate, and, where he deemed it appropriate, to torture and then execute all those imprisoned at S-21. I also agree that the CPK policy was discriminatory on political grounds. The Accused knew that not all detainees held at S-21 were in fact enemies of the Party, but that many were in any event detained, interrogated and executed.[730] He also knew that a large number of the confessions completed by the detainees were partially or wholly incorrect and that many confessed wrongly to activities or membership of suspected groups such as the CIA or KGB.

399. In reaching my view of the facts, I place emphasis on the unanimous finding that it was the CPK that identified "enemies" and for the most part ordered their arrest. I also note that the Accused was unaware of the highly confidential 30 March Directive and could not therefore be said to share its policy.[731] His task, which he accepted as a loyal and efficient member of the Party, was to implement unquestioningly all tasks required of him. In this manner, he materially assisted the implementation of the CPK policies against S-21 detainees. Although finding the Accused to be aware of the discriminatory basis of these policies, the inferences that I draw from the evidence lead me to conclude that it has not been proved to the required standard that he personally possessed the discriminatory intent required to support a conviction for persecution on political grounds.

[730] T., 22 June 2009 (Accused), p. 102; T., 4 August 2009 (LACH Mean), pp. 35-36; T., 6 August 2009 (Davjd CHANDLER), pp. 25-29.
[731] T., 30 April 2009 (Accused), pp. 17-22.

2.6 Law and Findings on Grave Breaches of the Geneva Conventions of 1949

400. The Chamber has subject-matter jurisdiction over grave breaches of the Geneva Conventions of 1949 pursuant to Article 6 of the ECCC Law. Article 6 of the ECCC Law provides:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:
>
> - wilful killing;
> - torture or inhumane treatment;
> - wilfully causing great suffering or serious injury to body or health;
> - destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
> - compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> - wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
> - unlawful deportation or transfer or unlawful confinement of a civilian;
> - taking civilians as hostages.[732]

401. The Amended Closing Order charges the Accused with the following grave breaches of the Geneva Conventions of 1949: (i) wilful killing; (ii) torture or inhumane treatment; (iii) wilfully causing great suffering or serious injury to body or health; (iv) wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial; and (v) unlawful confinement of a civilian.[733]

402. As a preliminary matter, the Chamber must establish that these offences constituted crimes under national or international law during the 17 April 1975 to 6 January 1979 period.

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[732] Article 6 of the ECCC Law essentially mirrors the grave breaches provisions of the Geneva Conventions of 1949 with two exceptions: (1) the grave breaches provisions explicitly include "biological experiments" as a form of torture or inhuman treatment; and (2) the grave breaches provisions require that the destruction and appropriation of property be "extensive".

[733] Amended Closing Order, p. 44.

403. Cambodia and Vietnam ratified the four Geneva Conventions of 1949 dated 12 August 1949 (collectively "Geneva Conventions")[734] on 8 December 1958 and 28 June 1957, respectively.[735] All four Geneva Conventions contain a "grave breaches" provision that applies to acts committed against "protected" persons or property within the context of an armed conflict of an international character.[736] Notably, each grave breaches provision enumerates particular offences for which universal mandatory criminal jurisdiction exists among the contracting States.[737] Under all four Geneva Conventions, the grave breaches provisions prohibit wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health.[738] Under Geneva Convention III Relative to the Treatment of Prisoners of War ("Geneva Convention III") and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV"), respectively, the grave breaches provisions also include depriving a prisoner of war or a civilian of the rights of fair and regular trial.[739] Additionally, the unlawful confinement of a civilian is considered a grave breach under Geneva Convention IV.[740]

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[734] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 ("Geneva Convention I"); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 UNTS 85 ("Geneva Convention II"); Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 ("Geneva Convention III"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 ("Geneva Convention IV", and collectively "Geneva Conventions").

[735] *See* ICRC, *State Parties / Signatories: Geneva Conventions of 12 August 1949*.

[736] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147; *see also Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, paras 80-81, 84.

[737] Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146 (each of which states in relevant part, "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.")

[738] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

[739] Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

[740] Geneva Convention IV, Article 147.

404. The Geneva Conventions' grave breaches provisions, which explicitly prohibit and identify as criminal the offences listed in Article 6 of the ECCC Law, were binding on Cambodia at the relevant time. The Chamber recalls that the principle of legality is also satisfied where a State is already treaty-bound by a specific convention.[741]

405. Further, the Geneva Conventions, and particularly their grave breaches provisions, codified core principles of customary international law.[742] The list of grave breaches was included in the Geneva Conventions largely on the basis of crimes pursued by the Nuremberg-era tribunals and recognised at the time of enactment as criminal according to general principles of law across national legal systems.[743] Subsequent jurisprudence from international tribunals has reaffirmed the customary status of the Geneva Conventions, including their grave breaches provisions,[744] as well as the individual criminal responsibility that attaches to violations of these norms.[745]

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[741] *See* Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 (annexed to document A/53/850-S/1999/231), 18 February 1999, para. 73 (stating that "Cambodia, Laos, Thailand and Viet Nam were parties to all four Geneva Conventions of 1949 during the period at issue, although none became a party to the 1977 Additional Protocols before 1980. The grave breaches of the provisions of the Geneva Conventions thus apply, although criminality extended beyond these grave breaches under the customary law of the time.") (footnotes omitted); *see also* Section 1.5.

[742] *See* ICRC, *Commentary to Geneva Convention II*, (Pictet ed. 1960), specifically Article 62, pp. 281-283 ("a Power which denounced the Convention would nevertheless remain bound by the principles contained in it in so far as they are the expression of inalienable and universal rules of customary international law."); ICRC, *Commentary to Geneva Convention III,* (Pictet ed. 1960), specifically Article 142, pp. 646-648; ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), specifically Article 158, pp. 623-626.

[743] *See* ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, (J-M. Henckaerts and L Doswald-Beck eds. 2005) p. 574; ICRC, *Commentary to Geneva Convention I*, (Pictet ed. 1952), specifically Article 50, p. 371.

[744] *Prosecutor v. Delalić et al.*, Judgement, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001 ("*Čelebići* Appeal Judgement"), paras 112-113 (recognising the customary nature of the Geneva Conventions); *Simić et al.* Trial Judgement para. 86; *see also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits Judgment, ICJ (ICJ Reports 1986), 27 June 1986, p. 114, para. 218 ("the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such [fundamental general] principles [of humanitarian law]"); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ (ICJ Reports 1996), 8 July 1996, p. 226, para. 79 ("the fundamental rules [contained in the Geneva Conventions] are to be observed by all States whether or not they have ratified the conventions […] because they constitute intransgressible principles of international customary law").

[745] *Prosecutor v. Hadžihasanović et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber (IT-01-47-AR72), 16 July 2003, para. 34, citing *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 134; *Tadić* Trial Judgement, para. 577.

406. It was accordingly foreseeable at the relevant time that the Accused could be held criminally liable for any acts listed as grave breaches of the Geneva Conventions. The law providing for this liability was also accessible to the Accused considering its international conventional and customary basis. This holds true notwithstanding that the Geneva Conventions do not specify the criminal sanctions to be imposed for violations of their grave breaches provisions.[746]

407. Moreover, the appalling nature of the offences constituting grave breaches of the Geneva Conventions helps to refute any claim that the Accused would have been unaware of their criminal nature.[747]

408. The Chamber consequently finds that, at all times relevant to the Amended Closing Order, offences charged against the Accused pursuant to Article 6 of the ECCC Law constituted crimes under international law.

2.6.1 Chapeau requirements for Article 6 of the ECCC Law

409. Article 6 of the ECCC Law incorporates the conditions of applicability contained in the Geneva Conventions. Accordingly, an accused may be found responsible for grave breaches only when these are perpetrated against persons or property regarded as "protected" by the Geneva Conventions and within the context of an international armed conflict.

410. These jurisdictional prerequisites have been set out in a useful five-part test by the ICTY, whose Statute similarly confers jurisdiction over grave breaches of the Geneva Conventions.[748] The following general requirements must be established to the required

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[746] *See Trial of The Major War Criminals Before the International Military Tribunal: Nuremberg, 27 August 1946 – 1 October 1946*, (1948), Vol. 22, pp. 463-464 (stating that individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches).

[747] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 42 (noting that the immorality or appalling character of an act may play a role in refuting any claim that its perpetrator did not know of its criminal nature).

[748] The jurisprudence of the ICTY is more extensive than that of the other *ad hoc* international tribunals on the issue as the Statutes of the ICTR and SCSL do not confer upon those Tribunals jurisdiction over offences as grave breaches of the Geneva Conventions given the non-international character of the conflicts that concern them.

standard: (i) the existence of an armed conflict; (ii) the international character of the armed conflict; (iii) a nexus between the acts of the accused and the armed conflict; (iv) the "protected persons" status of the victims under the Geneva Conventions; and (v) the knowledge of the accused.[749]

2.6.1.1 Existence of an armed conflict

411. The Geneva Conventions' common Article 2 ("Common Article 2") provides that the Conventions' provisions, including their grave breaches provisions, apply to:

> all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

412. Interpreting Common Article 2, the jurisprudence of the ICTY established that in the absence of a declared war, an "armed conflict" exists whenever there is a resort to armed force between States (where the armed conflict is of an international nature) or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State (when it is of an internal nature).[750]

2.6.1.2 International character of the armed conflict

413. Common Article 2 further requires that the armed conflict be one of an international character.[751]

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[749] *See Prosecutor v. Naletilić et al.*, Judgement, ICTY Appeals Chamber (IT-98-34-A), 3 May 2006 ("*Naletilić* Appeal Judgement"), para. 110, citing *Tadić* Appeal Judgement, para. 80. Article 6 of the ECCC Law, unlike Article 2 of the ICTY Statute, also requires that the acts be committed during the period of 17 April 1975 to 6 January 1979. The Chamber is aware of this requirement as it applies to all the charges before it, including offences charged pursuant to Article 6 of the ECCC Law.

[750] *Čelebići* Trial Judgement, paras 183-184, citing *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 70. By contrast, the provisions of common Article 3 of the Geneva Conventions apply to armed conflicts of a non-international character.

[751] This is an indispensable requirement of Common Article 2. *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 79; *Naletilić* Appeal Judgement, para. 117.

414. An armed conflict is indisputably international if it takes place between two or more States. An official recognition of a state of war is not required for the grave breaches provisions of the Geneva Conventions to apply. Rather, *de facto* hostilities between States may be sufficient to satisfy the internationality requirement, where these are conducted through the States' respective armed forces. As stated in the ICRC's Commentary to Geneva Convention IV:

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.
>
> The Convention only provides for the case of one of the Parties denying the existence of a state of war. What would the position be, it may be wondered, if both the Parties to an armed conflict were to deny the existence of a state of war. Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.[752]

415. The provisions of the Geneva Conventions indicate that their geographic and temporal application within an armed conflict extend beyond the vicinity of the actual hostilities and the cessation of fighting.[753] Once it is established that an international armed conflict existed at the place and time relevant to the charges against an accused, international humanitarian law will apply to the whole territory of the relevant States, whether or not actual combat takes place there, and will continue to apply beyond the cessation of hostilities until a general conclusion of peace is achieved.[754]

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[752] ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), specifically Article 2, pp. 20-21; *see also Kordić* Appeal Judgement, para. 373 ("[Common Article 2] cannot be interpreted to rule out the characterisation of the conflict as being international in a case when *none* of the parties to the armed conflict recognises the state of war. The purpose of Geneva Convention IV, *i.e*. safeguarding the protected persons, would be endangered if States were permitted to escape from their obligations by denying a state of armed conflict.")

[753] *See e.g.,* Geneva Convention III, Article 5 (providing for its application to prisoners of war from the time they fall into the power of the enemy until their final release and repatriation).

[754] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 70; *Čelebići* Trial Judgement, paras 208-211; *Kordić* Appeal Judgement, para. 321.

2.6.1.3 Nexus between the acts of the accused and the armed conflict

416. A sufficient nexus must exist between the acts of the accused and the armed conflict giving rise to the applicability of international humanitarian law. To satisfy this nexus, the acts of the accused must have been "closely related" to the armed conflict as a whole.[755] It is not necessary to establish that there were actual combat activities in the area where the acts are alleged to have occurred or that they were part of a policy or practice tolerated by one of the parties to the armed conflict. Where, however, acts occurred in a prisoner camp with the connivance or permission of the authorities running these camps and as part of an accepted policy towards prisoners, those acts will clearly be "closely related" to the armed conflict.[756]

2.6.1.4 Status as "protected persons" under the Geneva Conventions of 1949

417. Article 6 of ECCC Law grants the Chamber jurisdiction over "acts against persons or property protected under provisions" of the Geneva Conventions.[757] This reference covers "protected persons" as defined pursuant to Articles 4 of Geneva Convention III (as regards prisoners of war) and Geneva Convention IV (as regards civilian persons).[758]

418. Pursuant to Article 4 of Geneva Convention III, prisoners of war are persons, including "[m]embers of the armed forces of a Party to the conflict", who have "fallen into the power of the enemy." Article 4(1) of Geneva Convention IV defines protected persons as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

419. The ICTY Appeals Chamber has adopted a flexible interpretation of the nationality requirement expressed in Article 4 of Geneva Convention IV. Drawing on the object and

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[755] *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (IT-94-1-AR72), 2 October 1995, para. 70.
[756] *Tadić* Trial Judgement, paras 572-575.
[757] Although property is also "protected" under the Geneva Conventions, the offences charged against the Accused pursuant to Article 6 of the ECCC Law concern only protected persons.
[758] Articles 13, 24, 25 and 26 of Geneva Convention I and Articles 13, 36, 37 of Geneva Convention II likewise define those protected under their provisions. In the instant case, however, the Chamber is primarily concerned with Geneva Conventions III and IV as they pertain to prisoners of war and civilians.

purpose of the Geneva Conventions, it has found that a person may be accorded protected status notwithstanding the fact that he or she is of the same nationality as a party to the conflict.[759] It has found that the protected status of an individual should not depend on formal bonds and purely legal relations, but on the substance of relations that exists between the individual and the State.[760] The crucial consideration when analysing these substantive relations is the allegiance — or lack thereof — that an individual has to a party to the conflict.[761] Civilians may thus be considered as "protected persons" for the purpose of Geneva Convention IV where they are viewed by the State whose hands they are in "as belonging to the opposing party in an armed conflict and as posing a threat to [that] State."[762]

2.6.1.5 Knowledge of the accused

420. The ICTY Appeals Chamber has reasoned that if certain conduct becomes a crime only in the context of an international armed conflict, the existence of such a conflict is not merely a jurisdictional pre-requisite but also a substantive element of the offences charged. Accordingly, it has found that an accused must know that his criminal conduct had a nexus to the international armed conflict, "or at least that he had knowledge of the factual circumstances later bringing the Judges to the conclusion that armed conflict was an international one."[763]

421. These two prongs of the accused's knowledge – as regards the international character of the armed conflict and the protected status of the victims – have been made explicit only in recent years by international tribunals. However, both prongs are distilled

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[759] *Tadić* Appeal Judgement, para. 166 ("[N]ot only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."); *Aleksovski* Appeal Judgement, para. 151; *Čelebići* Appeal Judgement, paras 58, 73.
[760] *Tadić* Appeal Judgement, paras 166, 168.
[761] *Tadić* Appeal Judgement, para. 166; *Kordić* Appeal Judgement, para. 331; *Aleksovski* Appeal Judgement, paras 151-152.
[762] *Čelebići* Appeal Judgement, para. 98.
[763] *Naletilić* Appeal Judgement, paras 110-120; *Kordić* Appeal Judgement, para. 311; *see also* Article 8 (War Crimes) of the ICC's "Elements of Crimes" (ICC-ASP/1/3 (part II-B), entry into force 9 September 2002).

from the field of application of the grave breaches of the Geneva Conventions and are thus equally applicable to the 17 April 1975 to 6 January 1979 period.

422. To be convicted of an offence pursuant to Article 6 of the ECCC Law, an accused must therefore have sufficient knowledge of the international character of the armed conflict and of the protected status of the victims under the Geneva Conventions. Awareness by the accused that a foreign state was involved in the armed conflict and that a victim belonged to an adverse party to that armed conflict will suffice to establish this knowledge.

2.6.2 Findings on chapeau requirements for Article 6 of the ECCC Law

2.6.2.1 Existence of an international armed conflict

423. The Chamber finds that armed hostilities existed between Cambodia and Vietnam from 17 April 1975 through 6 January 1979 (Section 2.1). Continuous clashes, whether border skirmishes or more serious incursions into both Cambodian and Vietnamese territory, continued throughout this period, despite DK and Vietnam's desire to keep them covert at the outset (Section 2.1.1). The Chamber concludes that an international armed conflict accordingly existed at all times relevant to the Amended Closing Order.

2.6.2.2 Nexus between the acts of the Accused and the armed conflict

424. There is ample evidence that the acts of the Accused against protected persons at S-21 as charged were closely related to the armed conflict between DK and Vietnam.[764] Vietnamese detainees constituted the largest group of foreign detainees at the S-21 complex and their numbers increased with the escalation of the conflict, particularly throughout 1978.[765] Vietnamese soldiers detained at the S-21 complex were forced to make confessions regarding Vietnam's intent to invade Cambodia, which from January

[764] *See* T., 9 June 2009 (Accused), p. 74 (acknowledging that individuals were sent to S-21 as a result of the armed conflict).
[765] T., 9 June 2009 (Accused), p. 96; T., 10 June 2009 (Accused), pp. 5-7; T., 1 April 2009 (Agreed Facts), p. 65; *see also* "Vietnamese arrested by month", E68.32.

1978 onwards were broadcast on DK radio for propaganda purposes, and interrogated on matters of military intelligence.[766]

2.6.2.3 Status as "protected persons" under the Geneva Conventions of 1949

425. No fewer than 345 Vietnamese prisoners of war and civilians were detained at S-21 and constituted protected persons under the Geneva Conventions of 1949.[767] Vietnamese detainees were registered as either soldiers (122 entries), Vietnamese civilians (79 entries) or spies (144 entries).[768] Vietnamese prisoners of war, many of whom were captured on the battlefield, entered the S-21 complex in their military uniforms.[769] Amongst the Vietnamese civilians were women, as well as children brought to the S-21 complex along with their parents.[770] The Accused stated that "spies" were classified as such on order of his superiors but were in fact either civilians or combatants.[771]

426. Further, due to their real or perceived allegiance with Vietnam, some Cambodians, originating primarily from the East Zone, were detained and executed as Vietnamese sympathisers.[772] Although Cambodian nationals, they were viewed by the CPK as having allegiances to Vietnam and as a threat to DK. Accordingly, the Chamber considers that these Cambodian detainees were also protected persons within the meaning of Article 4 of Geneva Convention IV.

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[766] T., 10 June 2009 (Accused), pp. 7-8; 45-46; T., 16 June 2009 (Accused), p. 38;.T., 14 July 2009 (MAM Nai), p. 28; T., 21 July 2009 (PRAK Khan), p. 31.

[767] *See* "Vietnamese Prisoners Entering S-21", E68.27; T., 9 June 2009 (Accused), p. 97; T., 10 June 2009 (Accused), pp. 3, 5-6; *see also* (Section 2.3.3.4.2.

[768] T., 10 June 2009 (Accused), p. 6; "S-21 Prisoners described as Vietnamese soldiers", E68.28; "S-21 Prisoners described as Vietnamese spies", E68.29; "S-21 prisoners identified as Vietnamese", E68.30; "S-21 Prisoners described as Vietnamese", E68.31; *see also* the Accused comments on the Revised S-21 Prisoner List: T., 10 June 2009 (Accused), pp. 3-7.

[769] T., 9 June 2009 (Accused), pp. 98-99; T., 10 June 2009 (Accused), pp. 7, 17-18; T., 16 July 2009 (HIM Huy), p. 38.

[770] T., 10 June 2009 (Accused), pp. 18-19, 47-48; T., 21 July 2009 (PRAK Khan), p. 15; T., 4 August 2009 (PES Matt statement read), p. 87. As per S-21 policy, the children were not registered in detainee logs. *See* T., 10 June 2009 (Accused), pp. 18-19.

[771] T., 10 June 2009 (Accused), pp. 10, 56.

[772] T., 25 May 2009 (Nayan CHANDA), p. 22; T., 6 August 2009 (David CHANDLER), pp. 16-17; T., 9 June 2009 (Accused), p. 91; T., 1 April 2009 (Agreed Facts), p. 65; *see also* "Arrest from East Zone by month", E68.46, showing a high amount of arrests in 1978; "S-21 Prisoners coming from the East Zone", E68.45, showing a total number of 1165 entries.

2.6.2.4 Knowledge of the Accused

427. Although acknowledging that the conflict between Vietnam and Cambodia commenced before this date, the Accused alleged that he learned of it only on 6 January 1978.[773]

428. It is undisputed that the first record of an S-21 detainee described as "Vietnamese" dates back to 7 February 1976. The Accused recalled that Vietnamese detainees, including civilians and soldiers, were taken to the S-21- complex as early as 1975, though they were then few in number.[774] In some instances, the Accused ordered S-21 trucks and personnel to transport Vietnamese detainees from combat zones to the S-21 complex, and sent the blood of S-21 detainees to the General Staff Hospital for transfusions for RAK soldiers wounded in battle in 1977 or 1978.[775] He knew of the ongoing purges of Cambodian nationals on account of their perceived allegiance with Vietnam, as well as SON Sen's battlefield deployment in August 1977.[776] The Accused also reviewed, summarised and amended the confessions of Vietnamese detainees as early as April 1976.[777]

429. The Chamber concludes that the Accused was aware of the armed conflict with Vietnam at least from 7 February 1976. Further, the Accused knew that S-21 detainees included protected persons, namely Vietnamese civilians and prisoners of war, as well as Cambodians considered to be Vietnamese sympathisers.

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[773] T., 9 June 2009 (Accused), pp. 70-71, 75-79, 85, 89-90.
[774] T., 1 April 2009 (Agreed Facts), p. 72; T., 9 June 2009 (Accused), pp. 96-97; T., 10 June 2009 (Accused), p. 2.
[775] T., 9 June 2009 (Accused), pp. 97-98; T., 10 June 2009 (Accused), pp. 42-43; T., 16 June 2009 (Accused), pp. 81-83; T., 17 June (Accused), p. 38; T., 22 June 2009 (Accused), pp. 113-114; T., 16 July 2009 (HIM Huy), pp. 16, 37-39; T., 20 July 2009 (HIM Huy), pp. 22-23, 66; T., 21 July 2009 (PRAK Khan), pp. 37-38.
[776] T., 9 June 2009 (Accused), p. 91; T., 10 June 2009 (Accused), pp. 31, 58-59, 63, 75.
[777] T., 10 June 2009 (Accused), pp. 8, 10, 12, 14-16, 48; "S-21 Confession of Vietnamese prisoner Troeng Yaing Lak", E5/2.13, ERN (English) 00284002.

2.6.3 Law and findings on offences as grave breaches of the Geneva Conventions of 1949

430. The Amended Closing Order charges the Accused with the following grave breaches of the Geneva Conventions of 1949: (i) wilful killing; (ii) torture or inhumane treatment; (iii) wilfully causing great suffering or serious injury to body or health; (iv) wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial; and (v) unlawful confinement of a civilian.[778]

2.6.3.1 Wilful killing

431. The elements of the offence of wilful killing under Article 6 of the ECCC Law are the same as those of murder under Article 5 of the ECCC Law (crimes against humanity) (Section 2.5.3.1).

2.6.3.2 Findings on wilful killing

432. The Amended Closing Order states:

> 151. S21 personnel wilfully caused the death of at least 400 protected persons both directly and indirectly, through a variety of means.[779]

433. The Accused confirmed that Vietnamese prisoners of war and civilians as well as Vietnamese sympathisers detained at S-21 were subjected to the same detention conditions as other detainees and were also destined for execution, with no more favourable conditions applying to them due to their nationality or protected status.[780]

434. Executions of protected persons were carried out in the same manner as those of other S-21 detainees.[781] In common with other detainees, protected persons were

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[778] Amended Closing Order, pp. 44-45. The Chamber notes that the Amended Closing Order uses the term "inhumane treatment" while the Geneva Conventions refer to "inhuman treatment". The Chamber considers the two terms synonymous.
[779] Amended Closing Order para. 151.
[780] T., 10 June 2009 (Accused), p. 54 ("those who were sent to S 21 were considered as enemies to be smashed and, therefore, among those victims there must be Vietnamese civilians, soldiers and spies. So there is no other choice but to smash."); *see also* T., 15 June 2009 (Accused), p. 49; T., 1 July 2009 (BOU Meng), pp. 54-55.
[781] T., 16 July 2009 (HIM Huy), p. 86-87; *see also* Section 2.4.1.1.

generally executed at Choeung Ek and within the S-21 complex[782] following the completion of their confessions, if any.[783] Vietnamese children were also either killed at the S-21 complex or Choeung Ek after being separated from their parents.[784]

435. In addition to the detainees who were executed, the detention conditions imposed at S-21 were such that many detainees also died during their detention (Section 2.4.5.1).

436. Due to the inaccuracy of the existing record, it is not possible to quantify the precise number of the protected persons who died or were executed at S-21. On the basis of the Revised S-21 Prisoner List, the Chamber finds that no fewer than 345 Vietnamese detainees died or were executed at S-21, in addition to the large but unquantifiable number of Cambodian nationals perceived as Vietnamese sympathisers.[785]

437. The Trial Chamber finds that protected persons were deliberately killed by S-21 personnel within the S-21 complex or at Choeung Ek. It also finds that detainees died at S-21 as the result of omissions known to be likely to lead to death and as a consequence of the conditions of detention imposed upon them.

2.6.3.3 Torture or inhumane treatment

438. The offence of torture or inhumane treatment is expressly prohibited as a grave breach in each of the four Geneva Conventions.[786] Torture and inhumane treatment constitute two separate offences.[787]

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[782] T., 17 June 2009 (Accused), p. 92; T., 16 July 2009 (HIM Huy), pp. 69, 85-87; *see also* T., 21 July 2009 (PRAK Khan) pp. 50-51.

[783] T., 10 June 2009 (Accused), pp. 9-10, 18. The majority of protected persons at the S-21 complex were executed after 6 January 1978, the day POL Pot called for the celebration of the RAK victory over the Vietnamese Army (T., 9 June 2009 (Accused), pp. 96-97; T., 10 June 2009 (Accused), pp. 2-19; *see also* T., 3 August 2009 (LACH Mean), pp. 68-69; T., 4 August 2009 (PES Matt statement read), p. 87). During the last mass execution of about 200 remaining S-21 detainees in January 1979, Vietnamese detainees kept alive in the complex until then for interrogation purposes were also executed upon order by the Accused's superiors. (T., 17 June 2009 (Accused), pp. 83-85; s*ee also* T., 28 July 2009 (SUOS Thy), p. 23.

[784] T., 21 July 2009 (PRAK Khan), p. 15; T., 10 June 2009 (Accused), pp. 18-19. Despite a lack of specific information regarding the execution of children, the Accused did not contest these facts.

[785] "Vietnamese Prisoners Entering S-21", E68.27; "S-21 Prisoners identified as Vietnamese", E68.30.

[786] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

[787] *See Čelebići* Trial Judgement, para. 442.

439. The elements of the offence of torture under Article 6 of the ECCC Law are the same as those of torture under Article 5 of the ECCC Law (Crimes Against Humanity).[788]

440. Inhumane treatment is defined by ICTY jurisprudence as an intentional act or omission against a person protected under the Geneva Conventions, which causes serious mental harm or physical suffering or injury, or constitutes a serious attack on human dignity.[789]

441. The ICRC *Commentary to Geneva Convention IV* provides assistance in interpreting the offence:

> [Inhuman treatment] could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them from being brought down to the level of animals. That leads to the conclusion that by 'inhuman treatment' the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might cut the civilians internees off completely from the outside world and in particular from their families, or which caused great injury to their human dignity, could conceivably be considered as inhuman treatment.[790]

442. Acts which constitute torture or wilfully causing great suffering or serious injury to body or health will simultaneously constitute inhumane treatment. The offence extends also to encompass other acts which violate the principle of humane treatment, in particular the respect for human dignity.[791] This assessment is a question of fact which must take into account all of the circumstances of the individual case.[792] Acts such as mutilation and other types of severe bodily harm, beatings and other acts of violence,[793] and serious physical and mental injury[794] have been considered as inhumane.

443. Inhumane treatment differs from torture in that it need not be undertaken for any particular purpose. The ICTY has found that inhumane treatment includes an act causing

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788 *Krnojelac* Trial Judgement, para. 178; *see also* Section 2.5.3.7.
789 *See Čelebići* Trial Judgement, para. 543; *Čelebići* Appeal Judgement, para. 426.
790 ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), p. 598.
791 *Čelebići* Trial Judgement, para. 544.
792 *Čelebići* Trial Judgement, para. 544; *Blaškić* Trial Judgement, para. 155.
793 *Tadić* Trial Judgement, para. 730.
794 *Blaškić* Trial Judgement, para. 239.

serious mental or physical suffering which does not reach the threshold of severity required for the offence of torture.[795]

444. The perpetrator must have committed the act or omission with the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or with recklessness as to whether suffering or an attack on human dignity would result.[796]

2.6.3.4 Findings on torture or inhumane treatment

445. The Amended Closing Order states:

> 149. S21 personnel wilfully caused severe pain or suffering, whether physical or mental, to protected persons during interrogation. The purpose of using such methods within the course of the interrogation was to extract confessions aimed at obtaining military information and supporting CPK propaganda.
>
> 150. S21 personnel wilfully caused serious mental harm or physical suffering or injury, or submitted them to conditions which amounted to a serious attack upon the human dignity of the prisoners at S21.[797]

2.6.3.4.1 Torture

446. Vietnamese detainees within the S-21 complex were interrogated by Witness MAM Nai, with the help of an interpreter, Pha Tha Chan.[798] According to the Accused, "[b]oth civilian and Vietnamese military were detained the same way as the Khmer detainees. They were interrogated and tortured. But the Vietnamese people were not as severely tortured as the tortures that were inflicted on the Cambodian prisoners because we only needed their confession."[799] He added that while torture was used on Vietnamese prisoners where "necessary" or "unavoidable", it took place on a "very minimal scale".[800]

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795 *Čelebići* Trial Judgement, para. 542.
796 *Čelebići* Trial Judgement, para. 543.
797 Amended Closing Order, paras 148-150.
798 T., 10 June 2009 (Accused), pp. 9, 10, 45-46; T., 16 June 2009 (Accused), p. 47; T., 14 July 2009 (MAM Nai), pp. 26-29; *see also* Section 2.3.3.4.3.2.
799 T., 15 June 2009 (Accused), p. 49; *see also* T., 4 August 2009 (PES Matt statement read), p. 87 (indicating that he saw Vietnamese detainees who he thought had been tortured*;* T., 1 July 2009 (BOU Meng), pp. 39, 55 (indicating that the detainee painted by VANN Nath was Vietnamese).
800 T., 10 June 2009 (Accused), pp. 9-11, 19; *see also* T., 16 June 2009 (Accused), pp. 85, 86; T., 9 June 2009 (Accused), p. 74.

This is corroborated by MAM Nai's notebook, which counsels interrogators not to beat Vietnamese when they appear not to know information.[801]

447. The purpose of interrogation of Vietnamese detainees evolved with the escalation of the armed conflict. Initially, they were questioned on their "spy missions" and networks in Cambodia, as well as on Vietnam's intent to invade Cambodia and incorporate it into an Indochinese federation.[802] From 6 January 1978, the confessions of Vietnamese prisoners of war were taped and broadcast on the radio for propaganda purposes.[803]

448. The Chamber accordingly finds that Vietnamese detainees were subjected to torture, albeit in lesser number and with less severity than other detainees. It further finds that Cambodian nationals perceived as Vietnamese sympathisers were interrogated in the same manner and for the same purpose as all other Cambodian detainees.[804]

2.6.3.4.2 Inhumane treatment

449. Some treatment inflicted on protected persons not reaching the severity threshold of torture or great suffering, nonetheless amounted to violations of human dignity, as evidenced by the general conditions of detention and the numerous methods used to obtain forced confessions of Vietnamese detainees.[805] The Chamber is satisfied that protected persons were subjected to a serious attack on their human dignity. The Chamber further finds that this treatment was intentional or recklessly inflicted by S-21 staff.

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[801] "S-21 Notebook by MAM Nai *alias* Chan", E3/231, ERN (English) 00184616.
[802] T., 10 June 2009 (Accused), pp. 3, 8, 12; T., 1 April 2009 (Agreed Facts), pp. 87-88.
[803] T., 9 June 2009 (Accused), p. 74; T., 10 June 2009 (Accused), pp. 3, 48; T., 16 June 2009 (Accused), p. 38; T., 20 July 2009 (HIM Huy), pp. 4-5; *see also* Section 2.1.2.
[804] T., 9 June 2009 (Accused), p. 91; *see also* Section 2.4.4.
[805] The Case File contains 82 confessions of Vietnamese detainees (documents E3/665 to E3/747).

2.6.3.5 Wilfully causing great suffering or serious injury to body or health

450. The offence of wilfully causing great suffering or serious injury to body or health is expressly prohibited as a grave breach in each of the four Geneva Conventions.[806] It represents a single offence whose elements are framed in the alternative.[807]

451. The ICTY jurisprudence has defined the offence as "an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven."[808]

452. The ICRC Commentary to Geneva Convention IV notes as follows:

> *Wilfully causing great suffering* - this refers to suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism. In view of the fact that suffering in this case does not seem, to judge by the phrase which follows, to imply injury to body or health, it may be wondered if this is not a special offence not dealt with by national legislation. Since the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.
>
> *Serious injury to body or health* – this is a concept quite normally encountered in penal codes, which usually use as a criterion of seriousness the length of time the victim is incapacitated for work.[809]

The Chamber adopts this early analysis of the offence of wilfully causing great suffering or serious injury to body or health.

453. This offence is distinguishable from torture primarily as the alleged act or omission need not be committed for any particular purpose.[810] The offence is also further distinguishable from that of inhumane treatment as requiring serious mental or physical

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[806] Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention III, Article 130; Geneva Convention IV, Article 147.
[807] *Čelebići* Trial Judgement, para. 506.
[808] *Kordić* Trial Judgement, para. 245.
[809] ICRC, *Commentary to Geneva Convention IV,* (Pictet ed. 1958), specifically Article 147, p. 599.
[810] *See also Čelebići* Trial Judgement, paras 508, 511.

injury. Acts where the resultant harm relates solely to an individual's human dignity are not included within this offence.[811]

454. The physical or mental harm caused to the victim need not be irremediable or permanent, but must go beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.[812]

455. The jurisprudence of the ICTY has established that the requisite mental element for this offence includes both culpable intent and recklessness.[813]

2.6.3.6 Findings on wilfully causing great suffering or serious injury to body or health

456. The Amended Closing Order states:

> 148. These protected persons were wilfully subjected to serious mental and physical suffering due to inhumane acts which included deliberate deprivation of adequate food, sanitation and medical treatment. Prisoners were beaten and subjected to stringent restrictions during detention. These severe conditions individually or collectively depressed, degraded, and dehumanised detainees ensuring that they were always afraid.[814]

457. Protected persons suffered the same conditions of detention as other S-21 detainees,[815] resulting in serious bodily and mental injuries. The Chamber thus finds that S-21 staff wilfully caused Vietnamese and other protected persons great suffering by implementing conditions of detention at S-21 characterized by, amongst other things, a lack of access to adequate food and medical care (Section 2.4.5).

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811 *Kordić* Trial Judgement, para. 245.
812 *Krstić* Trial Judgement, paras 511-513.
813 *Blaškić* Trial Judgement, para. 152.
814 Amended Closing Order, para. 148.
815 T. 15 June 2009 (Accused), pp. 48-51; T., 16 July 2009 (HIM Huy), pp. 50, 51, 61; *see also* Sections 2.4.5.1-2.4.5.4.

2.6.3.7 Wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial

458. The offence of wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial is expressly prohibited as a grave breach in Geneva Convention IV and Geneva Convention III, respectively.[816]

459. The perpetrator must have deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in Geneva Convention IV and Geneva Convention III. These judicial guarantees include the right to be judged by an independent and impartial court,[817] to be promptly informed of the charges,[818] the protection against collective penalty,[819] protection under the principle of legality, [820] the right not to be punished more than once for the same act or on the same count,[821] to be informed of the right to appeal,[822] and the right not to be sentenced or executed without a previous judgement pronounced by a regularly constituted court.[823]

460. The jurisprudence of the ICTY has established that the requisite mental element for this offence includes both culpable intent and recklessness.[824]

2.6.3.8 Findings on wilful deprivation of fair trial rights

461. The Amended Closing Order states:

> 147. At least 400 protected persons were wilfully denied their right to be judged by an independent and impartial court as defined by the Geneva Conventions of 1949. In particular, the right to be promptly informed of their offences; to be protected from collective penalty; to be protected by the principle of legality; or to be sentenced by a competent court.[825]

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816 Geneva Convention III, Article 130; Geneva Convention IV, Article 147.
817 Geneva Convention III, Article 84(2).
818 Geneva Convention III Article 104; Geneva Convention IV, Article 71(2).
819 Geneva Convention III, Article 87; Geneva Convention IV, Article 33.
820 Geneva Convention III, Article 99(1); Geneva Convention IV, Article 67.
821 Geneva Convention III, Article 86; Geneva Convention IV, Article 117(3).
822 Geneva Convention III, Article 106; Geneva Convention IV, Article 73.
823 Geneva Convention III, Articles 100-105, 107; Geneva Convention IV, Articles 64-70, 74-75.
824 *Blaškić* Trial Judgement, para. 152.
825 Amended Closing Order, paras 146, 147.

462. All protected persons, including all Vietnamese and Cambodians perceived as Vietnamese sympathizers were deprived of their fair trial rights (Section 2.4.3). The Chamber observes that no arrangements were made to screen captured prisoners of war or civilians, nor were there any mechanisms to inform them of the reasons for their arrest or enable them to challenge its basis or to appeal. Further, the punishment meted out to them was clearly arbitrary. There were no trials, and extra-judicial executions were carried out on detainees as a matter of policy. While no judicial system existed during the DK period, S-21 functioned as a State institution with the power to detain, interrogate and execute persons. It was accordingly bound to exercise such powers in conformity with the fair trial rights guaranteed by the Geneva Conventions.

463. The Chamber finds that no fewer than 345 Vietnamese and a large number of other protected persons detained at S-21 were wilfully deprived of their right to a fair and regular trial.

2.6.3.9 Unlawful confinement of a civilian

464. The elements of the offence of unlawful confinement under Article 6 of the ECCC Law are in substance the same as those of imprisonment under Article 5 of the ECCC Law (crimes against humanity).[826]

465. Unlawful confinement of a civilian is expressly prohibited as a grave breach in Geneva Convention IV.[827] Although the confinement of civilians in an armed conflict may be permissible in limited cases, the relevant provisions of Geneva Convention IV clarify that deprivation of liberty is permissible only where there are reasonable grounds to believe that the security of the State is at risk.[828] Further, an initially lawful internment becomes unlawful if the detaining party fails to respect the detainee's basic procedural

[826] *Kordić* Trial Judgement, para. 301; *see also Kordić* Appeal Judgement, paras 69-73; *see also* Section 2.5.3.5.
[827] Geneva Convention IV, Article 147; *see also* Geneva Convention IV, Article 5 (authorizing measures in relation to persons "definitely suspected of or engaged in activities hostile to the security of the State", but mandating humane treatment and respect of fair trial rights in relation to them.)
[828] Article 42 of Geneva Convention IV states: The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary. […]; *see also Čelebići* Appeal Judgement, paras 320-321; *Kordić* Appeal Judgement, para. 72.

rights or to establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[829]

466. The jurisprudence of the ICTY has established that the requisite mental element for this offence, in common with all grave breaches of the Geneva Conventions, includes both culpable intent and recklessness.[830]

2.6.3.10 Findings on unlawful confinement of a civilian

467. The Amended Closing Order states:

> 146. More than a hundred Vietnamese civilians were detained at S21. There was no difference in treatment between Vietnamese civilians and other individuals subjected to imprisonment at S21, all were arbitrarily deprived of their liberty.[831]

468. The Chamber has found that all S-21 detainees were intentionally and arbitrarily imprisoned without legal basis (Section 2.4.3). This was also true of no fewer than 79 Vietnamese civilians, as well as the large number of other protected civilians detained within the S-21 complex (Section 2.3.3.4.2). No reasonable grounds justifying the confinement of these civilians have been established. Nor were opportunities provided to detainees, including protected civilians held within the S-21 complex, to challenge their detention (Section 2.4.3.2).

469. The Chamber finds, in the absence of factors indicating that the security of Cambodia required their internment during the armed conflict between Cambodia and Vietnam, that protected civilians, including a number of Vietnamese nationals, were unlawfully confined at S-21.

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[829] *See* Article 43 of Geneva Convention IV (providing for periodic review of detention by an appropriate court or administrative board ,as well as notification requirements in relation to detainees).
[830] *Blaškić* Appeal Judgement, para. 152.
[831] Amended Closing Order, para. 146.

2.7 Individual criminal responsibility of the Accused

470. Article 29 (new) of the ECCC Law outlines the forms of responsibility pursuant to which accused persons can be held individually criminally responsible for the crimes within the jurisdiction of the ECCC. Article 29 (new) of the ECCC Law is modelled on the provisions on forms of responsibility in the Statutes of the *ad hoc* international criminal tribunals and derives from notions of international law.[832] Article 29 (new) of the ECCC Law provides:

> Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.
>
> The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.
>
> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.
>
> The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

471. The Amended Closing Order states that the Accused "through his acts or omissions in Phnom Penh and within the territory of Cambodia, between 17 April 1975 and 6 January 1979, as Deputy Secretary or Secretary of S21, planned, instigated, ordered, committed, or aided and abetted, or is responsible by virtue of superior responsibility" for offences charged as crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Penal Code.[833]

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[832] *See* Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 6(1) of the SCSL Statute (all of which state "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [the relevant articles of the respective statutes], shall be individually responsible for the crime.")

[833] Amended Closing Order, p. 44-45 *as amended by* Decision on Appeal against the Closing Order, p. 41.

472. While the Amended Closing Order alleges multiple forms of responsibility in respect of each charge, the Chamber has the discretion to choose the form or forms of responsibility under which to assess the evidence in respect of the Accused.[834] A Chamber is not obliged to make exhaustive factual findings on each and every charged form of responsibility, and may opt to examine only those that describe the conduct of an accused most accurately.[835]

473. The principle of legality (Section 1.5) applies to the forms of responsibility, as well as to the substance of the crimes charged. The Chamber must thus establish that the forms of responsibility charged in the Amended Closing Order were recognised under national or international law during the 17 April 1975 to 6 January 1979 period.

474. The forms of responsibility mentioned in Article 29 (new) of the ECCC Law were also known under the 1956 Penal Code at the relevant time, except for planning and superior responsibility.[836] Planning was, however, criminalized by specific provisions,[837] making the criminalisation of such conduct foreseeable, whether as a form of responsibility or as a crime.

475. Further, the principle of individual criminal responsibility for the commission of violations of international humanitarian law was made explicit in the Nuremberg Charter and enforced by the Nuremberg-era judgements.[838] These Nuremberg-era judgements also confirmed that individual criminal responsibility extended beyond those who physically perpetrated crimes, including to those who ordered or assisted in their commission.[839] Subsequent jurisprudence and codifications at the international level have

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[834] *Krstić* Trial Judgement, para. 602; *Semanza* Trial Judgement, para. 397.
[835] *Prosecutor v. Milutinović*, Judgement, ICTY Trial Chamber (IT-05-87-T), 26 February 2009 ("*Milutinović* Trial Judgement"), Vol. I, para. 76.
[836] *See* Articles 76 and 82 to 87 of the 1956 Penal Code.
[837] *See* Articles 290, 223 and 239 of the 1956 Penal Code.
[838] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Article 6 of the Charter.
[839] *See e.g., Trial of Bruno Tesch and Two Others ('Zyklon B case')*, 1-8 March 1946, *Law Reports of Trials of War Criminals (1947)*, Vol. I, p. 93 (finding that supplying lethal gas to concentration camps with knowledge of its use entailed criminal responsibility); *Trial of Werner Rodhe and Eight Others*, 29 May-1 June 1946, *Law Reports of Trials of War Criminals (1948)*, Vol. V, p. 54 (accuseds who provided assistance to perpetrator convicted as "concerned in the killing"); *Trial of Wilhelm List and Others ('Hostages trial')*, 8 July 1947 – 19 February 1948, *Law Reports of Trials of War Criminals (1949)*, Vol.

reaffirmed the customary nature of each of the forms of responsibility included in the first paragraph of Article 29 (new) of the ECCC Law, as well as their applicability to a range of international crimes, including grave breaches of the Geneva Conventions of 1949 and crimes against humanity.[840]

476. Moreover, the Nuremberg-era tribunals found that the failure of a superior to carry out his duty to control his subordinates' criminal conduct could lead to individual criminal responsibility.[841] This principle was later codified in Articles 86 and 87 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict ("Additional Protocol I").[842] Though Additional Protocol I was adopted in 1977, the ICTY Appeals Chamber has found that "command responsibility was part of customary international law relating to

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VIII, p. 34 (finding of criminal responsibility based on the issuance of criminal orders); *Trial of Franz Schonfeld and Nine Others*, 11-26 June 1946, *Law Reports of Trials of War Criminals (1949)*, Vol. XI, p. 64 (accuseds who provided assistance to perpetrator convicted as "concerned in the killing"); *Ohlendorf and Others Case ('Einsatzgruppen case')*, Judgment of 8-9 April 1948, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950)*, Vol. IV, p. 411 (finding criminal responsibility where accused's acts had a substantial effect on those of the perpetrator); s*ee also* Control Council Law No. 10 (1945), reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. I, pp. XVI-XIX, Article 2(2).

[840] *See e.g., Tadić* Trial Judgement, para. 669 (stating that all of the forms of responsibility included in Article 7 of the ICTY Statute, which mirror those listed in Article 29 of the ECCC Law, have a customary basis); *Furundzija* Trial Judgement, paras 191-249 (as regards the customary basis of aiding and abetting); *see also* Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135, Article 129(1) (as regards penal sanctions for "persons committing, or ordering to be committed, any of the grave breaches of the present Convention"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287, Article 146(1) (same); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article III ("citing as criminally culpable those who "[c]ommit, participate in, directly incite or conspire in[, or] […] [d]irectly abet, encourage or co-operate in the commission of the crime of apartheid."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, 10 December 1984, Article 4(1) (as regards the criminal nature of an act "which constitutes complicity or participation in torture").

[841] *See e.g., Trial of General Tomoyuki Yamashita*, First Instance Judgement and US Supreme Court *Habeas* Decision of 4 February 1946, *Law Reports of Trials of War Criminals (1948)*, Vol. IV, p. 1; *Trial of Wilhelm von Leeb and Thirteen Others ('German High Command trial')*, 30 December 1947 – 28 October 1948, *Law Reports of Trials of War Criminals (1949)*, Vol. XII, p. 1; *Trial of Oswald Pohl and Others ('Pohl case'),* Judgment of 3 November 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950)*, Vol. V, p. 193.

[842] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, entry into force 7 December 1978, 1125 UNTS 3, Articles 86 (Failure to act) and 87 (Duty of commanders); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, entry into force 7 December 1978, 1125 UNTS 609, Article 1(1) (referring to "responsible command").

international armed conflicts before the adoption of [Additional] Protocol I."[843] The Chamber considers that this was also the case during the period relevant to the Amended Closing Order.

477. Jurisprudence from the Nuremberg-era tribunals and more recent international criminal tribunals also indicate that superior responsibility was not confined to military commanders under customary international law during the 1975 to 1979 period.[844] As detailed below, it is the degree of control that an individual exercises over others, rather than the nature of his or her function, that is fundamental to the notion of superior responsibility.

478. The Chamber finds that, at all times relevant to the Amended Closing Order, the forms of responsibility charged against the Accused had a basis in customary international law.

2.7.1 Committing

479. According to jurisprudence from international criminal tribunals, "committing" as a form of responsibility includes both commission through the physical perpetration or culpable omission of an act, and commission through the participation in a joint criminal enterprise.

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[843] *Prosecutor v. Hadžihasanović et al.,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber (IT-01-47-AR72), 16 July 2003, para. 29 (also concluding that customary international law provided for superior responsibility in non-international armed conflicts prior to 1991); *see also Prosecutor v. Hadžihasanović et al.,* Decision on Joint Challenge to Jurisdiction, ICTY Trial Chamber (IT-01-47-PT), 12 November 2002, para. 93(v) (as regards the applicability of superior responsibility in the absence of an armed conflict).

[844] *See e.g., Trial of Karl Brandt and Others ('Medical case')*, Judgment of 19 August 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950),* Vols I-II, pp. 1; *Trial of Friedrich Flick and Others Case ('Flick case')*, Judgment of 22 December 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950)*, Vol. VI, p. 1; *see also Čelebići* Appeal Judgement, para. 195; *Prosecutor v. Bagilishema*, Judgement, ICTR Appeals Chamber (ICTR-95-1A-A), 3 July 2002, para. 51; *Brima* Appeal Judgement, para. 257.

2.7.1.1 Committing through physical perpetration or culpable omission

480. Committing, as it is principally understood, consists in the physical perpetration of a criminal act or the culpable omission of an act that was mandated by a rule of criminal law.[845]

481. The accused must have acted with the intent to commit the crime, or with an awareness of the substantial likelihood that the crime would occur as a consequence of his or her conduct.[846]

2.7.1.2 Findings on committing through physical perpetration or culpable omission

482. The Amended Closing Order states:

> 153. DUCH personally tortured or mistreated detainees at S21 on a number of separate occasions and through a variety of means. Duch is not indicted for the mode of liability of "commission" for the domestic crime of torture.[847]

483. The Accused stated that he was personally involved in the interrogation of three detainees, KOY Thuon, CHHIT Iv and MA Mengkheang. He acknowledged having slapped CHHIT Iv to prevent him from being tortured by IN Lorn *alias* Nat. He also admitted to closely monitoring the interrogations of MEN Sann *alias* Ya, and SIET Chhe

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[845] *Tadić* Appeal Judgement, para. 188; *Prosecutor v. Kamuhanda*, Judgement and Sentence, ICTR Trial Chamber (ICTR-99-54A-T), 22 January 2004, para. 595; *Sesay* Trial Judgement, 2 March 2009, para. 249.

[846] *Prosecutor v. Limaj et al.*, Judgment, ICTY Trial Chamber (IT-03-66-T), 30 November 2005, para. 509; *Sesay* Trial Judgement, para. 250.

[847] Amended Closing Order, para. 153 *as amended* by Decision on Appeal against the Closing Order. The Chamber notes that the French version of the "Decision on Appeal Against Closing Order indicting Kaing Guek Eav *alias* 'Duch'" (which reads « Le paragraphe 153 de l'Ordonnance *est remplacé comme suit* : Duch n'a pas à répondre du crime de torture, tel que défini par le droit interne cambodgien, sur la base du mode de participation 'commission' ») does not match the English and Khmer versions (which read, respectively, "Paragraph 153 of the Closing Order is ordered to be amended *by adding the following*: Duch is not indicted for the mode of liability of 'commission' for the domestic crime of torture" and "កែប្រែវាក្យខណ្ឌ ១៥៣ នៃដីកាបញ្ជូនរឿងទៅជំនុំជម្រះ **ដោយបន្ថែមចំនុចដូចខាងក្រោម**៖ ឌុច មិនត្រូវបានចោទប្រកាន់ពីទម្រង់នៃការទទួលខុសត្រូវលើ "ការប្រព្រឹត្ត" បទទារុណកម្ម ក្រោមច្បាប់ជាតិឡើយ") (emphasis added). The Chamber considers this disparity to be the result of a naked translation error in the French version.

alias Tum, but denied interrogating them himself. The Accused otherwise denied having participated in interrogations or torturing detainees at S-21.[848]

484. Several witnesses stated that the Accused occasionally beat or kicked prisoners.[849] Witness VANN Nath testified that the Accused kicked Civil Party BOU Meng in the head, but the Civil Party himself denied this.[850] The Chamber notes that some of the Accused's statements at trial regarding his involvement in torture were unclear or contradictory.[851] The Chamber is not satisfied however, that kicking or beatings by the Accused have been proven to the required standard, nor that the slapping of CHHIT Iv caused pain or suffering of the severity required for a finding of torture or other inhumane acts.

485. Witness PRAK Khan initially stated that the Accused participated in the torture of a woman by administering electric shocks, beating her and removing her shirt.[852] However, at trial, he testified that it was DEK Bou who, in the presence of the Accused, tortured the detainee.[853] The Accused denied that any such incident took place at all.[854] Witness PRAK Khan's statements with respect to this incident are inconsistent and the Chamber is not satisfied that this fact has been proven to the required standard.

486. Accordingly, the Chamber finds that the Accused is not responsible for having committed torture or other inhumane acts through physical perpetration or culpable omission.

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[848] T., 16 June 2009 (Accused), pp. 29-30, 33-35; T., 22 June 2009 (Accused), pp. 24, 35; "Written Record of Confrontation", E3/396, ERN (English) 00166564.
[849] T., 10 August 2009 (SAOM Met), pp. 85-86; T., 11 August 2009 (SAOM Met), p. 9; T., 29 June 2009 (VANN Nath), p. 100; T., 4 August 2009 (NHEM En statement read), pp. 119-120; "Written Record of Interview of Witness Prak Khan", E3/413, ERN (English) 00161556-00161557; T., 21 July 2009 (PRAK Khan), pp. 34, 71; T., 22 July 2009 (PRAK Khan), p. 69.
[850] T., 29 June 2009 (VANN Nath), p. 96; T., 1 July 2009 (BOU Meng), pp. 37-38.
[851] *Cf.*, T., 11 August 2009 (Accused), pp. 29-33; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, para. 213(d) (disagree); T., 4 August 2009 (Accused), pp. 128-129.
[852] "Written Record of Interview of PRAK Khan", E3/413, ERN (English) 0161558.
[853] T., 21 July 2009 (PRAK Khan), pp. 23-24, 55-56; T., 22 July 2009 (Accused), pp. 57-58.
[854] T., 16 June 2009 (Accused), pp. 39-40.

2.7.1.3 Committing through participation in a joint criminal enterprise

2.7.1.3.1 Submissions and procedural history

487. The Co-Prosecutors have argued that the theory of criminal liability known as joint criminal enterprise is applicable before the ECCC and to the charges against the Accused. In particular, the Co-Prosecutors have drawn on the jurisprudence of the ICTY Appeals Chamber, and its Nuremberg-era antecedents, to argue that the Accused "committed" crimes charged in the Amended Closing Order through his participation in a joint criminal enterprise.[855] While not addressing the general applicability of joint criminal enterprise before the ECCC, the Accused has specifically contested that this theory may be applied to the charges against him.[856]

488. The Co-Investigating Judges did not include joint criminal enterprise as a mode of responsibility in the Closing Order.[857] The Pre-Trial Chamber denied the Co-Prosecutors' appeal against this exclusion in its 5 December 2008 decision.[858] The Pre-Trial Chamber reasoned that while facts relevant to a joint criminal enterprise were included in the Co-Prosecutors' Introductory Submission, these facts formed part of Case File 002-19-09-2007 and were not included in Case File 001/18-07-2007 (the present case) following the issuance of the Separation Order.[859] Further, while the Co-Prosecutors' Rule 66 Final Submission requested that the Co-Investigating Judges include joint criminal enterprise as a form of responsibility in the Closing Order,[860] no further relevant facts had been

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[855] "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73.

[856] "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2.

[857] The Chamber notes that the Co-Investigating Judges have since stated in a separate matter that joint criminal enterprise is an applicable form of liability before the ECCC and that it existed under customary international law during the 1975 to 1979 period. *See* Case File 002/19-09-2007-ECCC-OCIJ, "Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise", D97/13; *see also* Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6 (Pre-Trial Chamber decision finding that the basic and systemic forms of joint criminal enterprise are applicable before the ECCC, but that the extended form is not).

[858] Decision on Appeal against the Closing Order, paras 108-142.

[859] Decision on Appeal against the Closing Order, paras 117-123; *see also* Section 1.2.

[860] Specifically, the Co-Prosecutors' Rule 66 Final Submission stated as follows: "The JCE came into existence on 15 August 1975 when SON Sen instructed NATH and DUCH to set up S-21. The JCE existed through October 1975, when S-21 began its full-scale operations, to at least 7 January 1979 when the DK regime collapsed. The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of 'enemies' of the DK regime by committing the crimes described in this Final

included in the scope of the investigation following the separation order. The Pre-Trial Chamber held that, were the Accused to be indicted as "a participant in a joint criminal enterprise, the perception of the level and extent of his responsibility would differ from the description of his responsibility in the Closing Order". Thus, it concluded that the Accused was "not informed of the allegation related to his participation in the S-21 [joint criminal enterprise] prior to the [Co-Prosecutors'] Final Submission. The S-21 [joint criminal enterprise] did not form part of the factual basis for the investigation and for this reason the Pre-Trial Chamber will not add it to the Closing Order at this stage." The Pre-Trial Chamber consequently declined to consider whether joint criminal enterprise was implicitly included in Article 29 (new) of the ECCC Law or whether it formed part of national or international law during the 1975 to 1979 period.[861]

489. During the initial hearing on 17 February 2009, the Co-Prosecutors notified the Chamber and the Parties that they would request that the Chamber apply joint criminal enterprise as regards the charges against the Accused.[862] On 8 June 2009, the Co-Prosecutors filed a written submission ("OCP JCE Request") requesting that the Chamber declare joint criminal enterprise, in each of its three forms, to be generally applicable as a mode of criminal liability before the ECCC and that it find that the Accused committed

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Submission. An organized system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 and described in this Final Submission were within the purpose of this JCE. DUCH participated throughout the entire existence of the JCE, together with other participants in this JCE who themselves participated for various durations and who included the former Secretary of S-21 NATH, and the other members of the S-21 Committee, namely KHIM Vath *alias* HOR and HUY Sre as well as their subordinates." "Rule 66 Final Submission regarding Kaing Guek Eav *alias* 'Duch'", D96, paras 250-251.

[861] Decision on Appeal against the Closing Order, paras 123, 136, 141-142.

[862] T., 17 February 2009, pp. 9-10 ("[W]e would like to […] advise the Trial Chamber and the parties that at Trial, during the proceedings, the Co-Prosecutors intend to invite the Trial Chamber to consider the applicability of the concept of joint criminal enterprise to the proceedings against the [A]ccused. [… W]e want to advise in advance the Trial Chamber that we deem this concept to be applicable to the proceedings before this Chamber and indeed before this Court, that this concept represents and is supported by the facts as they are laid out in the Case File, that more specifically the so called category 1 [basic] and 2 [systemic] of the joint criminal enterprise will allow the Trial Chamber to consider the full breadth of the culpable liability of the [A]ccused. We further submit that the Trial Chamber is indeed [limited] by the factual basis within the case file, but is however, free to interpret the law to apply it and to legally characterize any legal fact therein. This [independence] and indeed this duty, means that the Trial Chamber is not bound by any decision of the pre-Trial Chamber on this issue. We will further argue, respectfully, that the Pre-Trial Chamber erred in its evaluation of the applicability of this concept to this file and these proceedings and […] invite the Trial Chamber and assist it in considering the applicability of this concept to the proceedings.")

crimes charged in the Amended Closing Order through his participation in a joint criminal enterprise.[863]

490. On 29 June 2009, the Chamber notified the Parties that the issue of the Accused's responsibility as a participant in a joint criminal enterprise was live before it and invited the Parties to respond to the OCP JCE Request. The Chamber further stated that it intended to rule on this Request in the Judgement.[864]

491. On 17 September 2009, co-counsel for the Accused filed a response to the OCP JCE Request ("Accused JCE Response"), claiming that the OCP JCE Request was inadmissible in light of the Pre-Trial Chamber's decision to exclude joint criminal enterprise from the Amended Closing Order. The Accused JCE Response further argued that the OCP JCE Request should be denied on grounds that there was an insufficient factual basis in the Amended Closing Order for a finding of joint criminal enterprise and that this mode of criminal liability had not been pleaded with sufficient specificity by the Co-Prosecutors. The Accused JCE Response added that, were the Chamber nevertheless to decide to apply joint criminal enterprise, the Accused must be invited to "make his submissions on the new legal characterisation contemplated before the case is adjourned for deliberation."[865]

2.7.1.3.2 Internal Rule 98(2)

492. As a preliminary matter, the Chamber notes that it is not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Amended Closing Order. Indeed, Internal Rule 98(2) states:

> [t]he judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.

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[863] "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73; *see also* "Group 3 Civil Parties – Brief in Support of the co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/3.
[864] T., 29 June 2009, pp. 8-9.
[865] "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, paras 7-10, 15-27, 38.

493. The Parties do not dispute that Internal Rule 98(2) permits changes to the legal characterisation of both the crimes *and* the forms of responsibility included in the Amended Closing Order.[866] While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).[867]

494. Internal Rule 98(2) mandates, however, that any legal re-characterisation made by the Chamber be limited to the facts set out in the Amended Closing Order. This approach accords with the powers conferred upon Trial Chambers in the Cambodian legal system,[868] as well as in French legal system upon which it was originally modelled.[869] The Chamber considers that the proviso of Internal Rule 98(2) that no new constitutive elements be introduced is a reiteration of this well-established limitation, namely that any re-characterisation must not go beyond the facts set out in the charging document.

495. The ICC's Regulations of the Court similarly permit its Trial Chambers to change the legal characterisation of facts following the start of the trial proceedings.[870] Before the international *ad hoc* tribunals, however, Trial Chambers have generally required a formal amendment to the charges against the accused where the facts establish that the accused has committed a different or more serious offence than that indicated in the indictment.[871] It follows from the many structural differences between the international *ad hoc* tribunals and the ECCC that certain of the common law-inspired procedural mechanisms of the former have no counterpart in the civil law-oriented framework of the latter. In contrast to the ICTY and ICTR, no comparable mechanism exists within the ECCC that would

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[866] *See e.g.,* "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, fn. 10.
[867] *See* Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004) (allowing for a change to the legal characterisation of facts to accord with a different form of participation).
[868] *See e.g.,* Article 348 of the 2007 Code of Criminal Procedure; Articles 10 and 175 of the 1993 (SOC) Code of Criminal Procedure.
[869] *See* Cour de Cassation, Cass. Crim., 22 April 1986, Bulletin Criminel, No. 136 (''[I]l appartient aux juridictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle à celle sous laquelle ils leur étaient déférés […] à la condition qu'il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tels qu'ils ont été retenus dans l'acte de saisine.'').
[870] *See* Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004).
[871] *See Kupreškić et al*. Trial Judgement, para. 748.

allow either the Parties or the Chamber to formally amend a Closing Order. The basis for the re-characterisation of facts before the ECCC is instead Internal Rule 98(2), which expressly envisages this eventuality, subject to fair trial safeguards.

496. The Chamber thus considers that Internal Rule 98(2) enables it to change the legal characterisation of facts contained in the Amended Closing Order to accord with a new form of responsibility provided that it does not go beyond those facts. In doing so, the Chamber must also ensure that (i) no violation of the fair trial rights of the Accused is entailed and (ii) the form of responsibility in question is applicable before the ECCC.

2.7.1.3.2.1 Fair trial rights of the Accused

497. Article 35 (new) of the ECCC Law states in relevant part:

> In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.
>
> a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
>
> b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;

498. The European Court of Human Rights, whose founding document contains similar fair trial provisions,[872] has stated that while a criminal court may change the legal characterisation of facts over which it has jurisdiction, it must afford the accused the possibility of exercising his or her defence rights "in a practical and effective manner and, in particular, in good time."[873] In practice, it has found that this entails ensuring that

[872] *See* Article 6(3) of the ECHR ("Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence […]").

[873] *Pélissier and Sassi v. France*, Judgment of 25 March 1999, ECtHR (no. 25444/94), 25 March 1999, para. 62; *see also I.H. and Others v. Austria*, Judgment of 20 April 2006, ECtHR (no. 42780/98), 20 April 2006, para. 34 ("in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterisation that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.")

the accused is aware of the possibility of the legal re-characterisation and provided with a sufficient opportunity to defend against it.[874]

499. Similarly, Regulation 55 adopted by the ICC allows that Court's Trial Chambers to change the legal characterisation of facts without a formal amendment of the charges in accordance with the following procedural safeguards:

> 1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
>
> 2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
>
> 3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
>
> (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
>
> (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).[875]

500. The Appeals Chamber of the ICC has confirmed that a change in the legal characterisation of facts pursuant to Regulation 55 is not inherently in breach of an accused's right to a fair trial.[876] It has further stated that the manner in which the

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[874] *See Abramyan v. Russia*, Judgment of 9 October 2008, ECtHR (no. 10709/02), 9 October 2008, paras 36-40; *see also Dallos v. Hungary*, Judgment of 1 March 2001, ECtHR (no. 29082/95), 1 March 2001, paras 47-53 (finding that a re-qualification of an offence did not impair the rights of the defence when the accused had sufficient opportunity to defend himself during the review proceedings); *Sipavičus v. Lithuania*, Judgement of 21 February 2002, ECtHR (no. 49093/99), 21 February 2002, paras 23-34.

[875] Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004).

[876] *Situation in the Democratic Republic of the Congo, the Prosecutor v. Lubanga*, Judgement on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts

procedural safeguards provided for in Regulation 55(2) and (3) are to be applied, and whether any additional safeguards may be required to fully protect the rights of the accused, will depend on the circumstances of the case.[877]

501. In the present case, the Co-Prosecutors reiterated throughout the trial their request that the Chamber apply joint criminal enterprise, including in its systemic form, to the charges against the Accused.[878] The Co-Prosecutors indicated the nature and purpose of the joint criminal enterprise, the period over which it existed, and the identity of those engaged in it.[879] On 29 June 2009, following the OCP JCE Request, the Chamber provided notice to the Accused that the issue of the applicability of joint criminal enterprise was before it and that it intended to rule on the issue in the Judgement.[880] The Accused was provided with an opportunity to respond to the OCP JCE Request and filed his Response on 17 September 2009.

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may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC Appeals Chamber (ICC-01/04-01/06 OA 15 OA 16), 8 December 2009, para. 87 (reversing the Trial Chamber's interpretation of Regulation 55 but finding that changes made to the legal characterisation pursuant to that Regulation would not otherwise be inherently in breach of the accused's fair trial rights).

[877] *Situation in the Democratic Republic of the Congo, the Prosecutor v. Lubanga*, Judgement on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC Appeals Chamber (ICC-01/04-01/06 OA 15 OA 16), 8 December 2009, paras. 85-87.

[878] T., 17 February 2009, pp. 9-10; *see also* T., 31 March 2009, p. 56 ("As we have outlined from the very beginning of this process, we urge this Court to consider and apply Joint Criminal Enterprise, or JCE to the facts of this case."); "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73; "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, paras 323-334; *see also* Section 2.7.1.3.1.

[879] As regards the nature, purpose and time period, *see* "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, para. 331 ("The evidence before the Chamber establishes that the Accused committed the crimes described as a participant in a JCE. The JCE came into existence on 15 August 1975 when Son Sen instructed In Lorn *alias* Nat, and the Accused to establish S-21. The JCE existed until at least 7 January 1979 when the DK regime collapsed and S-21 was abandoned. The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of "enemies" of the DK regime by committing the crimes described in this Submission. An organised system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 were within the purpose of this JCE."); *see also* "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, para. 24; "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, 18 July 2008, para. 250. As regards the identity of those engaged in the joint criminal enterprise, *see* "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, para. 332 ("The Accused took part in the JCE throughout its entire existence, together with others who participated for various durations, including Nat, the former Secretary of S-21, and the other members of the S-21 Committee, namely Hor and Huy Sre, as well as their subordinates"); *see also* "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, para. 25; "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, para. 251.

[880] T., 29 June 2009, pp. 8-9.

502. The Chamber considers that the OCP JCE request might have been presented in a more timely and coherent manner, and pleaded with greater specificity. The Chamber nevertheless rejects the Accused's contention in his JCE Response that the Chamber was obligated to determine the applicability of joint criminal enterprise prior to its deliberations and to provide him with still further opportunity to respond to that already accorded.[881] The Accused was repeatedly made aware of, and provided with a timely opportunity to address, the specific possibility that joint criminal enterprise, including its systemic form, might be held applicable to the charges against him. Co-counsel for the Accused also indicated their awareness that the Chamber might apply joint criminal enterprise in the current proceedings.[882]

503. Accordingly, the Chamber considers that no breach of the Accused's fair trial rights would be entailed by the legal re-characterisation envisioned.

2.7.1.3.3 Applicability of joint criminal enterprise before the ECCC

2.7.1.3.3.1 The notion of joint criminal enterprise

504. The notion of "joint criminal enterprise" came to prominence through jurisprudence of the ICTY Appeals Chamber, which found that an accused could be held criminally responsible for having "committed" a crime through his participation in a joint criminal enterprise.[883] Joint criminal enterprise is not, however, a novel creation of the ICTY.[884] As noted by ICTY Appeals Chamber, the underlying legal concepts upon which joint criminal enterprise is based can be traced back to the Nuremberg-era documents and judgements and exist in various forms in many national legal systems.[885]

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[881] *See* "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, paras 32-39.
[882] T., 31 March 2009 (Defence), p. 83 ("In addition, the international co-lawyer, Mr. Robert Petit said the theory of the joint criminal enterprise shall be implemented and exercised for the S-21 crimes. I do not deny to that, please go ahead, however it needs to be exercised for all those 195 prisons as well."); T., 20 July 2009 (Defence), p. 16 (arguing that witnesses should be warned by the Chamber that they might be held liable as participants with the Accused in a joint criminal enterprise) (closed session).
[883] *See generally Tadić* Appeal Judgement, paras 185-234.
[884] *See Prosecutor v. Krajišnik*, Judgement, ICTY Appeals Chamber (IT-00-39-A), 17 March 2009, Separate Opinion of Judge Shahabuddeen, para. 54.
[885] *See Tadić* Appeal Judgement, paras 195-220, 224-225.

505. Individual criminal responsibility for participation in a common criminal plan or purpose was included in Article 6 of the Nuremberg Charter and in Control Council Law No. 10.[886] The subsequent case law of Nuremberg-era tribunals, including that of national war crimes trials, confirmed that such participation could be the basis for individual criminal responsibility.[887] Notably, these cases based convictions upon individual participation in a common criminal plan or purpose carried out within concentration camps. As noted with respect to the *Dachau Concentration Camp* case:

> It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute 'acting in pursuance of a common design to violate the laws and usages of war'. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary.[888]

506. Based in large part on these Nuremberg-era pronouncements, the ICTY Appeals Chamber found that a common criminal plan or purpose doctrine was recognised as forming part of customary international law.[889] The jurisprudence of the ICTY, which has been followed by the other *ad hoc* international criminal tribunals, adopted the term

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[886] *See* Article 6 of the Nuremberg Charter (which states that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit [crimes against peace, war crimes, and/or crimes against humanity] are responsible for all acts performed by any persons in execution of such plan"); *see also* Article 2 of Control Council Law No. 10.

[887] *See e.g., Trial of Otto Sandrock and Three Other (Almelo Case)*, 24-26 November 1945, *Law Reports of Trials of War Criminals (1947)*, Vol. I, p. 35; *see also Trial of Franz Schonfeld and Nine Other*, 11-26 June 1946, *Law Reports of Trials of War Criminals (1949)*, Vol. XI, p. 64.

[888] *Trial of Martin Gottfried Weiss and thirty-nine others* (*Dachau Concentration Camp* case), 15 November-13 December 1945, *Law Reports of Trials of War Criminals (1949)*, Vol. XI, p. 14; *see also Trial of Josef Kramer and 44 others (Belsen case)*, 17 September-17 November 1945, *Law Reports of Trials of War Criminals (1947)*, Vol. II, p. 120 (in which the Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms: "The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened.")

[889] *Tadić* Appeal Judgement, paras 185-234 (finding that the notion of a common design existed under customary international law at least from 1992).

"joint criminal enterprise" to describe this particular form of criminal liability. Three distinct categories of joint criminal enterprise have been identified.[890]

507. In the first, or "basic" category of joint criminal enterprise, all members, acting pursuant to a common purpose, possess the same criminal intent. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill. The second category, "systemic" joint criminal enterprise, is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise. The third category, "extended" joint criminal enterprise, concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[891]

508. The jurisprudence has identified three broad objective elements shared by all three of these categories of joint criminal enterprise.[892] First, a plurality of persons is required, though they need not be organised in a military, political or administrative structure. While it is necessary to identify the plurality of persons belonging to the joint criminal enterprise, "it is not necessary to identify by name each of the persons involved".[893] Second, the existence of a common purpose that amounts to or involves the commission of a crime over which the Chamber has jurisdiction is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.[894] Third, the participation of the accused in the common purpose is required. This participation need not involve the

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[890] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), 21 May 2003, para. 36; *see also Gacumbitsi* Appeal Judgement, para. 158; *Fofana* Trial Judgement, para. 206.
[891] *Vasiljević* Appeal Judgement, paras 97-99.
[892] *Prosecutor v. Brđanin*, Judgement, ICTY Appeals Chamber (IT-99-36-A), 3 April 2007, para. 364.
[893] *Prosecutor v. Brđanin*, Judgement, ICTY Appeals Chamber (IT-99-36-A), 3 April 2007, para. 430.
[894] *Tadić* Appeal Judgement, para. 227; *see also Kvočka* Appeal Judgement, para. 118 (stating that in regards to the systemic form of joint criminal enterprise, it is not necessary to establish an agreement in relation to each of the crimes committed with a common purpose).

commission of a specific crime but may take the form of assistance to, or contribution, to the execution of the common purpose.[895] The contribution of the accused need not be necessary or substantial, but it should at least be a significant contribution to the crimes for which he or she is found responsible.[896]

509. The three categories of joint criminal enterprise nonetheless vary with regard to their mental elements. Under the basic form of joint criminal enterprise, the accused must intend to perpetrate the crime and this intent must be shared by all co-perpetrators. The systemic form of joint criminal enterprise, which is a variant of the basic form but specifically concerns a common concerted system of ill-treatment (*e.g.*, an extermination or concentration camp), requires that the accused have knowledge of the nature of the system and intend to further the common system of ill-treatment.[897] For its part, the extended form concerns acts, which, although outside of the common plan for which the accused held a shared intent, are a natural and foreseeable consequence of the common plan. Here, the accused must be aware that the crimes outside of the common plan are a natural and foreseeable consequence of the plan and must have willingly taken this risk.[898]

510. In addition, a number of national legal systems uphold legal principles that are generally akin to those of joint criminal enterprise.[899] In particular, Article 82 of the 1956 Penal Code makes reference to co-perpetration as a form of responsibility deriving from direct participation. Article 82 of the 1956 Penal Code further states that any voluntary participant in a crime, whether a direct or indirect participant, may be equally liable with the principal of the crime.[900] While Cambodian jurisprudence on the 1956 Penal Code could not be located, French jurisprudence is instructive given that the 1956 Penal Code was modelled on the French criminal code. Relevant French jurisprudence reveals a broad understanding of co-authorship or co-perpetration that may also partially overlap

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[895] *Vasiljević* Appeal Judgement, para. 100.
[896] *Prosecutor v. Krajišnik*, Judgement, ICTY Appeals Chamber (IT-00-39-A), 17 March 2009, para. 215.
[897] *Vasiljević* Appeal Judgement, para. 101; *see also Kvočka* Appeal Judgement, para. 118 (stating that for specific intent crimes, like persecution, the accused must also share the discriminatory intent).
[898] *Vasiljević* Appeal Judgement, para. 101.
[899] *See Tadić* Appeal Judgement, paras 224-225 (surveying national legal systems for legal principles that overlap with joint criminal enterprise).
[900] Article 82 of the 1956 Penal Code; *see also* Article 26 of the 2009 Penal Code.

with the notion of joint criminal enterprise.[901] The Chamber notes that references to national legislation and case law only serve to illustrate that the notion of joint criminal enterprise (or common purpose) upheld in international criminal law has an underpinning in many national systems, including that of Cambodia. As correctly noted by the Pre-Trial Chamber in a decision on a separate matter, while similarities exist between participation in a joint criminal enterprise (in its basic and systemic forms) and co-perpetration under the 1956 Penal Code, the two notions are nevertheless not identical. While both require the shared intent by participants that the crime be committed, "participation in a JCE, even if it has to be significant, would appear to embrace situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than the direct participation required under domestic law."[902] Ultimately, joint criminal enterprise as applied by this Chamber follows from customary international law, not national law.

2.7.1.3.3.2 Applicability pursuant to Article 29 (new) of the ECCC Law

511. Article 29 (new) of the ECCC Law does not expressly refer to the notion of joint criminal enterprise as a form of responsibility. The language of Article 29 (new) of the ECCC Law does, however, mirror that of the Statute of the ICTY.[903] Notably, the jurisprudence of the ICTY has held that the word "committed" in Article 7(1) of its Statute implicitly includes participation in a joint criminal enterprise.[904] The Chambers of the ICTR and the SCSL have similarly reasoned that joint criminal enterprise is included as a form of responsibility within their own Statutes.[905] The Chamber considers that the

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[901] *See e.g.*, Cour de Cassation, Chambre Criminelle, 4 décembre 1974, Gaz. Pal. 1975, Somm. 93 ; Cour de Cassation, Chambre Criminelle, 13 Juin 1972, Bull. crim. no. 195.

[902] Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6, 20 May 2010, para. 41.

[903] *See* Article 7(1) of the ICTY Statute ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime."); *see also* Articles 6(1) of the ICTR and SCSL Statutes.

[904] *See Tadić* Appeal Judgement, para. 190 .

[905] *See Gacumbitsi* Appeal Judgement, para. 158; *Fofana* Trial Judgement, para. 208.

notion of commission through participation in a joint criminal enterprise is included in Article 29 (new) of the ECCC Law.[906]

512. The Chamber further considers that, in light of the Nuremberg Charter, Control Council Law No. 10 and the subsequent international jurisprudence discussed above, the systemic form of joint criminal enterprise, along with the basic form from which it derives, were part of customary international law during the 1975 to 1979 period.[907] Given the customary status of joint criminal enterprise (in its basic and systemic forms) since the Nuremberg-era, as well as its resonance with the Cambodian law concept of co-perpetration applicable at the time, the Chamber considers that the requirements of accessibility and foreseeability are satisfied (Section 1.5).

513. The Chamber notes that the Co-Prosecutors indicated that they would rely only on the basic and systemic forms of joint criminal enterprise during the initial hearing,[908] and sought to apply the extended form of joint criminal enterprise only in the alternative in both their Final Trial Submissions and their Rule 66 Final Submissions.[909] The Chamber consequently considers that it need not generally pronounce on the customary status of the third extended form of joint criminal enterprise during the 1975 to 1979 period.

2.7.1.4 Findings on committing through participation in a joint criminal enterprise

514. The Chamber has made extensive findings regarding the criminal nature of the S-21 system supervised by the Accused, which clearly resonate with the systemic form of joint criminal enterprise. It has found that, following the 15 August 1975 meeting with SON Sen, the Accused helped establish S-21, along with IN Lorn *alias* Nat, its initial

[906] Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6, 20 May 2010, para. 49.
[907] Case File 002/19-09-2007-ECCC-OCIJ (PTC37) "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)", D97/17/6, 20 May 2010, para. 69; *see also* para. 71 (regarding the similarities between the basic and systemic forms).
[908] *See* T., 17 February 2009, pp. 9-10 (referring only to the first two forms of joint criminal enterprise); *see, however,* "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, 8 June 2009 (arguing for the applicability of all three forms of joint criminal enterprise).
[909] "Co-Prosecutors' Final Trial Submissions with Annexes 1-5", E159/9, 11 November 2009, para. 334; *see also* "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, 18 July 2008, para. 253.

Chairman (Section 2.3.3). As Chairman and Secretary of S-21, the Accused continued to refine and direct S-21's operations with the assistance of the junior members of the S-21 Committee, namely KHIM Vak *alias* Hor, and NUN Huy *alias* HUY Sre, until its abandonment on 7 January 1979 (Section 2.3.3.4). The Accused acted with these individuals, and through his subordinates, to operate the S-21 complex, a facility dedicated to the unlawful detention, interrogation and execution of perceived enemies of the CPK, both domestic and foreign. A concerted system of ill-treatment and torture was purposefully implemented in order to subjugate detainees and obtain their confessions during interrogations (Sections 2.3 and 2.4). S-24 was also used as an adjunct facility devoted to forced labour for detainees viewed as suspect by the CPK (Sections 2.3.3.7 and 2.4.2.1). As Deputy and then Chairman and Secretary of S-21, the Accused was deeply enmeshed in this criminal system, and contributed substantially to its implementation and development, including by ensuring the arrest and detention of some S-21 staff, and by being physically present during the arrest of certain notable detainees (Section 2.3.3.5.3).

515. The Chamber finds that the Accused knew of the criminal nature of the S-21 system and that he acted with the intent to further its criminal purpose. Further, the Chamber has found, by majority, the Accused's specific intent to discriminate against S-21 detainees on the basis of their perceived opposition to the CPK (Section 2.5.3.14.4).

516. Accordingly, the Chamber finds that, as a result of his participation in the systemic joint criminal enterprise at S-21, the Accused bears individual criminal responsibility for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts; as well as for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of a fair and regular trial, and unlawful confinement of a civilian.

517. Concurrent convictions for additional forms of responsibility listed in Article 29 (new) of the ECCC Law do not amount to additional convictions for the same crime.

Establishing the Accused's responsibility pursuant to additional forms may assist the Chamber at sentencing in determining the full extent of his participation in the crimes for which he is responsible.[910]

2.7.2 Planning

518. Planning requires that one or more persons design the criminal conduct that constitutes one or more crimes that are later perpetrated.[911] It must be demonstrated that the planning was a substantially contributing factor to the criminal conduct.[912]

519. The accused must have acted with the intent that the crime be committed, or have been aware of the substantial likelihood that the crime would be committed in the execution or implementation of that plan.[913]

2.7.3 Findings on planning

520. The Amended Closing Order states:

> 159. DUCH was substantially involved in formulating or endorsing the plan to establish S21 with the knowledge that its function would be criminal in nature. Further, following S21's formation, DUCH planned the specific crimes committed therein, with the intention that they be carried out.[914]

521. The Accused helped design the functioning of S-21 from its inception. He then continually strove to make S-21 a more efficient operation, including by choosing to relocate S-21 to the Pohnea Yat Lycée location and selecting Choeung Ek as an execution site (Sections 2.3.3.1, 2.3.3.4.1 and 2.3.3.6). The Chamber finds that the Accused's planning substantially contributed to the crimes later perpetrated at S-21. The Chamber further finds that the Accused intended these crimes to be committed, or at the very least

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910 *Cf.*, *Prosecutor v. Kamuhanda*, Judgement, ICTR Appeals Chamber (ICTR-99-54A-A), 19 September 2005, Separate and Partially Dissenting Opinion of Judge Shahabuddeen, paras 405-416.
911 *Kordić* Appeal Judgement, para. 26.
912 *Kordić* Appeal Judgement, para. 26; *Sesay* Appeal Judgement, paras 687, 1170.
913 *Kordić* Appeal Judgement, para. 31; *Sesay* Trial Judgement, para. 268.
914 Amended Closing Order, para. 159.

was aware of the substantial likelihood that they would be committed in the execution or implementation of his planning.

2.7.4 Instigating

522. Instigating requires that one person, through either an act or omission, prompts another person to commit a crime.[915] Liability for instigating may ensue through implicit, written, or other non-verbal prompting by the accused. In contrast to ordering and superior responsibility, instigating does not require that the accused have any authority over the perpetrator. Instigating also requires more than merely facilitating the commission of crime, which may otherwise suffice for its aiding and abetting.[916] The instigation must be a substantially contributing factor to the criminal conduct that was later perpetrated.[917]

523. A superior's consistent failure to prevent or punish a perpetrator's crimes may, in some instances, amount to instigating the perpetrator to commit further crimes.[918]

524. The accused must have intended to provoke or induce the commission of the crime, or have been aware of the substantial likelihood that a crime would be committed in the execution of the instigation.[919]

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[915] *Kordić* Appeal Judgement, para. 27.
[916] *Prosecutor v. Orić*, Judgement, ICTY Trial Chamber (IT-03-68-T), 30 June 2006, para. 271.
[917] *Prosecutor v. Karera*, Judgement, ICTR Appeals Chamber (ICTR-01-74-A), 2 February 2009, para. 317; *Kordić* Appeal Judgement, para. 27.
[918] *Prosecutor v. Hazihasanovic et al.,* Judgment, ICTY Appeals Chamber (IT-01-47-A), 22 April 2008, para. 30 ("[T]he Appeals Chamber stresses that a superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed"); *Prosecutor v. Bagilishema*, Judgment, ICTR Trial Chamber I (ICTR-95-IA-T), 7 June 2001, para. 50; *see also Sesay* Trial Judgement), para. 311; *Prosecutor v. Halilovic*, Judgement, ICTY Trial Chamber (IT-01-48-T), 16 November 2005, paras 95-96.
[919] *Kordić* Appeal Judgement, para. 32; *Sesay* Trial Judgement, para. 271.

2.7.5 Findings on instigating

525. The Amended Closing Order states:

> 160. As Deputy Chairman and Chairman of S21, and also as an active CPK Party member, DUCH induced, encouraged and prompted the staff at S21 to commit the crimes described in this Closing Order by instructing and teaching Party doctrine and practice, assigning tasks, and through his presence and participation in all aspects of the security complex. His leadership and participation were clear contributing factors to the overall functioning of S21 and demonstrated an intention that the staff of S21 carry out these crimes.[920]

526. The Accused indoctrinated S-21 staff, including the impressionable youths he specifically sought out as subordinates, to be cruel and to treat all S-21 detainees as enemies of the CPK. He also provided practical training to the S-21 interrogators on the use of physical and psychological violence against the detainees (Section 2.3.3.5.2). The Chamber considers that the indoctrination and training carried out by the Accused contributed substantially to the crimes later perpetrated at S-21. The Chamber further finds that the Accused intended to provoke these crimes, or at the very least was aware of the substantial likelihood that they would be committed in the execution of his instigation.

2.7.6 Ordering

527. Ordering requires that a person in a position of authority instructs another person to commit a crime.[921] No formal superior-subordinate relationship between the two persons is required.[922] The person giving the order need only possess the authority, be it in law or in fact, to order the commission of the crime.[923] Liability for ordering a crime may ensue where an accused issues, passes down, or otherwise transmits the order, including

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[920] Amended Closing Order, para. 160.
[921] *Kordić* Appeal Judgement, para. 28; *Prosecutor v. Kajelijeli*, Judgment and Sentence, ICTR Trial Chamber (ICTR-98-44A-T), 1 December 2003, para. 763; *Sesay* Appeal Judgement, para. 164.
[922] *Kordić* Appeal Judgement, para. 28; *Semanza v. Prosecutor*, Judgement, ICTR Appeals Chamber (ICTR-97-20-A), 20 May 2005 ("*Semanza* Appeal Judgement"), para. 361; *Sesay* Trial Judgement, para. 273.
[923] *Semanza* Appeal Judgement, para. 361; *Gacumbitsi* Appeal Judgement, paras 181-182; *Prosecutor v. Limaj et al.*, Judgment, ICTY Trial Chamber (IT-03-66-T), 30 November 2005, para. 515; *Sesay* Trial Judgement, para. 273.

through intermediaries.[924] There is no requirement that an order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence.[925] It must be established that the issuance of the order was a substantially contributing factor to the criminal conduct that was later perpetrated.[926]

528. The accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.[927]

2.7.7 Findings on ordering

529. The Amended Closing Order states:

> 154. DUCH held a position of authority at S21 throughout the temporal jurisdiction of the court. From this position of authority, DUCH had the ability to direct, instruct or order his subordinates to perform any task associated with the functioning of the S21 complex. The chain of command at S21 was clearly delineated and the roles of its staff members were rigorously defined and enforced.
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> 155. Orders and instructions, whether originating from DUCH or his alleged superiors, were given or passed with the intent and awareness that they would be achieved and institutionalised. Orders at S21 could be implicit, explicit, broad or specific, and could be received directly or indirectly by the perpetrator.
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> 156. The direction provided by DUCH contributed substantially to the events which took place at S21, and much of the conduct which was attempted or occurred can be described as criminal under the ECCC Law and Agreement.[928]

530. As Deputy of S-21 from October 1975 to March 1976, the Accused exercised authority over the members of the S-21 interrogation unit (Section 2.3.3.3). As Chairman of S-21 from March 1976 to its abandonment on 7 January 1979, the Accused was the undisputed head of S-21 and exercised authority over its entire staff (Section 2.3.3.4).

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924 *Milutinović* Trial Judgement, Vol. I, para. 87.
925 *Prosecutor v. Kamuhanda*, Judgement, ICTR Appeals Chamber (ICTR-99-54A-A), 19 September 2005, para. 76.
926 *Milutinović* Trial Judgement, Vol. I, para. 88.
927 *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 41-42.
928 Amended Closing Order, paras 154-156.

531. The Chamber has found that the Accused issued, passed down or transmitted orders to his S-21 staff to arrest, torture and execute detainees (Sections 2.3.3.5.3-2.3.3.5.5). The Chamber considers that these orders were factors which substantially contributed to the crimes later perpetrated at S-21. The Chamber further finds that the Accused intended to bring about the commission of these crimes, or at the very least was aware of the substantial likelihood that they would be committed as a consequence of the execution or implementation of his orders.

2.7.8 Aiding and abetting

532. As a preliminary matter, the Chamber notes that the French version of Article 29 (new) of the ECCC Law equates "aiding and abetting" to the notion of "complicité". In contrast, the French versions of the Statutes of both the ICTY and ICTR have equated the phrase "aiding and abetting" to "aidé et encouragé".[929] Given that Article 29 (new) of the ECCC Law is modelled on the provision of the *ad hoc* international criminal tribunals and that it derives from notions of international law, the Chamber finds that the phrase "aidé et encouragé" more clearly reflects the nature of this form of responsibility than does the notion of "complicité", which may encompass broader conduct.[930] The Khmer version of Article 29 (new) of the ECCC Law further supports this interpretation.[931]

533. Aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the commission of the crime by the perpetrator.[932] Though often considered jointly in the jurisprudence of international tribunals, "aiding" and "abetting" are not synonymous: "aiding" involves the provision of

[929] *See* Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute. French is not an official language of the SCSL.
[930] *Cf.,* Article 83 of the 1956 Penal Code (in which aiding and abetting, instigating and ordering are, amongst others, considered as forms of complicity).
[931] The literal translation of the Khmer version of the relevant portion of Article 29 of the ECCC Law refers to those "who planned, instigated, ordered or committed a crime, or *aided and abetted* in the preparation of the plan or in the commission of the crime" (emphasis added) (ECCC translation).
[932] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 45-46, 48; *Gacumbitsi* Appeal Judgement, para. 140.

assistance, while "abetting" involves "facilitating the commission of an act by being sympathetic thereto."[933]

534. No evidence of a plan or agreement between the aider and abettor and the perpetrator is required.[934] An accused may not be convicted of aiding and abetting a crime that was never carried out. The perpetrator of the crime need not have been tried or even identified.[935]

535. Liability for aiding and abetting a crime requires proof that the accused knew that a crime would probably be committed, that the crime was in fact committed, and that the accused was aware that his conduct assisted the commission of that crime.[936] This knowledge can be inferred from the circumstances.[937] Further, the requirement that the accused be aware of, though need not share, the perpetrator's intent applies equally to specific-intent crimes, like persecution as a crime against humanity.[938]

2.7.9 Findings on aiding and abetting

536. The Amended Closing Order states:

> 161. DUCH's subordinates respected his authority, and that at nearly every level of S21's operation, he gave them practical assistance, encouragement or moral support. This substantially contributed to the crimes described in this Closing Order. Further, DUCH appreciated his behaviour would assist in the commission of these crimes; knew their essential elements; and was aware of the intention of the perpetrators.[939]

537. In light of the Chamber's previous findings, it is clear that the practical assistance, encouragement and moral support provided by the Accused to his staff had a substantial

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933 *Milutinović* Trial Judgement, Vol. I, para. 89, fn. 107.
934 *Tadić* Appeal Judgement, para. 229.
935 *Milutinović* Trial Judgement, Vol. I, para. 92.
936 *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 49-50; *Brima* Appeal Judgement, para. 243.
937 *Milutinović* Trial Judgement, Vol. I, para. 94; *Sesay* Trial Judgement, para. 280.
938 *Prosecutor v. Blagojević et al.*, Judgement, ICTY Appeals Chamber (IT-02-60-A), 9 May 2007, para. 127 ("The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator. In cases of specific intent crimes such as persecutions or genocide, the aider and abettor must know of the principal perpetrator's specific intent.") (footnotes omitted).
939 Amended Closing Order, para. 161.

effect on their perpetration of crimes at S-21 (Section 2.3.3.5). The Chamber further finds that the Accused was aware that his conduct assisted in the commission of these crimes. Moreover, having trained his staff to consider all detainees as enemies of the CPK (Section 2.3.3.5.2), the Accused was aware of the discriminatory intent of the perpetrators in committing these crimes.

2.7.10 Superior responsibility

538. For an accused to be held responsible for the criminal conduct of his or her subordinates pursuant to superior responsibility, three elements must be fulfilled: (a) there must have been a superior-subordinate relationship between the accused and the person who committed the crime; (b) the accused must have known, or had reason to know, that the crime was about to be or had been committed; and (c) the accused must have failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator. Each of these elements is discussed in turn below.

539. The Chamber agrees with the international jurisprudence that has found that an accused may not be concurrently convicted pursuant to a "direct" form of responsibility (as listed in the first paragraph of Article 29 (new) of the ECCC Law) on the one hand, and superior responsibility on the other.[940] Instead, where both a form of "direct" responsibility and superior responsibility are established in relation to the same conduct, the Chamber will enter a conviction on the basis of the "direct" form of responsibility only, and consider the accused's superior position as an aggravating factor in sentencing.[941]

[940] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 91-92 (finding that concurrent conviction for individual and superior responsibility in relation to the same count based on the same facts constituted legal error invalidating the trial judgement); *Prosecutor v. Kajelijeli*, Judgment, ICTR Appeals Chamber (ICTR-98-44A-A), 23 May 2005, para. 81 ("*Kajelijeli* Appeal Judgement"); *Brima* Trial Judgement, para. 800.

[941] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, para. 91; *Kajelijeli* Appeal Judgement, para. 82.

2.7.10.1 Superior-subordinate relationship

540. Formal designation as a commander or a superior is not required in order to trigger superior responsibility: such responsibility can arise by virtue of a superior's power, whether in law or in fact, over those who committed the crime.[942] In order to demonstrate the existence of a superior-subordinate relationship, it must be established that the accused exercised effective control over the subordinate.[943] In other words, the accused must have had the material ability to prevent or punish the subordinate's commission of the crime.[944]

541. Factors that would demonstrate that an accused exercised effective control over a subordinate include: the nature of the accused's position, including his or her position within the military or political structure; the procedure for appointment and the actual tasks performed;[945] the accused's capacity to issue orders and whether or not such orders are actually executed;[946] the fact that subordinates show greater discipline in the presence of the accused;[947] the authority to invoke disciplinary measures;[948] and the authority to release or transfer prisoners.[949]

542. Further, superior responsibility may ensue on the basis of both direct and indirect relationships of subordination. Every person in the chain of command who exercises effective control over subordinates is responsible for the crimes of those subordinates, provided that the other requirements of superior responsibility are met.[950]

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[942] *Čelebići* Appeal Judgement, paras 191–192; *Kajelijeli* Appeal Judgement, para. 85.

[943] *See* Article 29 of the ECCC Law; *see also Prosecutor v. Bagilishema*, Judgement, ICTR Appeals Chamber (ICTR-95-1A-A), 3 July 2002 ("*Bagilishema* Appeal Judgement"), para. 61 ("The Appeals Chamber reiterates that the test in all cases is whether the accused exercised effective control over his or her subordinates."); *Prosecutor v. Delalić et al.,* Judgement, ICTY Trial Chamber (IT-96-21-T), 16 November 1998, paras 364-378 (regarding the requirement of "effective control").

[944] *Bagilishema* Appeal Judgement, para. 61 *citing Čelebići* Appeal Judgement, para. 198; *Brima* Appeal Judgement, para. 257.

[945] *Prosecutor v. Halilović*, Judgement, ICTY Appeals Chamber (IT-01-48-A), 16 October 2007, para. 66.

[946] *Strugar* Appeal Judgement, paras 253-254.

[947] *Čelebići* AppealJudgement, para. 206.

[948] *Strugar* Appeal Judgement, paras 260-262.

[949] *Čelebići* Appeal Judgement, para. 206.

[950] *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, para. 67; *Čelebići* Appeal Judgement, para. 252.

2.7.10.2 Superior knew or had reason to know

543. In order to hold a superior responsible under Article 29 (new) of the ECCC Law for crimes committed by a subordinate, the superior must know, or have reason to know, that the subordinate was about to commit or had committed such crimes. The knowledge of the superior may not be presumed but must be established by direct or circumstantial evidence.[951] The superior must have knowledge of the alleged criminal conduct of his or her subordinates and not simply knowledge of the occurrence of the crimes themselves.[952]

544. A superior will be considered to have reason to know that crimes had been or were about to be committed where, in the circumstances of the case, he or she possessed information sufficiently alarming to justify further inquiry.[953] This information may be general in nature and does not need to contain specific details on the crimes which have been or are about to be committed.[954] The superior cannot be held liable for having failed to seek out such information in the first place. A superior may not, however, deliberately refrain from obtaining the relevant information when it is otherwise available to him or her.[955]

2.7.10.3 Failure to prevent or punish

545. An accused may be held liable pursuant to superior responsibility if he or she failed to take necessary and reasonable measures to prevent the commission of a crime or punish its perpetrators. Necessary measures are those appropriate for the superior to discharge his or her obligation, showing a genuine effort to prevent or punish. Reasonable measures are those reasonably falling within the material powers of the

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[951] *Kordić* Trial Judgement, para. 427; *Sesay* Trial Judgement, para. 309.
[952] *Prosecutor v. Orić,* Judgement, ICTY Appeals Chamber (IT-03-68-A), 3 July 2008, paras 57-59.
[953] *Prosecutor v. Hadžihasanović et al.,* Judgement, ICTY Appeals Chamber (IT-01-47-A), 22 April 2008 ("*Hadžihasanović* Appeal Judgement"), para. 28.
[954] *Čelebići* Trial Judgement, para. 393; *Sesay* Trial Judgement, para. 310.
[955] *Čelebići* Appeal Judgement, para. 226; *Prosecutor v. Blaskić*, Judgement, ICTY Appeals Chamber (IT-95-14-A), 29 July 2004, paras 62-64, 406; *Sesay* Trial Judgement, para. 312.

superior. The determination of what constitutes necessary and reasonable measures must be made on a case-by-case basis and is not a matter of substantive law, but of evidence.[956]

546. The failure to punish and the failure to prevent involve different crimes committed at different times: the failure to punish concerns past crimes committed by subordinates, whereas the failure to prevent concerns future crimes of subordinates. They represent two distinct legal obligations, the failure of either one of which entails responsibility under Article 29 (new) of the ECCC Law.[957]

547. The failure to prevent and the failure to punish are not only legally distinct, but are also factually distinct in terms of the type of knowledge that is involved for each basis of superior responsibility. The duty to prevent arises for a superior from the moment he or she knows or has reason to know that a crime is about to be committed, while the duty to punish only arises after the commission of the crime.[958]

2.7.10.4 Findings on superior responsibility

548. The Chamber has found the Accused individually criminally responsible on the basis of "direct" forms of responsibility as listed in Article 29 (new) of the ECCC Law for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts; as well as the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

549. The Chamber is satisfied that the Accused's criminal liability for these crimes could also be established on the basis of his superior responsibility. Indeed, the Accused exercised effective control over the rest of the S-21 staff, knew that his subordinates were committing crimes, and failed to take necessary or reasonable measures to prevent their commission or punish their perpetrators (Section 2.3.3). However, in line with

[956] *Prosecutor v. Halilović*, Judgement, ICTY Appeals Chamber (IT-01-48-A), 16 October 2007, para. 63.
[957] *See Hadžihasanović* Appeal Judgement, para. 259.
[958] *Hadžihasanović* Appeal Judgement, para. 260.

established jurisprudence, the Chamber will take into account the Accused's superior position only at sentencing.

2.7.11 Defences raised that may exclude criminal responsibility

550. Throughout the trial, the Accused claimed that, as Deputy and then Chairman and Secretary of S-21, he acted pursuant to the orders of his superiors.[959] The Accused further alleged that he acted under duress in that he would have been killed had he not followed these orders.[960] The Defence argues that acting pursuant to superior orders or duress should exclude the Accused's criminal responsibility and result in his acquittal. Alternatively, the Defence submits that both are mitigating factors for the purposes of sentencing.[961]

2.7.11.1 Superior Orders

551. Article 29(4) of the ECCC Law provides:

> The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.[962]

552. Other international legal instruments, such as the Nuremberg Charter and the *ad hoc* Tribunal Statutes, also provide that acting pursuant to superior orders does not constitute a legitimate defence to charges of crimes against humanity and war crimes.[963] However, Article 33 of the Rome Statute excludes individual criminal responsibility for war crimes

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[959] T., 30 April 2009 (Accused), p. 66; T., 6 April 2009 (Accused), p. 36, 74-75; T., 22 June 2009 (Accused), p. 79.

[960] T., 6 April 2009 (Accused), pp. 20, 65; T., 2 September 2009 (Accused), p. 79; T., 16 September 2009 (Accused), pp. 7, 36; T., 22 June 2009 (Accused), pp. 79-81; T., 27 November 2009, p. 44.

[961] T., 25 November 2009 (Defence Closing Statement), p. 112; T., 27 November 2009 (Defence Closing statement), pp. 44-46 and 62 and T., 17 February 2009 (Defence), pp. 111-112.

[962] *See also* Article 100 of the 1956 Penal Code, the relevant national law during the 1975 to 1979 period, which states: "In the case of illegal orders given by a lawful authority, the judge shall determine, on a case-by-case basis, the criminal responsibility of those executing the orders." (Unofficial translation).

[963] Statute of the International Military Tribunal, Article 8: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determined that justice so requires." Article 7(4) of the ICTY Statute reads: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."; *see also* similar wording in Article 6(4) of the ICTR Statute and Article 6(4) of the SCSL Statute.

where the Accused did not know that the order was unlawful and the order was not manifestly unlawful.[964] In the present case, the Chamber has found that the Accused knew that the orders to kill, torture and arbitrarily detain persons protected under the Geneva Conventions were unlawful (Section 2.7.1.4). The Chamber also infers that the Accused knew that the acts constituting grave breaches of the Geneva Conventions were criminal in nature. It therefore finds that he also knew that orders of the Government of DK to commit these offences were unlawful.

2.7.11.2 Duress

553. No ECCC provision specifically addresses whether duress may exclude individual criminal responsibility, although Article 97(2) of the 1956 Penal Code states:

> Absolute necessity exists where the perpetrator of the offence, faced with an inevitable and imminent danger could only avoid it by committing the offence and, in addition, the danger did not arise from an act within his or her control, committed in order to create the danger.[965]

554. Other international tribunals, including the ICTY Appeals Chamber, have found that duress does not afford a complete defence to charges of crimes against humanity or war crimes involving the killing of innocent human beings, though it is admissible in mitigation of sentence.[966]

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[964] Article 33(1) of the Rome Statute provides: "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful: and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

[965] Unofficial translation.

[966] *See Prosecutor v. Erdemovic*, Judgement, ICTY Appeals Chamber (IT-96-22-A), 7 October 1997 (reversing a finding of the Trial Chamber that duress was not ruled out entirely as a complete defense, albeit one with strict requirements (*ibid.,* Judgement, ICTY Trial Chamber (IT-96-22-T), 29 November 1996) and remitting the matter to the Trial Chamber). In finding that duress could never amount to a complete defence to the killing of innocent civilians, the majority evaluated the status of the victims, the nature of the offence, the status of the Accused (a soldier carrying out combat operations), and the distinction between civil law systems (which generally allow duress to serve as a complete defence) and common law systems (which generally do not). The majority left open the possibility that duress could be a complete defence in relation to less serious crimes (ICTY Appeals Chamber Judgement, *ibid*., Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 66, 70, 88). By contrast, Judge Cassese found that duress may amount to a complete defence, including in relation to the killing of innocent civilians (*ibid.,* Separate and dissenting opinion of Judge Cassese, paras. 16 and 33)). In 1998, the Trial

555. At trial the Accused described the hierarchical structure of the Party Centre, the impossibility of disobeying the system, and the fact that even high-ranking party members could be categorized as enemies and killed.[967] Although the Accused described several situations in which he felt personally fearful,[968] he did not cite disobedience to an order.[969] The Chamber has elsewhere found that the Accused possessed and exercised significant authority at S-21 and that his conduct in carrying out these functions evidenced a high degree of efficiency and zeal.[970] The Chamber has also found that the Accused not only implemented but actively contributed to the development of CPK policies at S-21, for instance by producing confessions that were untrue (Section 2.3.3.5.4).

556. Although saying these appointments were against his will, the Chamber finds that the Accused's acceptance of appointment as deputy and then chairman of S-21 reflected his sense of duty to the CPK. His personal belief in the Party and commitment to its goals apparently subsisted even after he left S-21 on 7 January 1979.[971]

557. The Chamber accepts that towards the end of the existence of S-21, the Accused may have feared that he or his close relatives would be killed if his superiors found his conduct unsatisfactory. Duress cannot however be invoked when the perceived threat

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Chamber took up the remit and applied the Appeal Chamber's finding that duress could not constitute, as a matter of law, a complete defence in that case, although it used duress in mitigation of sentence (*ibid.,*Sentencing Judgement, ICTY Trial Chamber (IT-96-22-T*bis*), 5 March 1998); *see further* Article 31(1)(d) of the Rome Statute; *see also Trial of Otto Ohlendorf et al.* (*Einsatzgruppen* case), Trials of War Criminals, vol. IV, p. 480 and *US v. Alfred Krupp, et al.,* US Military Tribunal at Nuremberg, 1949 (X) LRTWC, p. 149 ("[…] if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the original conduct"); *see also Attorney-General of Israel v Eichmann* (1961) 36 ILR 5, p. 340.

[967] T., 25 November 2009 (Accused), pp. 64-64, 67; T., 14 September 2009 (Raoul JENNAR), pp. 68-70, 73.

[968] T., 6 April 2009 (Accused), pp. 20, 65; T., 2 September 2009 (Accused), p. 79; T., 16 September 2009 (Accused), pp. 7, 36; T., 22 June 2009 (Accused), pp. 79-81; T., 27 November 2009, p. 44.

[969] *See Prosecutor v. Erdemovic*, ICTY Appeals Chamber (IT-96-22-T), 7 October 1997, Separate and dissenting opinion of Judge Cassese, para. 15 (suggesting that disobedience to an order is a prerequisite for establishing duress).

[970] "Voices from S-21 – Terror and History in Pol Pot's Secret Prison" (book) by David CHANDLER, E3/427, p. 154, ERN (English) 00192847; *see also* T., 28 May 2009 (Craig ETCHESON), pp. 20, 28-29, 91-92; T., 6 August 2009 (David CHANDLER), pp. 50, 61-63, 69-70.

[971] *See* Amended Closing Order, para. 166; T., 27 August 2009 (Accused), pp. 98-101; T., 2 September 2009 (Accused), pp 41-46 (describing his continuing allegiance to the Khmer Rouge (albeit with diminishing enthusiasm) until his arrest).

results from the implementation of a policy of terror in which he himself has willingly and actively participated.

558. The Chamber accordingly finds that the Accused did not act under duress as a Deputy and later Chairman of S-21. Duress as such is therefore irrelevant both in relation to the Accused's criminal responsibility and in mitigation of sentence. The Chamber has, however, considered factors such as the coercive climate in DK and the Accused's hierarchical position within the CPK in its determination of sentence (Section 3.3.3).

2.7.12 Cumulative convictions

559. The Chamber has found the Accused individually criminally responsible pursuant to Article 29 (new) of the ECCC Law for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture (including one instance of rape), persecution on political grounds, and other inhumane acts, as well as for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

560. Where the Accused's conduct fulfils the elements of different offences, the Chamber will evaluate the impact of multiple convictions. The *ad hoc* tribunal jurisprudence has acknowledged that multiple convictions serve to "describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[972] Since cumulative convictions create a risk of prejudice to the Accused,[973] the ICTY Appeals Chamber has formulated the following test in this area:

> 417. Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

[972] *Kunarac* Appeal Judgement, para. 169.
[973] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 2.

> 418. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[974]

561. Whether the same conduct violates two distinct statutory provisions is a question of law. The *Čelebići* test, and subsequent jurisprudence which has applied it, has emphasized the legal elements of each crime that may be the subject of a cumulative conviction rather than the underlying conduct of the Accused.[975]

2.7.12.1 Crimes against humanity and grave breaches

562. According to the case law of the *ad hoc* tribunals, cumulative convictions have been entered for analogous crimes as both crimes against humanity and grave breaches of the Geneva Conventions, in view of the distinctive character of both categories of offences.[976] The Chamber accordingly convicts the Accused for the following specific offences of crimes against humanity: extermination, enslavement, imprisonment, torture, persecution and other inhumane acts cumulatively with the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

2.7.12.2 Persecution and other underlying offences as crimes against humanity

563. The additional element of persecution when compared to all other offences as crimes against humanity is the specific discriminatory intent required by the perpetrator (Section 2.5.3.13).

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974 *Čelebići* Appeal Judgement, paras. 412, 413.
975 *See e.g., Kordić* Appeal Judgement, para. 387; *Sesay* Appeal Judgement, para. 1191.
976 *See e.g., Kordić* Trial Judgement (noting the different threshold requirements of both crimes and entering cumulative convictions for the crimes against humanity and grave breaches of murder and willful killing (para. 820), inhumane acts and willfully causing great suffering (para. 821), as well as imprisonment and unlawful confinement (para. 824)); *Kordić* Appeal Judgement, para. 1037.

564. The jurisprudence of the *ad hoc* tribunals has given detailed consideration to the relationship between persecution and other component offences that may comprise a charge of persecution. While prior jurisprudence adopted another point of view,[977] the ICTY Appeals Chamber has recently entered cumulative convictions for both persecution and other underlying crimes against humanity, on grounds that the offence of persecution contains materially distinct elements not contained in other crimes against humanity.[978]

565. Two of five members of the Appeals Chamber in the *Kordić et al.* Appeal Judgement, reflecting the previously-settled jurisprudence of that Chamber, disagreed that a conviction for persecution can be cumulated with other convictions as crimes against humanity if both convictions are based on the same criminal conduct.[979] While the ingredients of persecution and underlying offences may appear distinct when considered in the abstract, the question, according to the *Čelebići* test, is whether they are *materially* distinct; that is, whether each offence contains elements that require proof of a fact not required by the other offences.[980] Where, for example, the charge of persecution is premised on murder or inhumane acts, and such charge is proven, the Prosecution need not prove any additional fact in order to secure a conviction for murder or inhumane acts as well. The proof that the accused committed persecution through murder or inhumane acts *necessarily* includes proof of murder or inhumane acts. These offences become subsumed within the offence of persecution.[981] The Chamber endorses this application of

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[977] *See Prosecutor v. Krstić*, ICTY Appeals Chamber, Judgement, 19 April 2004, paras 231-233; *Krnojelac* Appeal Judgement, para. 188 and Disposition; *Vasiljević* Appeal Judgement, paras 146-147 and Disposition. Subsequent *ad hoc* tribunals have, however, confirmed the approach adopted by the *Kordić et al.,* Appeal Judgement (*see e.g., Nahimana* Appeal Judgement, paras 1024-1026).

[978] *Kordić* Appeal Judgement, paras 1039-1043 (considering, for example, persecution to require proof that an act or omission discriminates in fact and proof of a specific intent to discriminate. Murder, by contrast, requires merely proof that the accused caused the death of one or more persons, regardless of whether the act or omission in question discriminates in fact or was specifically intended as discriminatory).

[979] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, paras 1, 13 (finding the previous decisions of the Appeals Chamber in *Krnojelac, Vasiljević* and *Krstić* to represent the correct application of the *Čelebići* test and considering that no cogent reasons existed to depart from this jurisprudence).

[980] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions*,* para. 5.

[981] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions*,* paras 10, 12 (noting that where persecution requires the materially distinct elements of a discriminatory act and a discriminatory intent, it is therefore more specific than murder or other inhumane acts as a crime against humanity (citations omitted)); *see also ibid.,* para. 11 (further noting

the *Čelebići* test, but concurs that there is need for a precise description of the convicted person's full culpability in the disposition, and hence express identification of the underlying conduct upon which the conviction for persecution has been based.[982]

2.7.12.3 Murder and Extermination

566. The Accused's responsibility in relation to the crimes against humanity of murder and extermination is based on the same underlying conduct (Section 2.4.1). Murder and extermination as crimes against humanity share a number of elements. The ingredient that distinguishes these two offences is that the crime of extermination requires an element of mass killing (Section 2.5.3.1). Murder as a crime against humanity is therefore subsidiary to extermination as a crime against humanity.[983]

2.7.12.4 Conclusions on the criminal responsibility of the Accused

567. The Chamber has found the Accused individually criminally responsible pursuant to Article 29 (new) of the ECCC Law for the following offences as crimes against humanity: murder, extermination, enslavement, imprisonment, torture (including one instance of rape), persecution on political grounds, and other inhumane acts; as well as for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

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that convictions for imprisonment and persecution are impermissibly cumulative. Where persecution takes the form of imprisonment, the former subsumes the latter (citations omitted)).

[982] *Kordić* Appeal Judgement, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, para. 2; *see also ibid.,* para. 6 (describing the crime of persecution as an 'empty hull'; a residual category designed to cover all possible underlying offences of persecution. It is therefore necessary to describe what breaches of which fundamental rights are encapsulated by this charge in order to avoid impermissible vagueness).

[983] The Chamber notes that the Amended Closing Order has specified murder as a component offence of persecution but makes no reference to extermination (Amended Closing Order, para. 141 (alleging that the Accused committed persecution by subjecting detainees to "arbitrary and unlawful detention, torture, enslavement, murder, and other inhumane acts.")) In view of its finding that all component crimes against humanity were in this case subsumed within the umbrella offence of persecution, the Chamber considers this to be of little consequence.

568. In light of the jurisprudence regarding cumulative convictions, the Chamber therefore convicts the Accused of persecution on political grounds as a crime against humanity (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts). It further enters convictions for the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

3 SENTENCING

3.1 Submissions

569. In view of the gravity of the crimes committed by the Accused and numerous aggravating factors, the Co-Prosecutors request a sentence of life imprisonment. They add, however, that a conversion of this life sentence to 45 years of imprisonment would provide an adequate remedy for the Accused's unlawful detention by the military authorities of the Kingdom of Cambodia. A further reduction of five years would also be appropriate in light of applicable mitigating factors. Accordingly, the Co-Prosecutors request that the Chamber impose a sentence of 40 years of imprisonment.[984]

570. During the closing statements, the Accused acknowledged his "legal and moral" responsibility for the crimes committed at S-21,[985] but nevertheless requested that the Chamber release him, and sought an acquittal on all crimes charged against him.[986] The Accused's international defence counsel, who appeared to distance himself from those comments, noted that the Chamber should instead consider a number of mitigating factors in determining a sentence.[987] In addition, the Accused's Final Written Submissions requested that the Chamber deduct from any sentence imposed the time spent by him in provisional detention since 10 May 1999, as well as an additional period as a remedy for the violation of his right to be tried within a reasonable time.[988]

3.2 Applicable law

3.2.1 ECCC provisions and sentencing framework

571. Rule 98(5) of the Internal Rules provides that "[i]f the accused is found guilty, the Chamber shall sentence him or her in accordance with the Agreement, the ECCC Law

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984 "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 357-486.
985 T., 25 November 2009 (Accused), p. 69.
986 T., 25 November 2009 (Defence), pp. 80-113; T., 27 November 2009 (Accused), pp. 59-60; T., 27 November 2009 (Defence), p. 62.
987 T., 26 November 2009 (Defence), pp. 75-82; T., 27 November 2009 (Defence), p. 52.
988 "Final Defence Written Submissions", E159/8, 11 November 2009, p. 15.

and these [Internal Rules]."[989] No distinction is drawn in any of these ECCC documents between national or international crimes as regards sentencing.

572. Article 10 of the ECCC Agreement provides that "[t]he maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment." Article 39 (new) of the ECCC Law supplements this provision as follows:

> Those who committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 [of the ECCC Law] shall be sentenced to a prison term from five years to life imprisonment.
>
> In addition to imprisonment, the [Trial Chamber] may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.
>
> The confiscated property shall be returned to the State.[990]

573. The ECCC Law and Agreement also provide that the Chamber shall exercise its jurisdiction in accordance with the provisions of Articles 14 and 15 of the ICCPR.[991] Article 15(1) of the ICCPR states that a heavier penalty than the one that was applicable at the time the criminal offence was committed cannot be imposed and that "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby".[992] A review of relevant international sentencing guidelines for crimes against humanity and grave breaches of the Geneva Conventions of 1949 indicates that the penalties applicable before the ECCC for these crimes do not contravene Article 15(1) of the ICCPR.[993]

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[989] Unlike the procedure applicable before other international criminal tribunals, the ECCC legal framework envisages neither the possibility of a plea of guilty nor a specifically-designated sentencing hearing. Under Cambodian law, questions relating to guilt and sentencing are dealt with at the same hearing and are determined in a single decision.

[990] *See also* Article 38 of the ECCC Law.

[991] *See* Article 33 new of the ECCC Law and Article 12(2) of the ECCC Agreement.

[992] *See also* Article 6(2) of the 1956 Penal Code and Article 10(1) of the 2009 Penal Code (providing for the immediate application of provisions which prescribe lighter penalties).

[993] *See e.g.*, Nuremberg Charter, Article 27 (which provided for the possibility of "impos[ing] upon a Defendant, on conviction, death or such other punishment as shall be determined by [the Tribunal] to be just") and Article 28 (allowing the Tribunal to deprive the convicted person of "any stolen property"); *see also* the penalties provided for in Article 77 of the ICC Statute, Article 24 of the ICTY Statute, Article 23 of the ICTR Statute and Article 19 of the SCSL Statute.

574. Nor do the relevant sentencing provisions within Cambodian law appear to contravene Article 15(1) of the ICCPR. The 1956 Penal Code, the applicable law at the time these offences were committed, suggests that the death penalty may have been applicable in relation to many offences akin to crimes against humanity and grave breaches of the Geneva Conventions.[994] In relation to subsequent Cambodian provisions, the Chamber is unable to undertake a comparison between the sentencing regime contained in the 2009 Penal Code and that applicable before the ECCC, as the former is not yet fully in force.[995] Article 33 (new) of the ECCC Law, which implements the Agreement, obligates the Chamber to exercise its jurisdiction in conformity with Articles 14 and 15 of the ICCPR. The Agreement creates a *sui generis* sentencing regime. It is therefore doubtful whether, on the basis of Article 33 (new), the Chamber could follow a subsequent national legislative provision in preference to provisions of the Agreement. Such an interpretation could mean that future acts of the national legislature concerning sentence might frustrate the Agreement.

575. The ECCC Agreement, the ECCC Law and the Internal Rules are otherwise silent as regards the principles and factors to be considered at sentencing. In particular, they do not indicate whether sentencing before the ECCC is governed by international or Cambodian legal rules, or some combination of each.[996]

576. International tribunals have developed sentencing guidelines in relation to the same or similar types of crimes to those punishable before the ECCC. There is, however, no uniform approach to sentencing before these tribunals. Further, the sentencing regime applicable before the ICTY, ICTR and SCSL diverges from that applicable before the ICC. As a result, there is no single international sentencing regime directly applicable before the ECCC.

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[994] *See* Article 21, 1956 Penal Code (imposing the death penalty in relation to crimes of the third degree, which include torture (Article 500, 1956 Penal Code) and more serious categories of homicide (*see e.g.* Article 506, 1956 Penal Code)).

[995] Only one portion (Part I) of the 2009 Penal Code is currently in force. The remainder of the 2009 Penal Code has yet to be promulgated and is accordingly not in force. It envisages, for crimes analogous to these, a mandatory term of life imprisonment.

[996] *Cf.*, Article 24 of the ICTY Statute (indicating that"[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.")

577. The Chamber considers that the international nature of the crimes for which the Accused has been convicted, and the uncertainties and complexities evident in the evolution of Cambodian criminal law from the 1956 Penal Code onwards,[997] rules out the direct application of Cambodian sentencing provisions.

578. The Chamber consequently considers that it must exercise its own discretion in determining the sentence it considers justified. In so doing, the Chamber will seek guidance from a number of relevant international and Cambodian sentencing principles and factors.[998]

3.2.2 Relevant sentencing principles and factors

579. The ECCC, like other internationalised tribunals, is entrusted with reducing crimes of considerable enormity and scope into individualised sentences. In doing so, it also seeks to reassure the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally-accepted laws and rules have to be obeyed by all, irrespective of status or rank.[999]

580. While an obvious function of a sentence is to punish, its goal is not revenge.[1000] The sentence must be proportionate and individualised such that it reflects the culpability of the accused based on an objective, reasoned and measured analysis both of his or her conduct and its consequential harm.[1001]

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[997] The Parties were provided with an opportunity to make submissions following the promulgation of the 2009 Penal Code of Cambodia but none chose to do so; *see* "Order Relevant to the 2009 Penal Code of Cambodia", E180/1, 4 February 2010.

[998] Judge LAVERGNE departs from the majority in relation solely to the legal approach to sentencing (*see* Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, E188.1).

[999] *Prosecutor v. Nikolić*, Sentencing Judgement, ICTY Trial Chamber (IT-94-2-S), 18 December 2003, para. 139; *Prosecutor v. Brima et al.*, Sentencing Judgement, SCSL Trial Chamber, (SCSL-04-16-T), 19 July 2007 ("*Brima* Sentencing Judgement"), para 16.

[1000] *See e.g.*, *Aleksovski* Appeal Judgement, para. 185.

[1001] *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber, (SCSL-04-15-T), 8 April 2008, para. 16; *Furundzija* Appeal Judgement, para. 249.

581. The principles of equality before the law, proportionality and individualisation of penalties are amongst the international principles that have been incorporated in Cambodian law.[1002]

582. International jurisprudence has established that the gravity of the crime committed is the "litmus test for the appropriate sentence",[1003] and requires "consideration of the particular circumstances of the case, as well as the form and degree of the participation of the [a]ccused in the crime."[1004] Rule 145(1)(c) of the ICC's Rules of Procedure and Evidence similarly emphasises:

> the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.[1005]

583. Moreover, the Chamber will consider all relevant aggravating and mitigating factors in determining a sentence. Aggravating factors should be proved by the Co-Prosecutors to the same standard as that required for a conviction and only circumstances directly related to the commission of the offence charged, and for which the accused has been convicted, will be considered to be aggravating. Hence, when a particular factor is an element of the underlying offence, it cannot be taken into account as an aggravating factor.[1006] Further, the same fact cannot be used both to demonstrate the gravity of the crime and as an aggravating factor.[1007] Rule 145(2)(b) of the ICC's Rules of Procedure and Evidence provides the following useful guidelines as regards aggravating factors, which the Chamber adopts, where relevant, to the sentencing of Kaing Guek Eav:

[1002] *See, e.g.,* Article 31(2) of the 1993 Constitution of the Kingdom of Cambodia; Article 96 of the 2009 Penal Code.
[1003] *See Aleksovski* Appeal Judgement, para. 182.
[1004] *See Stakić* Appeal Judgement, para. 380.
[1005] ICC RPE, Rule 145(1)(c). Similarly, Article 96 of the 2009 Penal Code of Cambodia provides that in imposing a penalty, account must be taken of the seriousness and circumstances of the offence and the character of the accused.
[1006] *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber (SCSL-04-15-T), 8 April 2009, para. 24.
[1007] *Prosecutor v. Deronjić,* Judgement on Sentencing Appeal, ICTY Appeals Chamber (IT-02-61-A), 20 July 2005, paras 106-107; *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber, (SCSL-04-15-T), 8 April 2008, para. 16.

> (i) [a]ny relevant prior criminal convictions for crimes under the jurisdiction of the [ICC] or of a similar nature; (ii) Abuse of power or official capacity; (iii) Commission of the crime where the victim is particularly defenceless; (iv) Commission of the crime with particular cruelty or where there were multiple victims; (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3 [i.e., gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status]; (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.[1008]

584. The jurisprudence of other international tribunals has established that the burden of proof on an accused with regard to mitigating factors is lower than it is on the prosecution for aggravating factors.[1009] Unlike aggravating factors, mitigating factors may be taken into account regardless of whether they are directly related to the alleged offence.[1010] Rule 145(2)(a) of the ICC's Rules of Procedure and Evidence identifies the following mitigating factors, which the Chamber also adopts:

> (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
>
> (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.[1011]

585. Mitigating factors also play a role in sentencing under Cambodian law.[1012]

3.2.3 The effect of multiple convictions upon sentence

586. There are no provisions in the ECCC Agreement, the ECCC Law or the Internal Rules indicating whether the Chamber may impose a single sentence following conviction for multiple offences, where each conviction is based on distinct criminal conduct.

[1008] ICC RPE, Rule 145(2)(b)**.**
[1009] *Blaškić* Appeal Judgement, para. 697.
[1010] *Prosecutor v. Sesay et al.*, Sentencing Judgement, SCSL Trial Chamber (SCSL-04-15-T), 8 April 2009, para. 28.
[1011] ICC RPE, Rule 145(2)(a).
[1012] *See* Article 93 of the 2009 Penal Code.

587. The practice at the Nuremberg and Tokyo Tribunals was to impose a single global sentence, even upon conviction for several offences. Before the ICTY, ICTR and SCSL, the matter has been left to the discretion of individual Trial Chambers, although the imposition of a single sentence will usually be appropriate in cases where the offences may be considered to belong to a single criminal transaction.[1013]

588. Article 78(3) of the Rome Statute instead provides that

> [w]hen a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment […].[1014]

589. The Chamber notes that while Cambodian practice has also varied on the matter, the 2009 Penal Code states:

> [i]f, in the course of a single prosecution, the accused is found guilty of several concurrent offences, each of the penalties incurred may be imposed. However, if several penalties of a similar nature are incurred, only one such penalty not exceeding the highest maximum penalty allowed by law may be imposed.[1015]

590. The Chamber therefore considers that it may impose a single sentence that reflects the totality of the criminal conduct where an accused is convicted of multiple offences.

3.2.4 Applicable sentence where the maximum sentence of life imprisonment is not imposed

591. The ECCC legal framework does not indicate any maximum sentence in instances where life imprisonment is not imposed. The ICTY, the ICTR and the SCSL consider the matter to be wholly within the discretion of the judges, who have considerable (though

[1013] *Prosecutor v. Ntakirutimana*, Judgement and Sentence, ICTR Trial Chamber (ICTR-96-10 & 96-17-T), 21 February 2003, para. 917; *see also Kambanda v. Prosecutor,* Judgement, ICTR Appeals Chamber (ICTR 97-23-A), 19 October 2000, paras 109-10; *Čelebići* Appeal Judgement; *Brima* Sentencing Judgement, para 12.
[1014] Rome Statute, Art. 78(3).
[1015] Article 137 of the 2009 Penal Code.

not unfettered) discretion to tailor the length of the sentence to best reflect the totality of the accused's individual culpability.

592. By contrast, Article 77(1) of the Rome Statute provides:

> […] the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.[1016]

593. Accordingly, the ICC envisages no intermediate term of imprisonment between 30 years imprisonment and life.

594. Similarly, Article 95 of the 2009 Penal Code does not provide for any intermediate penalty between 30 years imprisonment and a life sentence.[1017]

595. By a majority (Judge LAVERGNE dissenting), the Chamber after considering the sentencing range of five years to life imprisonment provided in the ECCC Law, and noting that there are no binding international guidelines in relation to sentencing, decides in applying ECCC Law that it has the discretion to impose a term of imprisonment other than a life sentence.

3.3 Findings

3.3.1 Gravity of the crimes

596. The Co-Prosecutors contend that in evaluating the gravity of the crimes, the Chamber should consider the role of the Accused in their commission, their impact on the

[1016] Rome Statute, Art. 77(1).
[1017] Article 95 of the 2009 Penal Code ("[i]f the penalty incurred for an offence is life imprisonment, the judge granting the benefit of mitigating circumstances may impose a sentence of between fifteen and thirty years imprisonment"); *see also* Articles 15 and 128(2) of the 1956 Penal Code.

victims and their families, and the Accused's individual circumstances.[1018] The Chamber agrees that these factors are relevant to determining the gravity of the crimes.

597. The Chamber has found the Accused criminally responsible for crimes of a particularly shocking and heinous character. As Deputy and then Chairman of S-21, the Accused managed and refined a system over the course of more than three years that resulted in the execution of no fewer than 12,272 victims, the majority of whom were also systematically tortured. Victims who were not executed died as a result of the conditions of detention, which led to widespread disease, malnourishment and physical and psychological pain, as well as extreme fear. The Accused worked tirelessly to ensure that S-21 ran as efficiently as possible and did so out of unquestioning loyalty to his superiors and CPK ideology, without regard to the humanity of the detainees he oversaw. Under his tutelage, S-21 became a highly efficient instrument of persecution in furtherance of a politically-motivated policy of discrimination.

598. Only a very small number of those detained at S-21 survived. S-21 survivors who appeared before the Chamber testified to the lasting physical and psychological impact of their ordeal.[1019] The relatives of S-21 detainees also testified to the devastating consequences of the Accused's crimes on these detainees' families.[1020]

599. Further, the Accused was an intelligent and educated man serving as Deputy and then Chairman and Secretary of S-21, and hence fully understood the nature of his acts at the time.

600. In light of the foregoing, the Chamber considers that the Accused's crimes are extremely grave.

[1018] "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 368-386.
[1019] *See e.g.* Sections 2.4.4.1.2, 2.4.5.1, 2.4.5.2 and 2.4.5.3.
[1020] *See e.g.,* T., 17 August 2009 (Robert HAMILL), pp. 92-101; T., 18 August 2009 (HAV Sophea), pp. 50-53; T., 18 August 2009 (NETH Phally), p. 106; T., 18 August 2009 (Antonya TIOULONG), pp. 15-17; T., 17 August 2009 (Martine LEFEUVRE), pp. 22-23, 30, 38-41; T., 20 August 2009 (OU Savrith), pp. 60-66.

3.3.2 Aggravating factors

601. The Co-Prosecutors contend that the Chamber should consider the following aggravating factors in rendering a sentence: the Accused's abuse of power or official capacity, the cruelty of the crimes committed, the defencelessness of the victims, and the discriminatory intent with which the crimes were committed.[1021] The Chamber agrees that these are relevant aggravating factors that may be considered in its determination of a sentence.

602. As Deputy and then Chairman of S-21, the Chamber has found that the Accused exercised his authority by indoctrinating, training and supervising staff in their commission of crimes against the S-21 detainees. Moreover, many of the S-21 staff members were very young and were corrupted by the requirement to treat the detainees with great cruelty. Although the Chamber has convicted the Accused solely on the basis of direct form[s] of responsibility for most crimes, the Accused's superior position constitutes an aggravating factor in relation to these crimes.[1022]

603. Many of the crimes committed at S-21 were also carried out in a particularly cruel manner. Detainees were subject to a host of brutal torture techniques and were, in some instances, literally beaten to death. Further, the Chamber considers that the sheer number of victims of these crimes, no fewer than 12,273, serves as an additional aggravating factor.

604. S-21 detainees, who included the children, spouses and family members of other detainees, were clearly defenceless and vulnerable. Throughout their detention, every facet of these detainees' lives was under the control of their captors, including the date and manner of their execution.

605. With the exception of persecution as a crime against humanity (for which a discriminatory intent is a legal ingredient of the offence), a discriminatory intent, where proved, may be considered as an aggravating factor in sentencing. Such intent may be

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[1021] "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 388-408.
[1022] *See* Section 2.7.10.4..

inferred from the circumstances of the crime where the accused knowingly participated in a system that discriminated on political grounds.[1023] The Chamber has found by majority that the Accused carried out his crimes with a specific discriminatory intent based on the victims' perceived political opposition and status as enemies of the CPK (Section 2.5.3.14.4). In finding the Accused guilty of the crime of persecution, the Chamber has considered that the crime of persecution encompasses all other crimes against humanity with which the Accused was charged (Section 2.5.3.14). It follows that in determining the applicable sentence, discriminatory intent, as a legal ingredient of the crime of persecution, can be considered as an aggravating circumstance neither in relation to the commission of the offence of persecution nor in relation to the commission of the crimes it encompasses. It is, however, an aggravating factor in relation to all other crimes for which the Accused is convicted, where a discriminatory intent is not a legal ingredient of those offences.

3.3.3 Mitigating factors

606. During his closing statement, the international defence counsel argued that the Chamber should consider the following mitigating circumstances: the fact that the Accused acted pursuant to superior orders and under duress, his cooperation with the ECCC, his remorse for the crimes committed, and his propensity for rehabilitation.[1024] In their Final Written Submissions, the Co-Prosecutors disputed that superior orders or duress were mitigating factors in the present case but agreed that allowances should be made for the Accused's general cooperation, limited acceptance of responsibility, remorse and the potential impact of these factors on national reconciliation.[1025] During their closing statements, the Co-Prosecutors amended their submissions to the extent that as the Accused was now arguing for an acquittal, no mitigating factors should be considered.[1026]

[1023] *Prosecutor v. Simić et al.,* Judgement, ICTY Trial Chamber (IT-95-9-T), 17 October 2003 ("*Simić et al.* Trial Judgement"), para. 51; *see also Blaškić* Appeal Judgement, para. 164.
[1024] T., 26 November 2009 (Defence), pp. 75-80.
[1025] *See* "Co-Prosecutors' Final Trial Submission", E159/9, 11 November 2009, paras 409-452.
[1026] T., 27 November 2009 (Prosecution), p. 4.

607. The Statutes of the ICTY, ICTR and SCSL specifically permit superior orders to be considered in mitigation of punishment.[1027] A subordinate who establishes the existence of superior orders "may be subject to a less severe sentence only in cases where the order of the superior effectively reduces the degree of his guilt. If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist."[1028] In view of the extended period of time over which these crimes were committed, the large number of victims and the Accused's dedication to refining the operations of S-21, the Chamber considers that the Accused has failed to establish that superior orders should be considered as a mitigating factor in the circumstances of this case (Section 2.7.11.1).

608. Though often pleaded in conjunction with superior orders, duress may also serve as an independent mitigating factor.[1029] Similarly, however, the Chamber finds that the Accused has failed to establish that duress should be considered as a mitigating factor in the circumstances of this case (Section 2.7.11.2). Nonetheless, the Chamber places limited weight on the coercive climate in DK and his subordinate position within the CPK.

609. Notwithstanding his belated request for acquittal, the Chamber considers that the Accused's cooperation with the ECCC may serve as a mitigating factor.[1030] The Accused demonstrated a willingness to cooperate with the ECCC throughout the investigation and the trial proceedings. He provided substantial information regarding his role in the functioning of S-21 and of the crimes committed therein. The Accused's cooperation with the ECCC undoubtedly facilitated the proceedings before the Chamber. Further, the

[1027] *See* Article 7(4) of the ICTY Statute, Articles 6(4) of the ICTR and SCSL Statutes.
[1028] *Prosecutor v. Erdemović,* Sentencing Judgement, ICTY Trial Chamber (IT-96-22-T), 29 November 1996, para. 53.
[1029] *See* e.g. *Prosecutor v. Martić,* Judgement, ICTY Trial Chamber (IT-95-11-T), 12 June 2007, para. 501; *see also* Rule 145(2)(a)(i) of the ICC RPE.
[1030] *See* Rule 145(2)(a)(ii) of the ICC RPE; *see also* Rules 101(B)(ii) of the ICTY, ICTR and SCSL RPE.

Chamber considers that his cooperation assisted in the pursuit of national reconciliation, one of the goals of the ECCC.[1031]

610. Expressions of remorse have been held to be a mitigating factor in sentencing before the international tribunals.[1032] The Accused repeatedly made public apologies and expressed remorse for his crimes when given the opportunity. The Chamber finds, however, that the mitigating impact of his remorse is undermined by his failure to offer a full and unequivocal admission of his responsibility. In particular, the Accused's request during the closing statements for acquittal, despite earlier apparent admissions of responsibility, diminishes the extent to which his remorse would otherwise mitigate his sentence.

611. The propensity for rehabilitation of an accused has also been taken into account at sentencing.[1033] The ICTY Appeals Chamber has counselled, however, that rehabilitation is not a factor "which should be given undue weight."[1034] Experts Françoise SIRONI-GUILBAUD and KA Sunbaunat, who were tasked with providing a psychological assessment of the Accused, stated that they believed that the Accused could be rehabilitated and reintegrated into society based on his past experiences and his present condition.[1035] The Chamber concurs with this opinion. The Chamber has thus accorded limited consideration to the Accused's propensity for rehabilitation in its determination of sentence.

3.3.4 Psychiatric and psychological assessment of the Accused

612. An expert report evaluating the Accused's personal and psychological characteristics concluded that he presented no indication of mental or psychological

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[1031] *See* Preamble of the ECCC Agreement (citing the importance of national reconciliation); *see also* T., 14 September 2009 (Richard GOLDSTONE), pp. 25-26, and T., 15 September 2009 (Stéphane HESSEL), pp. 49-75 (regarding national reconciliation).
[1032] *Blaškić* Appeal Judgement, para. 705.
[1033] *Furundzija* Trial Judgement, para. 291; *Kayishema et al.* Trial Judgement, para. 26.
[1034] *Čelebići* Appeal Judgement, para. 806.
[1035] *See* "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509, pp. 66-67, ERN (English) 00211147-00211148; T., 31 August 2009 (Françoise SIRONI-GUILBAUD and KA Sunbaunat), pp. 35, 101; T., 1 September 2009 (Françoise SIRONI-GUILBAUD and KA Sunbaunat), p. 23.

disorder.[1036] In its detailed discussion of the Accused's personality, the experts drew on their clinical experience and scientific research, as well as on cultural, religious and social factors relevant to the Accused, considered by them to be vital for a comprehensive assessment of him.

613. They described him as a "dutiful person, readily influenced by [and] responding well to strong leadership," with a "need for affiliation, and for recognition and acknowledgement by his superiors."[1037] They further noted the Accused's experiences of successive and major assimilation of different cultural systems, concluding in a radical and abrupt affiliation with communism, which he described "as a single, tangible [and] complete social order."[1038] Marxist ideology satisfied his need for certainty and was subsequently replaced with an equally strong commitment to Christianity, described as a "pragmatic and safe choice."[1039] In identifying with Marxism, the Accused showed zeal and "extreme allegiance"[1040]; surpassing his superiors' expectations in order to suppress his increasing doubts regarding Angkar's plans for "smashing" enemies, and his own fears of imminent death.[1041]

614. The experts described the Accused as lacking in empathy, which they attributed in part to the "fabrication" or conditioning process developed by the Khmer Rouge to eliminate emotions and to enhance self-control.[1042] They also noted that the Accused was able to construct powerful defence mechanisms insulating him from emotional reactions

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[1036] "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509. This report was prepared on the request of the Co-Investigating Judges and supplemented by the testimony of both experts on 31 August 2009 (T., 31 August 2009) and further assessments of the Accused during trial. The Accused cooperated fully during these assessments (*ibid.,* p. 16).
[1037] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 24.
[1038] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 24.
[1039] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 26.
[1040] T., 15 September 2009 (Accused), pp. 40, 42 (recounting the influence of his commitment to the Revoluion on his view of his own family, and noting that in consequence, he had to consider his parents as "individual[s] or a family which belonged to the Party" and his children as "children of Angkar" who "were raised to serve the Revolution.")
[1041] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 25 (noting that dehumanizing the victims also required dehumanizing the executioners by divesting them of their individual or personal emotions, and replacing them with political emotions, which Angkar could exploit and control).
[1042] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), pp. 32, 46; *see also* "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509, pp. 27, 36, 49 ERN (English) 00211108, 00211117, 00211130.

and inner conflicts created by his external reality: mechanisms which they described as ultimately enabling him to nurture his own family whilst overseeing the deaths of children at S-21.[1043]

615. The Accused was further depicted as highly intelligent, with an excellent memory, as well as meticulous, rigid, detail-oriented and obsessional: features that were also apparent to the Chamber during trial. The experts also perceived, and appeared to assess positively, the Accused's greater capacity for self-reflection regarding his life and actions as the investigation and trial progressed.[1044]

616. The Chamber accepts the conclusions reached by the experts and finds that the Accused has no psychological or psychiatric impairment relevant to his criminal responsibility. It accepts their assessment of his capacity for rehabilitation and reintegration into society.[1045] It concurs with their evaluation of him as an intelligent, well-educated and methodical individual, who appeared anxious to please the Chamber, as well as to appease the victims of his acts. Notwithstanding his last-minute request for acquittal, the Chamber finds the Accused to be fully aware of his responsibility for the suffering and death of thousands of innocent people at S-21, and of the extreme gravity of his participation and leadership at S-21.

3.3.5 Character witnesses

617. At trial, a number of witnesses testified regarding their knowledge of the character of the Accused and his conduct before and after the period of the crimes with which he is charged.

618. According to Witness SOU Sath, who was a classmate of the Accused at Siem Reap High School during his 1959-1961 school years, the Accused was a humble, kind, loyal

[1043] "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat", E3/509, pp. 35-36, ERN (English) 00211116-0021117.
[1044] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 16 (noting the Accused's assessment of his choices as having been correct at the time, but noting an "endeavour to distance himself from his past actions").
[1045] T., 31 August 2009 (KA Sunbaunat and Françoise SIRONI-GUILBAUD), p. 35 (noting also his ability to adapt to changing life experiences).

and generous boy, as well as being a good student who was respectful towards his teachers, eager to share his knowledge and to help others. The Witness also testified that the Accused showed no particular interest in politics at the time.[1046]

619. In 1965, after graduating from the National Teachers' Institute, the Accused was posted to teach mathematics at Skoun Junior High School. Two of the students he taught from 1965 to 1968, TEP Sem and TEP Sok, described him as a remarkable teacher who was meticulous, sincere, dedicated and always willing to help the less fortunate, as well as well-liked and respected by his students. He gave free individual lessons to disadvantaged students and school supplies to the needy.[1047]

620. Witnesses CHOU Vin, HUN Smirn and PENG Poan – who met the Accused while he taught in Phkoâm, and later in Svay Chek in the 1990s, when the Accused went by the name HANG Pin – testified that they remembered him as someone they liked; a dedicated and competent teacher, who worked hard and selflessly, and who was gentle, humble and solitary. They all testified that after his arrest, they were surprised to learn about his activities as head of S-21.[1048]

621. The Accused said that his conversion to the Protestant faith was a third phase of his life. The first was the training period, including his career as a teacher and was characterized by his "love for knowledge"; the second was his involvement in politics ("love for mankind") and, last, his Christian faith and the "love of God".[1049] Pastor Christopher LAPEL testified as to the significance and sincerity of the Accused's religious faith. When he first met the Accused in Battambang in December 1995, the Accused went by the name HANG Pin. The Accused was baptised on 6 January 1996 and after a two-week course, returned to his home area and served as a lay pastor of a community comprising 14 families. According to Pastor LAPEL, the Accused converted of his own free will, testifying that the Accused was "a man with a serving heart", who

[1046] T. 1 September 2009 (SOU Sath), pp. 34-47.
[1047] T. 1 September 2009 (TEP Sem), pp. 50-60, 62-65; T. 1 September 2009 (TEP Sok), pp. 67-84.
[1048] T. 1 September 2009 (CHOU Vin), pp. 86-108, 110-111; T. 2 September 2009 (HUN Smirn), p. 5-19; T. 2 September 2009 (PENG Poan), pp. 20-38.
[1049] "Psychological Assessment Report of Experts Françoise Sironi-Guilbaud and Ka Sunbaunat," E3/509, pp. 41-42, ERN (English) 00211122-00211123.

cared about "shar[ing] the word of God". He expressed pride that the Accused admitted to the crimes he committed and accepted his punishment.[1050]

622. The Chamber concludes that in his life before he became Chairman of M-13 and later of S-21, the Accused was a well-respected student and teacher, who readily assisted his fellow students and his pupils. It finds that the Accused has shown a constant and unusually strong level of commitment to his studies, to his teaching and in his political and religious beliefs. It is also satisfied that there were no factors in his professional or family life that in any way excuse his criminal conduct.

3.3.6 Impact of prior violations of the Accused's rights upon sentence

623. The Accused was held in continuous detention since 10 May 1999 when he was arrested and detained by the Cambodian Military Court on various charges pursuant to Cambodian law. On 31 July 2007, he was transferred to the ECCC Detention Facility pursuant to orders of the Co-Investigating Judges, where he has remained in detention.[1051]

624. On 15 June 2009, the Chamber issued a written decision in which it ruled that, in the event of a conviction, the Accused was entitled to full credit for the entirety of his time spent in detention since 10 May 1999. The Chamber further found the Accused's detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007 to have been unlawful and in violation of his rights to a trial within a reasonable time and detention in accordance with the law. Accordingly, the Chamber stated that, should the Accused be convicted, he would be entitled to a further reduction in his sentence, to be decided at the sentencing stage, for the violation of these rights.[1052]

625. There is no established formula for quantifying such a reduction in an accused's sentence. The Chamber notes that the jurisprudence of the ICTR nevertheless offers some

[1050] T.15 September 2009 (Christopher LAPEL), pp. 2-27.
[1051] *See* Decision on Request for Release, E39/5, 15 June 2009, paras 2-5 (procedural history).
[1052] Decision on Request for Release, E39/5, 15 June 2009.

helpful guidance in the matter.[1053] Further, the Chamber considers that the reduction must be express and measurable[1054] and based on the totality of the circumstances of the case.

626. In the instant case, the Accused was unlawfully detained by the Cambodian Military Court for more than eight years; far longer than the allowable provisional detention period. There appears to have been no substantial and systematic investigation of the allegations against him throughout this period of detention, and the legal basis for his continued detention was poorly elaborated. In some instances, extensions of the Accused's detention were ordered by the Prosecutor, rather than the competent judicial authorities.[1055]

627. Neither the gravity of the crimes of which he was suspected nor the constraints under which the Cambodian legal system was operating at the time can justify these breaches of the Accused's rights. In light of the foregoing (Judge LAVERGNE dissenting solely on the approach to sentence adopted by the majority), the Chamber decides that a reduction of **5 years** from the Accused's sentence constitutes an appropriate remedy.

3.3.7 Sentence

3.3.7.1 Imprisonment

628. In deciding on an appropriate sentence, the Chamber has taken into account the entirety of the circumstances of this case, including all relevant sentencing principles and factors previously discussed.

629. The Chamber has concluded unanimously that there are significant mitigating factors which mandate the imposition of a finite term of imprisonment rather than a life sentence. These factors include the Accused's cooperation with the Chamber, admission of responsibility, expressions of remorse (although undermined by his request for

[1053] *See Prosecutor v. Barayagwiza et al.*, Judgement and Sentence, ICTR Trial Chamber (ICTR-99-52-T), 3 December 2003, paras 1106-1107; *Semanza* Appeal Judgement, paras 323-329; *Kajelijeli* Appeal Judgement, para. 324.
[1054] *See Beck v. Norway,* Judgement, ECtHR (no. 26390/95), 26 June 2001, para. 27; *Chraidi v. Germany*, Judgement, ECtHR (no. 65655/01), 26 October 2006, paras 24-25; *Dzelili v. Germany*, Judgement, ECtHR (no. 65745/01), 10 November 2005, paras 83-85.
[1055] *See* Decision on Request for Release, E39/5, 15 June 2009, paras 18-21.

acquittal during closing statements), the coercive environment in DK in which he operated, and his potential for rehabilitation.

630. The Chamber has further noted a number of aggravating features, including the shocking and heinous character of the offences, which were perpetrated against at least 12,273 victims over a prolonged period. Such factors, when considered cumulatively, warrant a substantial term of imprisonment.

631. On the basis of the foregoing, the majority of the Chamber (Judge LAVERGNE dissenting) considers the appropriate sentence to be **35 years** of imprisonment.[1056]

632. The Chamber considers that a reduction in the above sentence of **5 years** is appropriate given the violation of the Accused's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007.

633. The Accused is entitled to credit for the time spent in detention,[1057] for the following periods:

a. 10 May 1999 until 30 July 2007; *i.e.*, the time spent in detention under the authority of the Cambodian Military Court;

b. 31 July 2007 until the Judgment becomes final, *i.e.*, the time spent in detention under the authority of the ECCC.

3.3.7.2 Confiscation of personal property, money and real property

634. The Chamber has identified no personal property, money or real property acquired unlawfully or by criminal conduct by the Accused. There are accordingly no identified assets which could form the subject of confiscation pursuant to Article 39 (new) of the ECCC Law.[1058]

[1056] *See* Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, E188.1.
[1057] *See* Decision on Request for Release, E39/5, 15 June 2009.
[1058] "Inquiry into income and assets of the Accused", E175, 15 October 2009.

4 CIVIL PARTY REPARATIONS

635. Internal Rule 100(1) provides that "[t]he Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused." The provisions of the Internal Rules pertaining to Civil Party participation have, since the commencement of trial, undergone significant modification.[1059] These amendments are aimed at ensuring, amongst other things, that ECCC proceedings allow effective victim participation in relation to mass crimes and the specific Cambodian context.[1060] Due to the advanced stage of proceedings in Case 001 at the time these reforms were commenced, these revised provisions have not been applied to the present case.[1061]

4.1 Procedural history

636. Initial decisions on the admissibility of Civil Party applications ascertained that the criteria for participation as a Civil Party were satisfied.[1062] In common with the practice before comparable international tribunals, the Chamber undertook a *prima facie* assessment of the credibility of the information provided by the applicants.[1063] This

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[1059] ECCC Internal Rules (Revision 4), promulgated on 11 September 2009 and ECCC Internal Rules (Revision 5), promulgaged on 9 February 2010 (http://www.eccc.gov.kh/english/internal_rules.aspx).

[1060] *See* ECCC Press Release dated 11 September 2009, issued at the conclusion of the 6th ECCC Plenary Session (http://www.eccc.gov.kh/english/cabinet/press/131/ECCC_Plenary_11_Sep_2009_Eng.pdf).

[1061] Internal Rule 114(3), adopted on 9 February 2010, provides that "[a]mendments concerning Civil Party participation adopted at the 7th Plenary Session shall be applicable to those ECCC cases for which, at the date of adoption, a closing order has not been issued". Unless the context otherwise requires, all references to the Internal Rules in this Section therefore pertain to Internal Rules (Revision 3), promulgated on 6 March 2009.

[1062] *See, however,* Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applicants, E2/94, 26 February 2009 (finding that proof of identity must be unequivocal and is not satisfied where the information provided merely appeared to be true in view of the significant rights enjoyed by Civil Parties at trial). Pursuant to Internal Rule 23(4), the Trial Chamber may at this stage declare a Civil Party application inadmissible: a decision that is subject to appeal (Internal Rule 104(4)(e)).

[1063] *See, e.g.,* Rule 86 of the RPE of the Special Tribunal for Lebanon ("In deciding whether a victim may participate in the proceedings, the Pre-Trial Judge shall consider […] whether the applicant has provided *prima facie* evidence that he is a victim as defined in Rule 2. ["A natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction"]); *see also Prosecutor v. Lubanga,* "Decision on victims' participation", ICC Trial Chamber I (ICC-01/04-01/06-1119), 18 January 2008, para. 99: "It would be untenable for the Chamber to engage in a substantive assessment of the credibility or the reliability of a victim's application before the commencement of the trial. Accordingly, the Chamber will merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of

process is distinct from the Chamber's determination of the merits of all applications in the verdict, on the basis of all evidence submitted in the course of proceedings.[1064]

637. During the initial hearing, the Chamber confirmed the Civil Party status of the 28 individuals who joined the proceedings during the investigative phase.[1065] The Chamber received 66 additional Civil Party applications before the expiry of the 2 February 2009 deadline, 65 of which were declared admissible either at the initial hearing or by decisions of 26 February 2009 and 4 March 2009, respectively.[1066] Consequently, 93 Civil Parties were permitted to take part in the proceedings. All were represented by lawyers, and organized into four groups. 22 Civil Parties were heard before the Chamber during the course of trial.

638. On 17 August 2009, the Defence indicated its intent to challenge, on specified grounds, a number of Civil Party applications.[1067] Adversarial argument concerning these challenges took place on 26 and 27 August 2009.[1068] In the course of the hearing, the lawyers for Civil Parties KEANG Vannary (E2/77) and ENG Sitha (E2/49) informed the Chamber of the withdrawal of their applications.[1069] On 15 September 2009, Civil Party

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the Court. The Trial Chamber will assess the information included in a victim's application form and his or her statements (if available) to ensure that the necessary link is established".

[1064] Internal Rule 100 provides that the Trial Chamber "shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused"; *cf.* "Co-Lawyers for Civil Parties (Group 2) – Final Submission", E159/6, 12 November 2009, paras 6-8 (requesting the Chamber to instead treat all Civil Parties accorded interim recognition as recognized Civil Parties).

[1065] T., 17 February 2009, p. 34.

[1066] *See* T., 17 February 2009, pp. 46, 50; *see also* Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applications, E2/94, 26 February 2009; Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, E2/94/2, 4 March 2009; *see further* Decision on Request to reconsider decision on proof of identity for Civil Party application (E2/36), E2/94/4, 10 August 2009; Decision on Motion Regarding Deceased Civil Party, E2/5/3, 13 March 2009.

[1067] T., 17 August 2009, pp. 2-7; *see also* T., 17 February 2009, pp. 41-42; T., 10 August 2009, pp. 8-9.

[1068] The Defence contested Civil Party applications E2/22, E2/37, E2/66, D25/15, E2/30, E2/38, E2/41, E2/49, E2/63, E2/64, E2/65, E2/69, E2/70, E2/71, E2/73, E2/74, E2/75, E2/76, E2/77, E2/81, E2/82, E2/83, E2/35 and E2/62. It withdrew its challenge to Civil Party applications E2/57 and D25/20 ("Written Record of Proceedings", E1/69, 26 August 2009; "Written Record of Proceedings", E1/70, 27 August 2009); *see,* in response, "Civil Party Group 1 - Request to establish the status of Ly Hor as a survivor of S-21 and authenticity of documents as a matter of record", E137, 7 August 2009; "Civil Party Group 1 - Motion to establish nature of relationship between four Civil Parties of Group 1 and direct victims of S-21" (E140), 13 August 2009; "Civil Party Group 1 - Motion to provide exhibits in support of five Civil Parties of Group 1", E165, 3 September 2009; "Co-Lawyers Group 2 - Request for Submission of Evidence in Support of Civil Parties Group 2: E2/22, E2/35, E2/64, E2/66 and E2/83", E163/3, 10 September 2009.

[1069] T., 27 August 2009, pp. 7-8, 10.

BUN Srey (E2/65) also abandoned the civil action.[1070] In their final written submissions and closing statements, the four Civil Party Groups requested the Chamber to declare the reparation claims of the remaining 90 Civil Parties admissible and to recognize their right to reparation.[1071]

4.2 Assessment of the Civil Party applications

639. Once declared admissible in the early stages of the proceedings, Civil Parties must satisfy the Chamber of the existence of wrongdoing attributable to the Accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.

4.2.1 Existence of injury

640. Internal Rule 23(2) provides that in order for Civil Party action to be admissible, the injury must be "physical, material or psychological", and the "direct consequence of the offence, personal and have actually come into being".[1072]

641. In addition to physical suffering, the injury in question may also be psychological and include mental disorders or psychiatric trauma, such as post-traumatic stress disorder, or material injury pertaining to loss of property or income.[1073] The injury suffered must

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[1070] "CPG3: Lettre d'abandon de Droit de la Constitution de la Partie Civile au près des Chambres Extraordinaires au sein des Tribunaux Cambodgiens", E2/65/5, 15 September 2009.

[1071] "Civil Party Group 1 – Final Submission", E159/7, 10 November 2009; "Co-Lawyers' for Civil Parties (Group 2) – Final Submission", E159/6, 10 November 2009; "Civil Parties (Group 4) – Final Written Submission", E159/4, 10 November 2009; "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009; *see also*, T., 23 November 2009.

[1072] Although no change in substance was entailed, these admissibility criteria and standard of proof were clarified in the amendments adopted at the 7th Plenary Session. Rule 23*bis* (1) now provides:
"In order for a Civil Party action to be admissible, the Civil Party applicant shall:
a) be clearly identified; and
b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.
When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true."

[1073] *See* e.g. T., 25 August 2009 (CHHIM Sotheara), pp. 41-42, 44-46 (detailing the consequences for the mental and physical condition of family members of direct victims of S-21 and the nature of the traumatisation resulting from knowledge of a relative's death there as including, amongst other things, identification with the suffering of victim, guilt, helplessness and psychiatric conditions such as post-traumatic stress disorder). Although only the English version of Rule 23(2)(a) refers to psychological injury, the Khmer and French versions refer to *préjudice moral* and "ការខូចខាតខាងផ្លូវចិត្ត", respectively.

be personal. The Chamber has previously ruled that a civil action may, under certain conditions, be pursued on behalf of deceased Civil Party applicants by their successors.[1074]

4.2.2 Existence of a causal link between the victim's injury and the Accused's offending

642. The injury suffered must result directly from the criminal conduct of the Accused. The notion of "direct consequence" is expressly mentioned in Article 13 of the 2007 Code of Criminal Procedure and emphasizes the link between the crime and the injury suffered, rather than the intended target of the criminal act. Responsibility is thus not limited to persons against whom the crimes were committed, but may also be the direct cause of injury to a larger group of victims.[1075]

643. Although the immediate family members of a victim fall within the scope of Internal Rule 23(2)(b), direct harm may be more difficult to substantiate in relation to

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See further Situation in Uganda, "Decision on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation […]' of Pre-Trial Chamber II", ICC Appeals Chamber, 25 February 2009 (ICC-02/04-179), para. 34.

[1074] Civil Party SUOS Sarin (D25/24) died before the start of trial; *see* "Certificate of Death - Suos Sarin", E2/5/1.2. The Chamber determined that her husband, UM Pyseth, was authorized as a successor to continue her civil action; *see* Decision on Motion Regarding Deceased Civil Party, E2/5/3, 13 March 2009, paras. 10-12 (finding that the successors of a deceased Civil Party must demonstrate that the Civil Party had filed a Civil Party application. Absent such proof, successors can act only seek reparation in their own right).

[1075] Under French law, which contains a similar prerequisite, close family members of a direct victim qualify as Civil Parties in their own right, on the basis of Article 2 of the French Code of Criminal Procedure: "Civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanour or a petty offence is open to all those who have personally suffered damage *directly* caused by the offence" (emphasis added). *See further* Article 13 of the 1964 Cambodian Code of Criminal Procedure, which notes: "Il ne suffit pas qu'il y ait tout à la fois une infraction à la loi pénale et un domage causé, il faut de plus qu'entre ces deux éléments, il y ait un rapport de cause à effet ou en d'autres termes, *que ce dommage soit le résultat direct de l'infraction* et qu'il soit né et actuel." (emphasis added). The extension of the notion of injury to all those who have suffered harm as a direct consequence of the crime is also reflected in at least one other international legal instrument; *see e.g.* "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the United Nations General Assembly", GA UN Resolution 60/147, UN Doc. A/RES/60/147, para. 8: "For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate […], the term "victim" also includes *the immediate family or dependants of the direct victim* and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" (emphasis added).

more attenuated familial relationships.[1076] The Chamber nevertheless considers that harm alleged by members of a victim's extended family may, in exceptional circumstances, amount to a direct and demonstrable consequence of the crime where the applicants are able to prove both the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the deceased. In this regard, the Chamber accepts the view of expert CHHIM Sotheara regarding the nature of familial relationships within Cambodian culture[1077] and has therefore evaluated the claims of extended family members who have sought to demonstrate a particular bond with immediate victims of S-21 and S-24.

4.3 Responsibility of KAING Guek Eav vis-à-vis the Civil Parties

644. KAING Guek Eav has been convicted, in relation to offences committed at S-21 and S-24, of crimes against humanity of persecution (extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape) and other inhumane acts) and of the following grave breaches of the Geneva Conventions of 1949: wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian. The Chamber now considers whether he can also be found responsible for the particular harm alleged by two categories of Civil Parties, namely those who claim to be survivors of S-21 or S-24, and

[1076] *See e.g.* Inter-American Court on Human Rights, *Garrido and Baigorria v. Argentina*, Reparations and Costs Judgment, 27 August 1998, para. 64; *Castillo-Páez v. Peru*, Reparations and Costs Judgment, 27 November 1998, para. 88-89; *Loayza-Tamayo v. Peru*, Reparations decision, 27 November 1998, paras 88-90, 142-143, *Case of the "White Van"(Paniagua Morales a.o.) v. Guatemala*, Reparations decision, 25 May 2001, paras 106, 108 (using a broad notion of a "family" and applying a presumption of proof of psychological harm suffered by parents and children of the person killed); *see also Prosecutor v. Lubanga,* "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation' of 18 January 2008", ICC Appeals Chamber, 11 July 2008 (ICC-01/04-01/06-1432), para. 32: "Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child."

[1077] T., 25 August 2009 (CHHIM Sotheara), pp. 36-37, 48 (noting the historical tendency of Cambodian families to live together with other family members, such as aging parents or with siblings and their families and hence, the likelihood of strong bonds also to grandparents, cousins, uncles and aunts. While such bonds were common, their closeness nevertheless depends on the particular case).

those whose claims were instead based on alleged kinship or special bonds of affection or dependency in relation to immediate victims of S-21 or S-24.[1078]

4.3.1 Civil Parties claiming to be survivors of S-21 or S-24

645. Of the eight Civil Parties who claimed to be survivors of S-21 or S-24, the Chamber considers the following four Civil Parties to have substantiated this claim and hence, to have established that KAING Guek Eav is directly responsible for their harm suffered:[1079]

- BOU Meng (D 25/1);
- CHUM Mey (D 25/3);
- CHUM Neou (D 25/16); and
- CHIN Met (E2/80).

646. It is beyond doubt that the few survivors of S-21 or S-24 suffered serious psychological and physical harm, in addition to loss of close family members, as a direct consequence of the criminal conduct for which KAING Guek Eav was convicted.[1080]

[1078] *See* Internal Rule 23(6)(b), which provides: "The Chambers shall not hand down judgment on a Civil Party action that is in contradiction with their judgment on public prosecution of the same case". Although it follows that acquittal of the Accused would end a claim for reparation, responsibility in relation to each individual Civil Party does not automatically follow from a criminal conviction of the Accused. Further, and while the Chamber was not required to precisely identify every victim in convicting KAING Guek Eav of the crimes for which he was charged, it has considered the particular circumstances of many Civil Parties in its assessment of the evidence.

[1079] The Chamber in the course of trial accepted evidence tendered in support of Civil Party claims such as detainee lists, official lists or registers, confessions, photographs and other evidence from S-21 that identified detainees. Where the Accused himself acknowledged the truthfulness of Civil Party statements and the documentary evidence provided, the Chamber has also tended to accept its veracity. The Chamber, however, is unable to determine a Civil Party application based on uncorroborated Civil Party statements alone; *see e.g Prosecutor v. Kony et al*, "Judgement on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation […]' of Pre-Trial Chamber II", ICC Appeals Chamber, (ICC-02/04-01/05-371), 23 February 2009, paras. 36, 38 ("[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings [….] What evidence (be it documentary or otherwise) may be sufficient cannot be determined in the abstract, but must be assessed on a case-by-case basis and taking into account all relevant circumstances, including the context in which this Court operates").

[1080] All survivors have given credible accounts of their past and present suffering as a consequence of their internment; *see e.g.* T., 20 August 2009 (CHUM Neou), pp. 83-85, 88-89 (recounting the loss of her baby while detained at S-24 and husband NOU Samouen at S-21); T., 1 July 2009 (BOU Meng), pp. 11-32, 43-45 (detailing detention and torture, in addition to the loss of his wife MA Yoeun *alias* Thy, at S-21); T., 30 June 2009 (CHUM Mey), pp. 10-14, 22-27 (recounting severe torture at the S-21 complex, during which his toenails were ripped out); T., 8 July 2009 (CHIN Met), pp. 54-79 (detailing internment at S-24 and suffering, amongst other things, malnutrition and forced labour over a sustained period).

647. Despite the undoubted physical and psychological harm suffered by the remaining four Civil Parties claiming to be survivors of S-21, the Chamber is not satisfied to the required standard that the following Civil Parties were victims of crimes committed by KAING Guek Eav at S-21 or S-24:

- Although the Chamber does not doubt that LAY Chan (E2/23) suffered severe harm as a result of detention, interrogation and torture during the DK period, no evidence was provided to show that this occurred at S-21. No objective proof from official registers, photographs or confessions corroborates his claim to have been detained there, and his description of detention conditions is at odds with the bulk of the evidence before the Chamber regarding established practices at S-21.[1081] The Chamber is accordingly not satisfied to the required standard that LAY Chan (E2/32) was detained either at S-21 or S-24. Absent sufficient proof of a causal link between the events described and the crimes for which KAING Guek Eav was convicted, his Civil Party application is rejected;

- NAM Mon (E2/32) stated that she was initially a member of the S-21 medical staff, and was later detained there following the arrest of some of her brothers, who were S-21 guards. From there, she was allegedly transferred to S-24 and then to another detention centre.[1082] There are, however, inconsistencies between the information contained in her Civil Party application and her in-court statements and subsequent submissions.[1083] She was unable to provide any particulars concerning either S-21 or S-24 and the evidence produced by her purporting to show kinship to persons photographed and executed at S-

[1081] T., 07 July 2009 (LAY Chan), pp. 8, 11-2, 17-19 (stating that he was unable to recall being officially registered or photographed or having to provide a biography, providing a description of his cell that does not correspond to others provided of the cells at S-21 and claiming, contrary to established policies, to have been released from S-21 without explanation. During a site visit to S-21, he was also unable to recognize any part of S-21 as the place where he was incarcerated).
[1082] T., 9 July 2009 (NAM Mon), pp. 58-61.
[1083] Based on the date of birth provided in Civil Party Application E2/32, which is 2 July 1968, the Civil Party would have joined the S-21 medical staff at the age of 6 or 7 years. Further, her in-court statements diverged in significant respects from those provided by other witnesses and experts heard in the course of proceedings: *see* T., 09 July 2009 (NAM Mon), pp. 81-85; *see also* Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), E176, 28 October 2009, para. 14 (rejecting a request that a further written submission be accepted as evidence); *see also* T. 27 August 2009, pp. 37-38; "Co-Lawyers Group 2 – Request for Submission of Additional Statement of Civil Parties E2/32 of the Case File 001/18-07-2007-ECCC/TC", E2/32/5, 2 September 2009.

21 do not clearly establish that these persons are her relatives.[1084] Even allowing for the impact of trauma and the passage of time, the Chamber is unable to conclude that NAM Mon (E2/32) was detained either at the S-21 complex or at S-24. Although the Chamber acknowledges her tremendous suffering, NAM Mon's Civil Party application is also rejected;

- PHAOK Khan (E2/33) recounted being tortured and interrogated at a prison in the vicinity of Phnom Penh during the DK period.[1085] While it is plausible that the Civil Party may have been detained and tortured by Khmer Rouge soldiers, there is no objective evidence that this occurred at the S-21 complex.[1086] The description provided of his place of detention does not match that of S-21 and, contrary to standard S-21 procedures, the Civil Party was neither photographed nor compelled to provide a biography.[1087] In addition, the Civil Party's account of his escape from the place of execution and the geographical indicia provided are inconsistent with Choeung Ek, where he claims to have been left for dead.[1088] PHAOK Khan further alleged that his wife and a cousin were also killed at S-21. However, no evidence was furnished to show that his wife was detained there. While it is undisputed that an individual named CHOEUNG Phoam was detained and executed at S-21, the applicant himself admitted that he could not provide proof of his relationship to him.[1089] His Civil Party application is therefore also rejected;

- LY Hor (E2/61) avers that he was detained first at the S-21 complex and later transferred to S-24, from where he escaped.[1090] While the existence of a detainee named

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[1084] T., 13 July 2009 (NAM Mon), pp. 19-26 (revealing inconsistencies regarding the names or time of death of the direct victims alleged to be the Civil Party's relatives). Neither the name nor any of the aliases used by her alleged relatives appear on any of the staff lists or detainee lists of S-21.
[1085] T., 7 and 8 July 2009 (PHAOK Khan).
[1086] The only S-21 document alleged to include the Civil Party's name is an analysis of the confession of a detainee named Sok Nann, who named Phok Sakhon as an enemy; *see* "Annex 3: Biography of Phok Sakhon", E5/7/1.3. However, there is no indication that this name was one used by the Civil Party. Further, admissibility of this document is questionable, since the confessions in question may have been obtained under torture; *see* "Order on use of statements which were or may have been obtained by torture", D130/8, 28 July 2009 (in relation to Case File 002).
[1087] T., 7 July 2009 (PHAOK Khan), pp. 70-71, 82-83. The Civil Party further admitted during a group visit to the Tuol Sleng Museum in 2008 that he was unable to recognize this location as the place where he was detained. *See* T., 7 July 2009 (PHAOK Khan), p. 12.
[1088] T., 7 July 2009 (PHAOK Khan), pp. 67-69, 77-78; T., 8 July 2009 (PHAOK Khan), pp. 10-11.
[1089] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, para. 93.
[1090] T., 6 July 2009 (LY Hor), p. 9.

EAR Hor at S-21 may be accepted on the basis of the documents and explanations provided, there is doubt as to whether this detainee was the Civil Party.[1091] Further, there is no indication in the S-21 archives of the detainee having been transferred from S-21 to S-24 and no explanation was given for this alleged transfer, which was contrary to the norm.[1092] The Chamber accordingly also finds LY Hor's Civil Party application not to have been established to the required standard.

4.3.2 Other Civil Parties

648. As noted, Civil Parties claiming to be victims due to the loss of a close relative at S-21 and S-24 must prove that at least one of their family members was the immediate victim of the crimes for which KAING Guek Eav was convicted. The Chamber finds that the following Civil Parties have been unable to establish the existence of immediate victims to the required standard:

- SO Saung (E2/34) alleges that her brother-in-law MEAS Sun *alias* TENG Sun was detained and executed at S-21. In support of her claim, she provided a photograph from the archives of the Tuol Sleng Museum.[1093] However, the photograph provides no attestation of identity and on its own does not establish that the person in the photograph is actually MEAS Sun. Further, no proof was provided of any dependency or special bonds of affection between the Civil Party and her brother-in-law;[1094]

- CHHAY Kan (E2/35) *alias* LEANG Kan, alleges that one of her nephews, NHEM Chheuy, was detained at S-21, having seen his photograph when visiting the Tuol Sleng Museum.[1095] While it is established that, as a child, LEANG Kan lived with this nephew,

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[1091] The Chamber is uncertain that LY Hor was also known by the name EAR Hor during the DK period. *cf.* "Civil Party Group 1 - Request to Establish the Status of LY Hor as a Survivor of S-21 and Authenticity of Documents as a Matter of Record", E137, 28 July 2009.
[1092] Although a handwritten annotation on the biography of detainee EAR Hor indicates that he was "released on 8 March 76" ("Biography of EAR Hor", E2/61.2,ERN 00361722), KAING Guek Eav and numerous witnesses, including several former S-21 staff members, all testified that apart from very few exceptions not involving ordinary prisoners, all S-21 detainees were executed (*see e.g.*, T., 27 July 2009 (SUOS Thy), pp. 102-103.)
[1093] *See* "Photograph of Teng Sun", E5/7/1.4; "Attestation", E161.2.
[1094] Although kinship by marriage was established by attestation ("Lettre de confirmation", E2/34/5.2), such kinship alone is insufficient (Section 4.2.2).
[1095] *See* "Photograph of LEANG Kan at S-21", E2/35.2.

who was an orphan,[1096] it has not been established that the photograph of the detainee provided in support of her application is in fact that of NHEM Chheuy;[1097]

- HIET Tey Chov (E2/38) reports the loss of several family members during the DK period and alleges that his uncle SOSS El *alias* TEU El was arrested in April 1975 and detained at S-21.[1098] However, no evidence was provided in support of this claim;

- Civil Party E2/62 claims that her brother was allegedly detained and executed at S-21. In support of her claim, she provided a photograph from the Tuol Sleng Museum archives.[1099] However, the photograph is unidentified and therefore does not establish whom the photograph depicts. Further, and as the Civil Party has acknowledged, no document exists to substantiate the nature of her alleged kinship to the victim;[1100]

- PANN Pech (E2/63) claims that her brother-in-law PLAING Hauy was allegedly detained and executed at S-21 but provides no evidence in support of this claim;[1101]

- LIM Yon (E2/69), in addition to reporting the arrest and execution of several relatives during the DK period, claims that one of her brothers was allegedly imprisoned at S-21.[1102] However, no evidence was provided to corroborate this claim;

- CHAN Yoeurng (E2/70) claims that her uncle SOK Bun was detained and executed at S-21. While an attestation of this kinship was provided,[1103] the applicant admits that no substantiation of her uncle's alleged detention at S-21 was provided.[1104]

[1096] *See* "Letter of certification of CHHAY Kaen by commune chief", E163/3.5.
[1097] T., 23 November 2009 (Civil Party lawyer), p. 49 (noting that the search for further information proved fruitless).
[1098] "Victim Information Form - HIET Tey Chov", E2/38.
[1099] *See* "Photograph at S-21", E165/1/1.2; "Letter of certification by Chief of Tuol Sleng genocide museum", E165/1/1.3.
[1100] T., 23 November 2009 (Civil Party lawyer), p. 21.
[1101] Further, alleged kinship by marriage alone is an insufficient basis for a Civil Party application (Section 4.2.2).
[1102] "Victim Information Form – LIM Yon", E2/69.
[1103] *See* "Letter of certification of CHAN Yoeurng by commune chief", E161.5 (available in Khmer only).
[1104] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, paras 115-118.

- NORNG Sarath *alias* Por (E2/73) claims that his cousin NORNG Saruoth and his uncle NORNG Soang were detained and executed at S-21.[1105] However, the applicant provided neither documentary proof in support of this alleged detention nor any attestation establishing the alleged kinship;

- NGET Uy (E2/74) alleges that her husband PRAK Pat, a former Khmer Rouge military cadre, was imprisoned, tortured and executed at S-21. In support of her claim, she referred to the testimony of a nephew of her husband, who allegedly worked at S-21.[1106] However, the precise identity of this potential witness was not disclosed. Further, no attestation or document corroborates either this claim or the alleged marital bond;[1107]

- THIEV Neab *alias* KHIEV Neab (E2/75), claims that her husband Heng CHOEUN *alias* CHOEUN, was arrested in late 1978 while he was a civil servant at Office 870 and taken to Prey Sar (S-24). She claims to have witnessed his arrest and alleges that a soldier named Reth informed her of her husband's death at S-24.[1108] However, the exact identity of this witness is unknown, and no attestation or document corroborates her claims. Further, no proof of this kinship is provided;

- MORN Sothea (E2/82) claims that his mother, a former diplomat, and many other family members disappeared during the evacuation of Phnom-Penh in April 1975.[1109] Although his statement appears credible, it is unsupported by proof of any demonstrable link to the crimes for which KAING Guek Eav has been convicted;

- HONG Savath (E2/83) alleges that her uncle LOEK Sreng was detained and executed at S-21.[1110] She claims to have recognised him in a photograph she saw in 2008 during a visit to the Tuol Sleng Museum. However, neither this photograph nor any documentary evidence was provided as proof of her uncle's detention at S-21. The Civil

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[1105] *See* "Victim Information Form – NORNG Sarath", E2/73.
[1106] "Claiming letter by Nget Uy", E2/74.1.
[1107] "Claiming letter by Nget Uy", E2/74.1; T., 23 November 2009 (Civil Party Group 1 Closing Statement), p. 21.
[1108] "Claiming letter by THIEV Neab", E2/75.1.
[1109] "Victim Information Form – MORN Sothea", E2/82; T., 26 August 2009 (Civil Party lawyer), p. 57.
[1110] *See* "Confirmation letter of YOU Hong by the commune chief", E163/3.11 (establishing proof of kinship).

Party, who was 11 years of age when her uncle disappeared, has also not provided evidence of any special bonds of affection or dependency in relation to her uncle.

649. The following Civil Parties have also not provided proof of kinship or special bonds of affection or dependency in relation to immediate victims of S-21 or S-24:

- KHUON Sarin (D25/11), whose claim is based on the arrest and execution of KHIEV Sakhor, a staff member of the Cambodian embassy in Japan. While KHIEV Sakour's detention at S-21 has been proven,[1111] there is no document showing the exact nature of his alleged kinship to the Civil Party or proof of any special bonds of affection. Although KAING Guek Eav did not dispute this Civil Party application, the Chamber nevertheless cannot uphold it;

- SUON Seang (D25/15) was allegedly told by friends that three of his younger brothers had been detained at S-21. However, no proof of their detention was provided. He further claims that one of his cousins PEIN Um *alias* Rith, was also detained and executed at S-21. While the detention of an individual named PEIN Um at S-21 has been established,[1112] the Civil Party provided no proof of kinship to him;[1113]

- CHHOEM Sitha (E2/22) described the arrest, mistreatment and execution of soldiers from Division 310, of which he was a member. Although many soldiers from this Division were detained at S-21, none of these immediate victims were identified save for an individual named KAUV Phalla.[1114] A certificate from his village chief and commune chief states that CHHOEM Sitha was allegedly the uncle of a KAUV Phalla. However, a special bond of affection has not been proved;[1115]

- KLAN Fit (E2/37) claims that he was arrested along with 10 other friends, six of whom were ultimately imprisoned at S-21. Bonds of friendship, however, do not fall within the scope of the criteria in Internal Rule 23(2)(b) (Section 4.4.4);

[1111] *See* e.g., "Confession of KHIEV Sakuor at S-21", E2/12.1 (available in Khmer only).
[1112] *See* "Biography of PEN Um from S-21", E165/1/2.6; "Biography – PEN Um", E165/1/2.4.
[1113] *See* "Family Record Book of SUON Seang", E165/1/2.1.
[1114] *See* "Biography of prisoner in detention – KAUV Phalla", E163/3.4.
[1115] *See* "Confirmation letter of CHHOEM Phom by commune chief", E163/3.2.

- NHEB Kimsrea (E2/64) claims that her uncle CHEAB Baro *alias* Pen, the latter's wife KHUT Phorn and five of her cousins were detained and executed at S-21. There is evidence to show that an individual named CHEAB Parou *alias* Pen, was detained at S-21.[1116] However, the applicant, who was born in 1978, acknowledges that she could not have known her uncle, her aunt and her cousins.[1117] Accordingly, special bonds of affection have not been established between the applicant and these relatives;

- SOEM Pov (E2/71) alleges that her brother-in-law NGUY Sreng was detained and executed at S-21.[1118] In support of these claims, she provided a biography from the archives of S-21.[1119] Although the detention of NGUY Sreng at S-21 is thus established, kinship by marriage alone is an insufficient foundation absent proof of any special bonds of affection or dependency (Section 4.2.2);

- Jeffrey JAMES (E2/86) and Joshua ROTHSCHILD (E2/88) allege that their uncle James W. CLARK was detained and executed at S-21. The detention of James W. CLARK at S-21 is undisputed.[1120] However, the applicants' kinship to the victim was not established to the required standard.[1121] Although describing their distress at discovering his fate, the applicants, aged 5 and 8 years respectively when James W. CLARK was arrested, have also not substantiated any special bond of affection or dependency in relation to the victim.

650. The Chamber finds the following Civil Parties to have proved the existence of immediate victims of S-21 or S-24 and either close kinship or particular bonds of affection or dependency in relation to these victims.[1122] They have further shown that the

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[1116] *See* "Biography of prisoner in detention", E163/3.8; "Confession of CHEAP Parou *alias* Pen", E163/3.9.
[1117] *See* T., 23 November 2009 (Civil Party Group 2 Closing Statement), p. 48.
[1118] *See* "Letter of certification of SOEM Pov by commune chief", E161.6 (available in Khmer only) (establishing kinship by marriage).
[1119] *See* "Biography – NGUY Sreng", E2/71.2.
[1120] Confessions by James W. Clark from the Tuol Sleng Museum were provided; *see* "Confession of James William Clark", E2/86.3 and E2/88.3; "Declaration of James William Clark", E2/86.5 and E2/88.5.
[1121] *See* "Passport of Jeffrey James", E2/86.1; "Passport of Joshua Rothschild", E2/88.1; "Certificate of live birth - Jeffrey James", E140.10 (establishing that the applicants are the sons of Sherry Alice Clark, but not that Sherry Alice Clark is the sister of James W. Clark).
[1122] In many instances, the Chamber considered that proof of kinship alleged could be inferred from the personal and family data contained in the detainee's confessions or biography, especially where this was

death of these victims caused demonstrable injury within the scope of Internal Rule 23(2) and that this harm was a direct consequence of the crimes for which KAING Guek EAV was convicted:[1123]

- BOU Meng (D25/1) for the loss of his wife MA Yoeun *alias* Thy;
- CHUM Neou (D25/16) for the loss of her husband NOU Samouen and her child;
- CHHIN Navy (D25/2) for the loss of her husband TEA Havtek;
- HAV Sophea (D25/4) for the loss of her father CHIN Sea *alias* HAV Han;
- PHUNG Guth Sunthary (D25/5) and IM Sunthy (D25/7) for the loss of their father and husband PHUNG Ton, respectively;
- CHUM Sirath (D25/6) for the loss of his two brothers CHUM Narith and CHUM Sinareth;
- MEASKETH Samphotre (D25/8), TIOULONG Antonya (D25/27), TIOULONG-ROHMER Neva (D25/28), KIMARI Nevinka (D25/26) and KIMARI Visaka (E2/29) for the loss of their daughter, sister, and mother TIOULONG Raingsy and son-in-law, brother-in-law and father LIM Kimari, respectively;
- ROS Men (D25/9) for the loss of her brother ROS Thim;
- CHE Heap (D25/10) for the loss of his brother CHE Heng;
- CHRAING Sam-Ean (D25/12) for the loss of his brother CHRAING Sam On *alias* SOAM Sam On;
- SEANG Vanndi (D25/13) for the loss of his brother SEANG Phon[1124];
- TOCH Monin (D25/14) for the loss of his cousin CHEA Khan with whom he was raised and of whom he is the only surviving relative;
- KAUN Sunthara (D25/17) for the loss of her brother CHIM Lang and sister-in-law AOM Kin Daunny;
- MAN Saut (D25/18) for the loss of his son MAN Sim *alias* Riem;

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consistent with the information provided by the applicant. The Chamber accepted this information where it recorded the detainee's identity and was contained in a preliminary part of the document that could not reasonably be presumed to have been obtained under torture. *See* e.g., "Confession of Michael Scott DEEDS", E3/472/3 (regarding kinship to Timothy Scott DEEDS).

[1123] As some Civil Party applications are accepted on the basis of victims who were immediate family members, other victims who were instead extended family members are listed merely for information purposes. It is only where applications were based exclusively on alleged links to extended family members that the Chamber has considered whether sufficient evidence was provided to show the existence of special bonds of affection or dependency. Reference to the evidence accepted by the Chamber is made only in relation to applications that were contested at trial.

[1124] "Written Record of Response of Sieng Phon *alias* Pha", E141.1.

- KONG Teis (D25/19) for the loss of her husband SEK Chhiek;
- NGETH Sok (D25/20) for the loss of her brother NOB Sar *alias* NOB Ngan *alias* Chareun *alias* NGETH Ngem[1125];
- TATH Lorn (D25/21) for the loss of his father SOK Sort *alias* SOK Pon;
- Timothy Scott DEEDS (D25/22) for the loss of his brother Michael DEEDS;
- YIM Leng (D25/23) for the loss of his father THLORK Luon *alias* Yorn;
- UM Pyseth as successor of his late wife SUOS Sarin (D25/24) for the loss of the latter's sister SUOS Sovann;
- KE Khon (D25/25) and KE Samaut (E2/46) for the loss of their brother KE Kengsy;
- IEM Soy (E2/21) for the loss of her brother CHUH Choy *alias* Cheiv;
- UL Say *alias* Riem (E2/24) for the loss of her husband ENG Mak *alias* Venn;
- SIN Lim Sea (E2/25) for the loss of his elder sister SIN Chhun Lim;
- OU Savrith (E2/26), NHEK OU Davy (E2/31) and OU Kamela (E2/27) for the loss of their brother, husband and father OU Vindy, respectively;
- ROS CHUOR Siy (E2/28) for the loss of her husband ROS Sarin;
- NHOEM Kim Hoeurn (E2/30) for the loss of her two brothers NHOEM Kuy and NHOEM Chan;[1126]
- SUON Sokhomaly (E2/39) for the loss of her husband SUON Kaset;
- SIN Sinet *alias* Srun (E2/41) for the loss of her grandfather PHEACH Kim *alias* Sin, in whose house she had lived since the age of 7;[1127]
- ROUN Sreynob (E2/42) for the loss of her brother ROUN Math *alias* Savy;
- EL Li Mah (E2/43) for the loss of her brother ISMAEL Asmat *alias* Sokh;

[1125] *See* "Birth certificate of Ngeth Sok", E165/1/5; "National Identity Card of NGETH Sok", E165/1/5.1 (attesting to the alleged kinship); "Biography – Sar *alias* Chareun", E3/467/2 and E165/1/5.2; "Attestation", E165/1/5.3 (available in Khmer only) (attesting to the detention of NOB Sar *alias* NOB Ngan *alias* Chareun, at S 21).

[1126] *See* "Claiming letter of CHEA Im", E2/30.10; "Statement of KIM Kuch and HEM Sakou", E164/1.1 (certified by the commune chief and attesting to the alleged kinship); "Photo of NHOEM Kuy", E2/30.2; "Photo of NHOEM Kuy taken at S-21", E2/30.8; "Photo of NHOEM Chan", E2/30.3; "Photo of NHOEM Chan taken at S-21", E2/30.9; "Affirmation letter of KIM Kuch and HEM Sakou", E164/1.2 (certifying that the persons appearing in the photographs are NHOEM Kuy, NHOEM Chan and DUONG Rum); "Biography of prisoner in detention – NHOEM Chan", E2/30.6.

[1127] *See* "Birth Certificate of SIN Sinet", E165/1/3; "Family Record Book of SIN Sinet", E165/1/3.1; "Biography of prisoner in detention – PHEACH Kim", E165/1/3.2; "Victim's picture at S-21", E165/1/.3.4; "Picture of Civil Parties identifying victim's picture at S-21", E165/1/3.5.

- SMAN Sar (E2/45) and SMAN Nob (E2/44) for the loss of their brother SMAN Sles *alias* LENG Sokha and for the loss of their son and nephew, SA Math *alias* Saroeun, respectively;
- MEN Lay (E2/47) for the loss of her son MIN Kan;
- NHEM Sophan (E2/48) for the loss of her sister NHEM Thol *alias* Ra;
- NETH Phally (E2/50) for the loss of his brother NETH Bunthy;
- MAN Mas *alias* MAN Malymas (E2/51) for the loss of her son TA Losmath *alias* Man Math;
- KOM Men *alias* KUM Men (E2/52) for the loss of her husband SREI Yeng;
- TRY Ngech Leang (E2/53) for the loss of her brother KHOEUNG Muoysoa;
- HENG Ngech Hong (E2/54) for the loss of her father SOK Heng;
- BENG Chanthorn (E2/55) for the loss of his brother BENG Pum;
- YUN Chhoeun E2/56) for the loss of a nephew YUN Loeun, who lived in his house until aged 15, when he was conscripted into the army;
- LY Khiek (E2/57) for the loss of his sister AUY Mao *alias* Ren;[1128]
- PUOL Punloek *alias* Nget (E2/58) for the loss of his father POUL Toeun *alias* Chaing;
- CHANN Krouch (E2/59) for the loss of his brother CHANN Noun *alias* Sinoun;
- NORNG Kim Leang (E2/60) for the loss of her sister NORNG Kim Guek *alias* NORNG Kimvet;[1129]
- PENH Sokkhun (E2/66) for the loss of her sister PENH Sopheap;[1130]
- KAN San (E2/72) for the loss of her brother KAN Kan;
- UNG Voeurn *alias* HUL Voeurn (E2/76) for the loss of her brother UNG Koam *alias* Phoan;[1131]
- MEAS Saroeurn (E2/78) for the loss of her father OUK Tob;

[1128] *See* "Birth Certificate of LY Khiek", E165/1/4; "Book of residence of LY Khiek", E165/1/4.1; *see also* "S-21 Daily name list of prisoners", E165/1/4.2 (attesting to the alleged kinship and detention at S-21 of AUY Ren *alias* Mao, whose name appears on the prisoner list with an annotation indicating that she died of illness).
[1129] *See* "Victim Information Form – NORNG Kim Leang", E2/60; "Biography of prisoner in detention – NORNG Kimvet", E2/60.1.
[1130] *See* "Biography – PENH Sopheap", E2/66.3; "Attestation from KID (Khmer Institute of Democracy)", E2/66/3 (available in Khmer only); *see also* "Identity Card of PENH Sokhen", E2/66/5; "Confirmation letter of YIN Sam An by commune chief", E163/3.10 (attesting to the alleged kinship).
[1131] *See* "Certificate letter by the mayor of the commune", E164/1.9 (attesting to the alleged kinship); "Biography - UNG Koam", E2/76.4.

- SEK Siek (E2/79) for the loss of her cousin and fiancé MORK Chhoeun, who was living in the family's house;
- CHHAT Kim Chhun (E2/81) for the loss of his father AM Thoat and a relative called POT Mouy alias SA Phal;[1132]
- UK Vasorthin (E2/84) for the loss of his father OUK Chy;
- Martine LEFEUVRE (E2/85) and OUK Neary (E2/89) for the loss respectively of their husband and father OUK Ket; and
- Robert HAMILL (E2/87) for the loss of his brother Kerry HAMILL.

4.4 Claims for reparations

651. Requests for reparations by Civil Parties whose harm was recognized by the Chamber to have been directly caused by the crimes committed by KAING Guek Eav shall be granted where the awards sought:

a) qualify as collective and moral reparations within the meaning of Internal Rule 23(1)(b), and
b) are sufficiently certain or ascertainable to give rise to an enforceable order against the Accused.

4.4.1 Civil Party requests

652. On 27 August 2009, the Chamber directed the Civil Party groups to file written submissions outlining the forms of collective and moral reparations sought against the Accused, if convicted.[1133] In response, the Civil Parties filed a joint submission which stressed the right of victims of mass violence and gross human rights violations to reparation, and requested that reparations awarded against the Accused should include as a minimum:[1134]

[1132] *See* "Letter of certification of CHHAT Kim Chhun by commune chief". E161.10 (available in Khmer only), "Photo OM Thon", E161.12 (available in Khmer only), "Letter of certification of CHHAT Kim Chhun by commune chief", E161.11 (available in Khmer only), "S-21 biography of Detainee POT Moy", E2/81.3 (available in Khmer only); "Biography – POT Moy", E2/81.4.
[1133] Direction on Proceedings relevant to Reparations and on the Filing of Final Written Submissions, E159, 27 August 2009.
[1134] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3, 14 September 2009, paras 43-44 (requesting "meaningful reparations […] of a collective and moral nature", which the ECCC "should try to maximize […] by working with the Government of Cambodia and established NGOs").

- the compilation and dissemination of statements of apology made by KAING Guek Eav throughout the trial acknowledging the suffering of victims, including comments by the Civil Parties;
- access to free medical care (both physical and psychological), including free transportation to and from medical facilities;
- funding of educational programs which inform Cambodians of the crimes committed under the Khmer Rouge regime and at S-21 in particular;
- erection of memorials and pagoda fences at S-21 (Choeung Ek and Prey Sar) as well as in the local communities of the Civil Parties; and
- inclusion of the names of the Civil Parties in Case 001 in the final judgment, along with a description of their connection to S-21.[1135]

653. In the event the Accused is found to be indigent, the Civil Parties requested the Chamber to declare the ECCC competent to ensure that reparation awards are implemented by the Royal Government of Cambodia in accordance with its international obligations, or by the Victims Unit through a voluntary trust fund.[1136]

654. In their final submissions, the Civil Party groups reiterated the requests set out in their Joint Submission, with Groups 1, 2 and 3 providing further particulars or supplementary claims. In particular, Civil Party Group 1 requested:

- express recognition in the final judgment of the right to reparation;
- distribution of the findings of the Chamber at trial through various media outlets;
- access for victims in general and S-21 victims in particular to free medical care, including psychological assistance, and that assistance provided in this regard by TPO be supported and reinforced through a reparations award;
- initiatives to educate Cambodian society concerning gross human rights abuses, genocide and crimes against humanity. Specific measures requested in this regard include salaries and training of teachers, provision of facilities, curriculum design, publication of educational materials, and ongoing training for local participants in a rights education program;
- assistance in the form of a fund for the Civil Parties, vocational training, micro-enterprise loans and business skills training;

[1135] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3, 14 September 2009, paras 16, 21, 24, 26-30, 45.
[1136] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3,14 September 2009, paras 2-41, 47.

- erection of memorials, particularly at Choeung Ek and Prey Sar, including a commemorative plaque listing the names of all known victims, information boards listing the names of the Civil Parties, as well as pagodas and pagoda fences in the local communities of the Civil Parties;
- proclamation of a national commemoration day to memorialize the victims who died and suffered at the hands of the Khmer Rouge, distinct from the 7 January Victory Day; and
- full and frank disclosure of the assets in the name of the Accused.[1137]

655. Finally, Civil Party Group 1 requested the Chamber to clearly delineate its framework for the enforcement and implementation of any reparations awards, and to further mandate the Victims Unit to undertake wider consultation on how reparations are to be approached in the Cambodian context.[1138]

656. Civil Party Group 2 requested that the Accused, regardless of his current income or property, take the following actions or bear the cost of the following reparations:

- writing and sending a letter to the Royal Government of Cambodia requesting the Government to offer a genuine, truthful and sincere apology to the Civil Parties;
- installation of memorial stones for the Civil Parties and their relatives and the production of information tablets about the victims, including the translation of this information into the other two working languages of the ECCC;
- construction of a memorial on the site of the former re-education centre at Prey Sar and the organization of an associated international architectural competition;
- visits for at least 13 Civil Parties who are not from Phnom Penh to Tuol Sleng, Prey Sar and Choeung Ek three times a year for four days per visit;
- medical treatment, medication and psychological services for all survivors of Tuol Sleng, Prey Sar and Cheung Ek, if any, and for indirect victims if their illness is related to the crimes committed;
- production of at least 100 hours of audio-visual material of the trial, including its distribution in the provinces for regular showing;
- production of at least 10 written and audio documents summarising and explaining the final judgment against the Accused for display in one pagoda in each commune;
- organisation of 17 ceremonies for the naming of a public building after a victim and the production and installation of information tablets; and

[1137] "Civil Party Group 1 - Final Submission", E159/7, 10 November 2009, para. 121.
[1138] "Civil Party Group 1 - Final Submission", E159/7, 10 November 2009, paras 119-124.

- writing and sending an open letter to the Royal Government of Cambodia requesting that one third of the entrance fees to S-21 and Choeung Ek be utilized for these reparations, and that the rest be divided among the Civil Parties as a monetary award.[1139]

657. Civil Party Group 3 requests the following reparations:

- dissemination of information about the trial in each Cambodian province by setting up exhibits in a public location;
- compilation and publication of the statements of apology made by KAING Guek Eav during the trial, acknowledging the suffering caused to the victims, together with comments of the Civil Parties;
- access to free medical care, including physical and psychological therapy, and payment of transportation costs to and from appropriate health facilities;
- funding of educational programs, both in schools and museums, that inform Cambodians of the crimes committed under the Khmer Rouge regime at S-21, S-24 and Choeung Ek in particular;
- erection of memorials both at Choeung Ek and Prey Sar;
- engraving the names of all Tuol Sleng detainees on the external wall of S-21;
- erection of a plaque memorialising all the victims that have not been identified;
- construction of a walkway along the external wall of S-21;
- preservation of the buildings and cells at S-21 in their current state and preservation of the instruments of torture that were found there;
- preservation of the existing archives at S-21, including those that are on display and those that are in storage and not accessible to the public;
- conservation of the Vann Nath paintings displayed at S-21;
- protection of the Choeung Ek site;
- inclusion of the names of all the Civil Parties in the final judgment, including a specification as to their connection with S-21; and
- publication of the parts of the judgment recounting the facts and the responsibility of the Accused, as well as the disposition, within six months to one year following its notification in the official gazette and other national newspapers and ensuring their regular broadcast on national radio and television networks.[1140]

658. In the event the Accused is determined to be indigent, Civil Party Group 3 further request the Chamber to request the Royal Government of Cambodia to implement these

[1139] "Co-Lawyers' for Civil Parties (Group 2) – Final Submission", E159/6, 5 October 2009, paras 14-21.
[1140] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, *see also* "CGP3 - Mémoire Additionnel Concernant la Reparation", E159/3/1, 17 September 2009.

measures, in compliance with its international obligations, or order the establishment of a voluntary trust fund to be managed by Victims Unit. Finally, it requests the Chambers to establish processes for the implementation of reparations and a mechanism for Civil Parties to seek redress in case of non-compliance with reparations awards.[1141]

659. In response, the Defence in its final submissions indicated that it did not object to the grant of the Civil Party requests for reparation, and took particular note of the request for reparation in the form of a compilation and dissemination of statements of apology made by KAING Guek Eav throughout the trial acknowledging the suffering of victims. However, it pointed out that the Accused appeared to be indigent at the time of his transfer to the ECCC.[1142]

4.4.2 Legal framework

660. Civil Party participation before the ECCC includes both a right for victims to participate as parties in the criminal trial of an Accused in support of the Prosecution and to pursue a related civil action for collective and moral reparations against an Accused for harm that is directly attributable to the crimes for which the Accused is convicted.[1143]

661. Although the Internal Rules depart from Cambodian national law in significant respects, the notion of Civil Party participation before the ECCC is derived from analogous forms of participation recognized before some national jurisdictions, including in the Kingdom of Cambodia.[1144] The key features of Civil Party participation are that awards are directed against and borne exclusively the Accused following a determination

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[1141] "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009.
[1142] "Final Defence Written Submissions", E159/8, 11 November 2009, paras 49-50.
[1143] Internal Rule 23(1) provides that "[t]he purpose of Civil Party action before the ECCC is to: a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the Prosecution; and b) Allow Victims to seek collective and moral reparations, as provided in this Rule".
[1144] For instance, and unlike ordinary Cambodian courts, the ECCC lacks the competence to award individual monetary compensation to Civil Parties, Reparations awards in the ECCC context are instead "collective and moral" (Internal Rule 23(1)(b)). Such departures from national law were considered necessary in view of the large number of Civil Parties expected before the ECCC and the inevitable difficulties of quantifying the full extent of losses suffered by an indeterminate class of victims**.** Reparations before the ECCC were therefore intended to be essentially symbolic (aimed at conferring official recognition upon victims, and assisting to restore dignity and preserve the collective memory) rather than compensatory.

of responsibility for the harm established by Civil Parties as resulting from the criminal offending. The ECCC lacks the competence to enforce reparations awards.[1145] Reparations awarded by the ECCC against an Accused can therefore only be enforced, where necessary, within the ordinary Cambodian court system.

662. The Chamber acknowledges the principles expressing the right of victims of gross violations of international human rights law to redress, reflected in a number of international treaties and other instruments,[1146] declarations of United Nation bodies[1147] and decisions of regional courts.[1148] The Chamber is nonetheless constrained in its task by the requests before it and type of reparations permitted under its Internal Rules. Limitations of this nature cannot be circumvented through jurisprudence but instead require Rule amendments.[1149]

[1145] *See* Article 1 of the ECCC Law and of the ECCC Agreement (conferring competence to prosecute individuals who were "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia […] committed during the period from 17 April 1975 to 6 January 1979").

[1146] *See e.g.,* Articles 2(3), 9(5) and 14(6) of the ICCPR; Article 14 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984; Article 75 of the ICC Statute; Article 24 of the United Nations Convention for the Protection of All Persons from Enforced Disappearance, GA Res. 61/177, 20 December 2006, A/RES/61/177, not yet in force; this right is also enshrined in a series of regional treaties, such as Articles 5(5), 13 and 41 of the ECHR, Articles 25, 63(1) and 68 of the American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 and Article 21(2) of the African Charter on Human and Peoples' Rights, 1520 UNTS 217, 27 June 1981*; see also* Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147, UN Doc. A/RES/60/147, 16 December 2005 and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res. 40/34, 29 November 1985.

[1147] *See e.g.,* UN Human Rights Committee General Comment No. 31 [80]*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras 15-17; UN Committee Against Torture General Comment No. 2, *Implementation of article 2 by States Parties,* UN Doc. CAT/C/GC/2, 24 January 2008, para. 15.

[1148] *See e.g., Velasquez Rodriguez case*, Judgement, Inter-American Court on Human Rights (Ser. C No. 4), 29 July 1988, para. 174; *see also Papamichalopoulos v. Greece*, Judgement, ECtHR (no. 14556/89), 31 October 1995, para. 36.

[1149] The need to adapt Civil Party participation to the particular needs of trials of mass crimes and the specific Cambodian context is a major impetus behind the ongoing reforms to victim participation before the ECCC; *see* ECCC Press Release dated 9 February 2010, issued at the conclusion of the **7**th ECCC Plenary Session: http://www.eccc.gov.kh/english/cabinet/press/147/Press_Release_Conclusion_7th_Plenary_Session_(ENG.pdf) (notifying decision to empower the Victims Support Section, in the broader interests of victms, to develop and implement new programs and measures occurring outside of formalized court proceedings, encompassing a broader range of services, as well as a more inclusive cross-section of victims than those who are admitted as Civil Parties in cases before the ECCC. The amended rules, applicable to future ECCC trials, further clarify that these measures may be developed in collaboration with

663. Further, the competence of the ECCC is distinct from that of certain regional human rights courts,[1150] which are instead empowered to adjudicate questions of State responsibility and to order States to make reparation to their citizens where found responsible for gross violations of international human rights law. The Chamber has no jurisdiction over Cambodian or other national authorities or international bodies. Nor can it properly impose obligations on or grant rights to persons or entities that were not parties to the proceedings before it. At most, the Chamber can merely encourage national authorities, the international community and other potential donors to show solidarity with the victims by providing financial and other forms of support that contributes to their rehabilitation, reintegration, and restoration of dignity.

664. Where an Accused appear to be indigent, there is currently no mechanism allowing the ECCC to substitute or supplement awards made against them with funds provided by national authorities or other third parties.

665. The Chamber is, additionally, unable to issue orders where the object of the claim is uncertain or unascertainable, and which are incapable of enforcement. Accordingly, a prerequisite to the grant of an award is the clear specification of the nature of the relief sought, its link to the harm caused by the Accused that it seeks to remedy, and the quantum of the indemnity or amount of reparation sought from the Accused to give effect to it. Placing the burden on the Chamber to substitute its own decision in these areas is inconsistent with a mechanism that is claimant-driven, and is also irreconcilable with the need for a fair and expeditous trial, the envisaged duration of the ECCC and the resources at its disposal.

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governmental and non-governmental agencies external to the ECCC. This creates the possibility to develop more ambitious programs than would otherwise be achievable within the ECCC's existing capacities and resources.)

[1150] *See* Articles 5(5), 13 and 41 of the ECHR, Articles 25, 63(1) and 68 of the American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 and Article 21(2) of the African Charter on Human and Peoples' Rights, 1520 UNTS 217, 27 June 1981.

666. In the present context, constraints also stem from the overwhelming losses suffered by the Civil Parties and the unlikelihood of recovery from KAING Guek Eav, who appears to be indigent.[1151]

4.4.3 Analysis of the various categories of reparations requested

4.4.3.1 Requests pertaining to the content of the judgment

667. The Civil Parties request that their names and those of the immediate victims be included in the final judgment, including a specification as to their connection with the crimes committed at S-21. Although reparations before the ECCC are, strictly speaking, limited to measures ordered against the Accused, the Chamber alone was capable of honouring the request to include the names of Civil Parties and their relatives who died at S-21 in this judgment. It also notes that comparable, official acknowledgments of suffering before other international bodies have been characterized as reparation of considerable symbolic significance for victims.[1152]

4.4.3.2 Compilation and publication of statements of apology

668. The Civil Parties have requested the compilation and publication of all statements of apology made by KAING Guek Eav during the trial, together with comments of the Civil Parties. Numerous such statements were made during the course of trial. As the compilation of these apologies and expressions of remorse may provide some satisfaction to victims and as they are in substance the only tangible means by which KAING Guek Eav may acknowledge his responsibility and the collective suffering of the victims of his

[1151] According to the "Déclaration des revenus et biens" (Declaration of Means) completed by the Accused at the request of the Chamber in October 2009, KAING Guek Eav has no bank account, owns no property and has no income; *see* "Déclaration des revenus et biens de l'Accusé", E175/1.1, 16 October 2009. The Chamber notes that the Accused has been in detention since 1999.

[1152] *See e.g.,* Impunity, Commission on Human Rights Res. 2002/79 (UN Doc. E/CN.4/RES/2001/70), 25 April 2002, para. 9: "[The Commission on Human Rights] [r]ecognizes that, for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators […] of these violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to encourage victims to participate in such a process."

criminal conduct, the Chamber grants this request.[1153] The Chamber nevertheless rejects the request to include statements by Civil Parties within this compilation, on grounds that such statements are distinct from the apologies made by KAING Guek Eav, and as their content has not been specified.

4.4.3.3 Requests concerning publication of the judgment and outreach

669. Requests for, amongst other things, the production of documentaries and the dissemination in the broadcast media of portions of the judgement are rejected on grounds of lack of specificity. The precise nature of the measures sought and their costs are uncertain and indeterminable and accordingly not amenable to an award against KAING Guek Eav. The Chamber notes, however, that the judgement will be issued publicly, and made available on the ECCC website, where it will be accessible to all media outlets wishing to make reference to it. It further notes that public provision of information regarding the judgement will occur as a feature of the ECCC Public Affairs Section's outreach activities, which are likely to contribute significantly to reconciliation initiatives within Cambodian society at large and public education.

4.4.3.4 Requests for individual monetary awards to Civil Parties or establishment of a fund

670. All requests which, whether directly or indirectly, seek individual monetary awards for Civil Parties, or the establishment of a trust fund for victims, are beyond the scope of available reparations before the ECCC. Accordingly, requests such as the provision of vocational training, micro-enterprise loans and business skills training are rejected.

[1153] Although not ordered against a convicted person, the Chamber notes the widespread recognition of similar measures as reparations; *see e.g., Rainbow Warrior (New Zealand/France)*, Decision, Arbitral Tribunal (UNRIAA, vol. XX, p. 217), 30 April 1990, para. 122 (noting the practice of international courts and tribunals of using satisfaction as a form of reparation (in the wide sense). Satisfaction may consist of an expression of regret, a formal apology, a declaratory judgment or another appropriate modality. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.); *see also* UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, Annex, UN Doc. E/CN.4/2000/62, 18 January 2000 (including among measures constituting satisfaction to victims apologies, including public acknowledgement of the facts and acceptance of responsibility).

4.4.3.5 Requests for measures by the Royal Government of Cambodia

671. Although likely to contribute to the collective and moral reparation of the harm suffered by victims, these requests fall outside the jurisdiction of the ECCC as they are not measures which can be satisfied through orders made against KAING Guek Eav. They are rejected on grounds that the institution of a national commemoration day for victims and the issuance of official statements of apology fall exclusively within national governmental prerogatives, which the ECCC has no competence to compel.

4.4.3.6 Requests for the construction of pagodas and other memorials

672. While sympathetic to these requests, the Chamber lacks sufficient specificity regarding the exact number of memorials sought and their nature, their envisaged location, or estimated cost. No information has been provided, for example, regarding the identity of the owners of all proposed sites, whether they consent to the construction of each proposed memorial, or whether additional administrative authorisations such as building permits would be necessary to give effect to each measure. As the material before it does not enable the Chamber to issue an enforceable order against KAING Guek Eav to pay a fixed or determinable amount in reparation, these requests are rejected.

4.4.3.7 Requests to preserve the S-21 archives, Vann Nath's paintings and the S-21 and S-24 sites

673. While acknowledging the significance of preservation efforts in this area, the Chamber notes that these requests are not in the form of particularized and quantified claims that may be readily transformed into orders against KAING Guek Eav. Further, the Chamber has been provided with no particulars regarding the current legal ownership of these sites, archives or items, or whether their owners or possessors consent to proposals that they be accessed or altered[1154], or the reallocation of revenues derived from them to Civil Parties. They are accordingly rejected.

[1154] *See e.g.,* "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009, ERN (English) 00399719 (requesting, amongst other measures, erection of a plaque memorializing the victims, the construction of a walkway and the engraving of detainee names on the external wall of S-21).

4.4.3.8 Requests for the provision of access to free medical care and educational measures

674. Requests of this type – which by their nature are not symbolic but instead designed to benefit a large number of individual victims – are outside the scope of available reparations before the ECCC.[1155] Provision of free medical care to a large and indeterminate number of victims may purport to impose obligations upon national healthcare authorities and thus exceed the scope of the ECCC's competence. The Chamber is similarly unable to order measures that may impact on national education policies such as teacher training, salaries, and curriculum development. Even if awards of this sort were within the scope of Internal Rule 23(1)(b), proof would be required as to the link between the measure sought by each claimant and the crimes for which KAING Guek Eav has been found responsible. No such material has been provided to the Chamber. Further, the number and identity of all intended beneficiaries of these requests, the nature of the measures sought and the cost of their provision are neither particularized nor readily quantifiable within the available resources of the Chamber.

675. Although victim needs in these areas are undisputed, they are inherently incapable of satisfaction through an order against the Accused, and the requests in their current form cannot provide the basis of enforceable orders against KAING Guek Eav. They are consequently rejected.

[1155] *See* Internal Rule 23(1)(b).

5 DISPOSITION

676. For the foregoing reasons, having considered all the evidence and the submissions of the Parties, the Chamber decides as follows:

677. The Chamber finds the Accused **GUILTY**.pursuant to Articles 5, 6 and 29 (new) of the ECCC Law of the following crimes committed in Phnom Penh and within the territory of Cambodia between 17 April 1975 and 6 January 1979:

- Crimes against humanity (persecution on political grounds) (subsuming the crimes against humanity of extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape), and other inhumane acts).
- Grave breaches of the Geneva Conventions of 1949, namely:
    - wilful killing,
    - torture and inhumane treatment,
    - wilfully causing great suffering or serious injury to body or health,
    - wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and
    - unlawful confinement of a civilian.

678. For the reasons given by the Chamber in its Decision on the Preliminary Objection, it has not evaluated the guilt or otherwise of the Accused in respect of national crimes of premeditated murder and torture, violations of Articles 501, 506 and 500, respectively, of the 1956 Penal Code and punishable before the ECCC pursuant to Article 3 (new) of the ECCC Law.[1156]

679. On the basis of the foregoing, the majority of the Chamber (Judge LAVERGNE dissenting) sentences the Accused to a single sentence of **35 years** of imprisonment.

[1156] Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187, 26 July 2010.

680. The Chamber considers that a reduction in the above sentence of **5 years** is appropriate given the violation of the Accused's rights occasioned by his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007.

681. The Accused is entitled to credit for the entirety of his time spent in detention, *i.e.* from 10 May 1999 to 30 July 2007 (under the authority of the Cambodian Military Court) and from 31 July 2007 until the Judgement becomes final (under the authority of the ECCC).[1157]

682. The Chamber declares all Civil Parties listed in paragraphs 645 and 650 to have suffered harm as a direct consequence of the crimes for which KAING Guek Eav has been convicted.

683. The Chamber shall compile all statements of apology and acknowledgements of responsibility made by KAING Guek Eav during the course of the trial. This compilation shall be posted on the ECCC's official website within 14 days of the date of this judgement becoming final. It rejects all other Civil Party claims.

684. This judgement, which was pronounced publicly on 26 July 2010, is appealable by the Parties in accordance with the Internal Rules. Given the gravity of the crimes for which he has been convicted, KAING Guek Eav shall remain in detention until this judgement becomes final.

[1157] *See* Decision on Request for Release, E39/5, 15 June 2009.

Done in Khmer, English and French.

Dated this twenty-sixth day of July 2010
At Phnom Penh
Cambodia

Greffiers

LIM Suy Hong Matteo CRIPPA SE Kolvuthy Natacha WEXELS-RISER DUCH Phary

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Judge NIL Nonn
Presiding

_____ _____
Judge Silvia CARTWRIGHT Judge YA Sokhan

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Judge Jean-Marc LAVERGNE Judge THOU Mony

[Seal of the Tribunal]

6 ANNEX I: PROCEDURAL HISTORY

6.1 Arrest, Transfer and Detention of the Accused

1. On 10 May 1999, the Cambodian military authorities arrested and detained the Accused at the Phnom Penh Military Court Prison. He was indicted by the Cambodian Military Court for crimes against domestic security and genocide, and subsequently with genocide, crimes against humanity, war crimes and crimes against internationally protected persons.[1] His provisional detention, which was extended annually, continued under the jurisdiction of the Military Court until his transfer to the ECCC.[2]

2. On 30 July 2007, the Accused was detained by order of the Co-Investigating Judges of the ECCC and transferred to the ECCC Detention Centre. On 31 July 2007, the Co-Investigating Judges issued an order for the provisional detention of the Accused.[3] On 3 December 2007, the Pre-Trial Chamber dismissed an appeal lodged by the Defence against this order.[4] The Co-Investigating Judges extended the Accused's provisional detention until his appearance before the Trial Chamber.[5] This decision was confirmed by the Pre-Trial Chamber.[6]

3. On 1 April 2009, the Defence challenged the lawfulness of the Accused's provisional detention and requested his release for the duration of the trial.[7] On 15 June 2009, the Trial Chamber denied the Defence request, and ordered that the Accused

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1 Introductory Submission (entitled "Indictment"), E52/4.3, 10 May 1999; "Detention Order", E52/4.8, 10 May 1999; Introductory Submission (entitled "Order to Forward Case for Investigation"), E52/4.26, 6 September 1999; "Detention Order", E52/4.22, 10 September 1999; *see also* Second Introductory Submission (entitled "Second Order to Forward Case for Investigation"), E52/4.9, 10 May 1999; "Decision on Extension of Judicial Investigation", E52/4.34, 18 May 2000; "Decision on Extension of Judicial Investigation, E52/4.46, 15 May 2001.

2 "Detention Order Duch", E52/4.47, 22 February 2002; E52/4.48, 22 February 2003; E52/4.54, 22 February 2004; E52/4.57, 28 February 2005; E52/4.60, 28 February 2006; "Detention Order", E52/4.63, 28 February 2007*; see also* "Decision on Extension of Judicial Investigation", E52/4.52, 20 February 2004.

3 "Arrest Warrant", C1, 30 July 2007; "Detention Order", C4/2, 31 July 2007; "Order of Provisional Detention", C3/10, 31 July 2007.

4 "Decision on Appeal against Provisional Detention Order of Kaing Guek Eav *alias* 'Duch'", C5/45, 3 December 2007.

5 "Order on extension of provisional detention", C3/II, 28 July 2008.

6 "Detention Order", D99/3/43, 5 December 2008.

7 "Written Record of Proceedings – 1 April 2009", E1/7.

remain in provisional detention for the duration of the trial.[8] However, the Chamber found that the Accused's prior detention before the Military Court constituted a violation of applicable Cambodian domestic law and internationally recognised fair trial rights. It declared that if convicted, the Accused would be entitled to a reduction in sentence, to be determined at the sentencing stage, as a remedy for these violations.[9] The Chamber further declared that in calculating the length of any sentence to be served, the Accused would be entitled to credit for the entirety of the time spent in detention from 10 May 1999 onwards.[10]

6.2 Investigation Phase

6.2.1 Preliminary investigation

4. The Co-Prosecutors initiated a preliminary investigation on 10 July 2006.[11] On 18 July 2007, they filed an Introductory Submission with the Co-Investigating Judges, thus opening a judicial investigation against five suspects, including the Accused.[12]

6.2.2 Initial appearance and charges

5. The initial appearance of the Accused before the Co-Investigating Judges took place on 31 July 2007. The Accused was notified that he was under judicial investigation for the facts alleged in the Introductory Submission and was charged with crimes against humanity, and subsequently with grave breaches of the Geneva Conventions of 1949.[13]

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8 Decision on Request for Release, E39/5, 15 June 2009, paras 9-14, 22-26; "Written Record of Proceedings – 15 June 2009", E1/32.
9 Decision on Request for Release, E39/5, 15 June 2009, paras 34-36.
10 Decision on Request for Release, E39/5, 15 June 2009, paras 27-29.
11 Amended Closing Order, para. 4.
12 "Introductory Submission", D3, 18 July 2007.
13 "Written Record of Initial Appearance", D7, 31 July 2007; "Written Record of Interview of Charged Person", D20, 2 October 2007.

6.2.3 Separation Order

6. On 19 September 2007, the Co-Investigating Judges ordered the separation of the Case File of the Accused in relation to facts concerning S-21. These were investigated under Case File number 001/18-07-2007 and comprise the present case.[14]

6.2.4 Conclusion of investigation and Closing Order

7. On 15 May 2008, the Co-Investigating Judges notified the Parties pursuant to Internal Rule 66(1) that they considered their investigation to be concluded.[15] Pursuant to Internal Rule 66(4), the Co-Investigating Judges forwarded the Case File to the Office of the Co-Prosecutors on 23 June 2008.[16] On 18 July 2008, the Co-Prosecutors filed their Final Submission and the Defence their response on 24 July 2008.[17]

8. On 8 August 2008, the Co-Investigating Judges issued the Closing Order, indicting the Accused for the crimes against humanity of imprisonment, enslavement, torture, rape, murder, extermination, persecution and other inhumane acts and for the following grave breaches of the Geneva Conventions of 1949: unlawful confinement of a civilian, wilfully depriving rights to a fair trial, wilfully causing great suffering, torture and inhumane treatment, and wilful killing.

6.3 Appeal of the Closing Order

6.3.1 Co-Prosecutors' Appeal

9. On 21 August 2008, the Co-Prosecutors appealed the Closing Order to the Pre-Trial Chamber, alleging that the Co-Investigating Judges erred by failing to indict the Accused

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[14] "Separation Order", D18, 19 September 2007. All other facts related to all suspects mentioned in the Introductory Submission were investigated under Case File number 002/19-09-2007.
[15] "Notice of Conclusion of Judicial Investigation", D89, 15 May 2008.
[16] "Forwarding Order", D95, 23 June 2008.
[17] "Rule 66 Final Submission Regarding Kaing Guek Eav *alias* 'Duch'", D96, 18 July 2008; "Response of Kaing Guek Eav's Defence Team to the Prosecutor's Final Submission", D96/1, 24 July 2008.

for the domestic crimes of homicide and torture under the 1956 Cambodian Penal Code, and for the commission of crimes through participation in a joint criminal enterprise.[18]

6.3.2 Pre-Trial Chamber Decision

10. On 5 December 2008, the Pre-Trial Chamber issued its decision on the Co-Prosecutors' appeal against the Closing Order. The Pre-Trial Chamber concluded that the domestic crimes of torture and homicide, punishable under Article 3 of the ECCC Law and Articles 500, 501 and 506 of the 1956 Penal Code, contained distinct elements not present in the international crimes of murder and torture. As these offences were not subsumed by the international crimes, the Pre-Trial Chamber added these charges to the Amended Closing Order.[19] The Pre-Trial Chamber further concluded that although the facts in the Closing Order suggested co-perpetration of the acts committed within S-21, participation in a joint criminal enterprise did not form part of the factual basis for the investigation. As the Accused was not informed about his alleged participation in a joint criminal enterprise prior to the Final Submission, the Chamber declined to charge the Accused with this form of responsibility in the Closing Order.[20] The effect of this decision was to remit the Accused for trial pursuant to the Amended Closing Order.

6.4 Civil Parties

6.4.1 Joining of Civil Parties

11. A number of individuals applied to join Case 001 as Civil Parties. Twenty-eight applicants joined during the investigative phase, with a further sixty-six applying to join during the trial proceedings prior to the 2 February 2009 deadline.[21] Four of these applications were subsequently withdrawn or rejected.[22] Accordingly, a total of 90 Civil

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[18] "Record of Appeals", D99/3, 21 August 2008; "Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav 'Duch'", D99/3/3, 5 September 2008.
[19] "Decision on Appeal against Closing Order Indicting Kaing Guek Eav Alias 'Duch'", D99/3/42, 5 December 2008, paras 72, 84, 99-101, 103, 107.
[20] "Decision on Appeal against Closing Order Indicting Kaing Guek Eav Alias 'Duch'", D99/3/42, 5 December 2008, paras 125, 141.
[21] Amended Closing Order, para. 6.
[22] Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69, E2/94/2, 4 March 2009; Decision on Request to Extend Deadline for the Filing of Civil Party Applications, E2/92/2, 10 March

Parties participated in the trial proceedings of Case 001. The Civil Parties were organised into four groups, each represented by their own counsel.

6.4.2 Hearing of Civil Parties

12. On 30 April 2009, following requests by the Civil Parties to be heard at trial, the Trial Chamber agreed to hear seven Civil Parties alleged to be former S-21 detainees during the trial segment concerning the functioning of S-21. 15 Civil Parties were heard between 17 and 24 August 2009. [23]

6.5 Trial Proceedings

6.5.1 Trial preparation and initial hearing

13. Prior to and during trial proceedings, the Trial Chamber held several Trial Management Meetings. These meetings, held in closed session, assisted the Chamber in the management of numerous trial-related procedural matters. [24]

14. The initial hearing took place on 17 and 18 February 2009. Amongst other things, this hearing considered the Preliminary Objection raised by Defence, the Co-Prosecutors' motion to file new evidence, protective measures, and the admissibility of Civil Party applications. Further, the Chamber sought clarification on the intention of the Co-Prosecutors and the Defence to raise certain issues during the trial, and also reviewed

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2009; "CPG3: Lettre d'abandon de Droit de la Constitution de la Partie Civile au près des Chambres Extraordinaires au sein des Tribunaux Cambodgiens", E2/65/5, 15 September 2009; Decision on Request to Extend Deadline for the Filing of Civil Party Applications, E2/92/2, 10 March 2009 (rejecting, for lack of substantiation, request of Civil Party Group 1 to belatedly admit the Civil Party application of Norng Chanphal (E2/92)). NORNG Chanphal later testified before the Chamber as a witness (T., 2 July 2009).

[23] Decision Concerning the Scheduling of the Hearing of Civil Parties During the Substantive Hearing, E57, 30 April 2009. 28 Civil Parties initially requested to be heard. This number was subsequently reduced to 22 after 6 Civil Parties declined or were unavailable to be heard by the Chamber; *see* Written Record of Proceedings – 06 July 2009, 11-12 August 2009, 18 August 2009, 20 August 2009 and 24 August 2009, comprising documents E1/43, E1/61, E1/64, E1/66 and E1/67; *see also* Written Record of Proceedings, 17-20 August 2009 and 24 August 2009, comprising documents E1/63 to E/67..

[24] Trial Management Meetings were held on 15 and 16 January, 11 June and 23 June 2009, respectively.

progress on agreed facts and the finalization of witness lists.[25] The Chamber also decided during this hearing to call a number of witnesses and experts to be heard during trial.[26]

6.5.2 Preliminary Objection

15. On 28 January 2009, the Defence filed a preliminary objection alleging that prosecution of the Accused for the domestic crimes of murder and torture pursuant to Articles 500, 501 and 506 of the 1956 Penal Code was barred because the applicable limitation period had expired.[27] The Trial Chamber indicated that it would issue its decision on the preliminary objection at the same time as the judgement on the merits.[28]

6.5.3 Substantive hearing

16. Pursuant to the Trial Chamber's "Direction on the Scheduling of the Trial", the substantive hearing was divided into seven different segments:

i. Issues relating to M-13;
ii. Establishment of S-21 and the Takmao prison;
iii. Implementation of CPK policy at S-21;
iv. Armed conflict;
v. Functioning of S-21 including Choeung Ek,
vi. Establishment and functioning of S-24; and

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[25] "Written Record of Proceedings – 17 and 18 February 2009, E1/3 and E1/4; *see also* "Agenda for Initial Hearing", E8/1, 13 February 2009; Direction Requesting Additional Information from the Parties and Co-Investigating Judges in Preparation of the Initial Hearing, E5/11, 5 February 2009.

[26] "Written Record of Proceedings – 17 and 18 February 2009, E1/3 and E1/4. At various stages during trial, the Chamber issued additional decisions removing from this list several witnesses and experts; *see e.g.* Decision on Protective Measures for Witnesses and Experts and on Parties' Requests to Hear Witnesses and Experts: Reasons, E40/1, 10 April 2009; Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, E135, 7 August 2009; and "Written Record of Proceedings – 29 June 2009, 6 July 2009, 16 July 2009, 27 August 2009 and 15 September 2009, comprising documents E1/39, E1/43, E1/50, E1/70 and E1/75.

[27] "Preliminary Objection Concerning Termination of Prosecution of Domestic Crimes", E9/1, 28 January 2009; "Co-Prosecutors' Written Response to the Defence's Preliminary Objection to the Applicability of the 1956 Cambodian Penal Code", E9/7, 18 May 2009; "Group 1 – Civil Parties' Co-Lawyers' Submission on the Preliminary Objection" E9/5, 18 May 2009; "Submission of Co-Lawyers for Civil Parties – Group 2 – on the, Preliminary Objection Concerning Termination of Prosecution of Domestic Crimes", E9/8, 18 May 2009; "Response (Group 3) to the Preliminary Objection Concerning Expiry of the Statute of Limitations for Domestic Crimes", E9/6, 18 May 2009; "Conclusion Écrites Concernant L'Exception Préliminaire Soulevée Par La Défense", E9/9, 18 May 2009.

[28] Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, ECCC Trial Chamber, E/187, 26 July 2010.

vii. Issues relating to the character of the Accused.[29]

17. On 30 March 2009, the substantive hearing commenced with the reading of parts of the factual analysis in the Amended Closing Order and of the charges against the Accused.[30] Opening statements by the Co-Prosecutors, followed by the Accused and his Defence co-lawyers, took place on 31 March 2009.[31]

18. On 31 March 2009, the Co-Prosecutors informed the Trial Chamber that the Defence either agreed with or did not dispute 238 of the 351 proposed facts alleged in the Amended Closing Order.[32] As directed by the Trial Chamber, the Co-Prosecutors read these facts in court. [33]

19. At trial, the Trial Chamber heard testimony from 9 experts and 24 witnesses, including 7 character witnesses. In addition to the 22 Civil Parties heard during the course of trial, the records of interviews of a number of witnesses were read out on 4, 5, 11 and 12 August 2009. The Chamber invited the Parties to make observations on each statement.[34]

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[29] Direction on the Scheduling of the Trial, E26, 23 March 2009.

[30] "Written Record of Proceedings – 30 March 2009", E1/5; *see also* "Order Scheduling the Start of the Substantive Hearing and Sitting Days for First Three Months", E15, 23 February 2009.

[31] "Written Record of Proceedings – 31 March 2009", E1/6; Direction on making a brief Opening Statement during the Substantive Hearing, E19, 10 March 2009. On 27 March 2009, the Trial Chamber rejected the request of the Co-Lawyers for the Civil Parties to submit an opening statement; *see* Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, E23/4, 27 March 2009.

[32] "Written Record of Proceedings – 31 March 2009", E1/6; "Response to Direction Requesting Additional Information from the Parties and Co-Investigating Judges in Preparation of the Initial Hearing", E5/11/1, 10 February 2009; "Response of the Co-Prosecutors Regarding Agreement on Facts", E5/11/2, 11 February 2009; *see also,* "Defence Position on the facts contained in the Closing Order", E5/11/6.1, 1 April 2009; "Defence's explanation concerning the document entitled 'Defence's Position on the facts contained in the Closing Order'", E5/11/6, 1 April 2009.

[33] "Written Record of Proceedings – 01 April 2009", E1/7.

[34] The records of interviews of the following witnesses were read in court: Khieu Ches (E3/456), Pes Math (E3/457), Nhem En (E3/458), Nhep Hau (E3/460), Kung Phai (E3/461, E3/462, E3/396, E3/244), Makk Sithim (E3/484, E3/396), Tay Teng (E3/485, E3/486, E3/218, E3/242), Soam Sam Ol (E3/487), Meas Pengkry (E3/446, E3/242, E3/218), Uk Bunseng (E3/490), Horn (Hân) Iem (E3/491), Phach Siek (E3/495), Kaing Pan (E3/496), and (in summary form) Chey Sopheara (E3/488); *see* "Written Record of Proceedings – 4, 5, 11 and 12 August 2009," comprising documents E1/57, E1/58, E1/61 and E1/62.

6.5.4 Other relevant issues

6.5.4.1 Co-Prosecutors' Motion Regarding Joint Criminal Enterprise

20. On 8 June 2009, the Co-Prosecutors requested the Chamber to declare the notion of Joint Criminal Enterprise to be applicable before the ECCC, and to apply it in relation to the commission of the crimes charged against the Accused.[35] The Chamber recalled that the Co-Prosecutors had expressed their intention to rely on the notion of Joint Criminal Enterprise during the initial hearing and indicated that it considered the issue to be live before the Chamber.[36] Following submissions by the Parties, the Trial Chamber indicated that it would issue its decision on this matter with the judgement on the merits.[37]

6.5.4.2 Civil Party Motion Regarding Submissions on Sentencing and on Character of the Accused

21. On 27 August 2009, following a joint Civil Party request, the Trial Chamber delivered two oral decisions, by a majority (Judge LAVERGNE dissenting in part).[38] The Chamber decided that the Civil Party lawyers lacked standing to make submissions on sentencing, including submissions on a sentence to be imposed, submissions relevant to sentencing.[39] The Trial Chamber also denied the Civil Parties' request to put questions relevant to the Accused's character to the Accused, two experts and nine witnesses.[40]

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35 "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, 8 June 2009.

36 "Written Record of Proceedings – 29 June 2009", E1/39.

37 "Civil Party Group 1 – Notification Pursuant to the Co-Prosecutors' Request for Application Joint Criminal Enterprise", E73/1, 30 June 2009; "Civil Parties Group 3 – Brief in Support of the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/3, 16 September 2009; "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, 17 September 2009.

38 "Groups 1 and 2 – Civil Parties' Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing", E72, 9 June 2009.

39 The Civil Party lawyers were permitted to refer to such factors only when referring to the guilt or innocence of the Accused or to a Civil Party claim for reparation; *see* "Written Record of Proceedings – 27 August 2009", E1/70; *see also* 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, E72/3, 12 October 2009.

40 "Written Record of Proceedings – 27 August 2009", E1/70; 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, E72/3, 12 October 2009.

22. On 1 and 25 September 2009 respectively, Civil Party Groups 3 and 2 appealed both decisions of the Trial Chamber.[41] On 24 December 2009, the Supreme Court Chamber declared these appeals inadmissible pursuant to Internal Rule 104(4).[42]

6.5.5 Closing statements

23. On 17 September 2009, the Civil Parties filed written submissions stipulating the forms of collective and moral reparations sought against the Accused, if convicted.[43]

24. Between 23 and 27 November 2009, the Parties presented their closing statements.[44] Following his closing statement, the Accused orally requested that the written version of his statement be put on file, which request the Trial Chamber granted.[45]

25. The Civil Parties' co-lawyers and the Co-Prosecutors presented rebuttal statements on 26 and 27 November 2009, to which the Defence responded on 27 November 2009.[46]

26. The Accused made his final statement on 27 November 2009. Although acknowledging his responsibility for the crimes committed, the Accused requested acquittal and release. Following the conclusion of closing statements, the President declared the trial proceedings closed. [47]

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[41] "CPG3 – Declaration d'Appel", E162, 1 September 2009; "Appeal of Co-Lawyers for Civil Parties (Group 2) Against Trial Chamber's Decisions to Exclude Civil Party Lawyers from Questioning the Accused, Witnesses and Experts on the Accused's Character and to Exclude Civil Parties from Submissions on Sentencing", E169, 25 September 2009.

[42] Decision on the Appeals Filed by Lawyers for Civil Parties (Groups 2 and 3) Against the Trial Chamber's Oral Decision of 27 August 2009, E169/1/2, 24 December 2009.

[43] "Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3, 17 September 2009; "CPG3 – Mémoire Additionnel Concernant la Réparation", E159/3/1, 17 September 2009.

[44] *See* "Written Record of Proceedings – 23-26 November 2009, comprising documents E1/78 to E/81; *see also* "Scheduling Order for Closing Statements", E170, 30 September 2009; "Civil Party Group 1 – Final Submission", E159/7, 10 November 2009; "Co-Lawyers' for Civil Parties (Group 2) – Final Submission", E159/6, 10 November 2009; "Civil Parties (Group 4) – Final Written Submission", E159/4, 10 November 2009; "Co-Lawyers for Civil Parties (Group 3) – Final Submission", E159/5, 11 November 2009; "Co-Prosecutors' Final Trial Submission with Annexes 1-5", E159/9, 11 November 2009; "Final Defence Written Submissions" E159/8, 11 November 2009; Direction on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions, E159, 27 August 2009.

[45] "Accused's Final Written Submission", E159/10, 25 November 2009; "Written Record of Proceedings – 25 November 2009", E1/80.

[46] "Written Record of Proceedings – 26 and 27 November 2009", documents E1/81 and E1/82.

[47] "Written Record of Proceedings – 27 November 2009", E1/82.

6.5.6 Subsequent proceedings

27. The Parties were subsequently given the opportunity to make written submissions on the impact, if any, of the new 2009 Penal Code, which entered into force after the closing statements. None of the parties availed themselves of this opportunity.[48]

28. The Chamber delivered its verdict and filed the written judgement on 26 July 2010. It sentenced the Accused to 35 years of imprisonment based on convictions for the crime against humanity of persecution (extermination (encompassing murder), enslavement, imprisonment, torture (including one instance of rape) and other inhumane acts) as well as for grave breaches of the Geneva Conventions of 1949 (wilful killing, torture and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian).

[48] "Order Relevant to the 2009 Penal Code of Cambodia", E180/1, 4 February 2010.

7 ANNEX II: AERIAL VIEW OF THE S-21 COMPLEX

"Aerial Photograph of Tuol Sleng Genocide Museum", E3/16, ERN (Khmer, French and English) 00189137.

8 ANNEX III: LIST OF CIVIL PARTIES

Pseudonym	Full Name	Place of Residence	Date of Birth	Place of Birth	Occupation
D25/1	Mr. BOU Meng	[[Redacted]]	[[Redacted]]	[Redacted]	[Redacted]
D25/2	Ms. CHHIN Navy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/3	Mr. CHUM Mey	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/4	Ms. HAV Sophea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/5	Ms. PHUNG Guth Sunthary	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/6	Mr. CHUM Sirath	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/7	Ms. IM Sunthy	[Redacted]	[Redacted]	[Redacted]	[Redacted]

D25/8	Ms. MEASKETH Sanphotre	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/9	Ms. ROS Men	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/10	Mr. CHE Heap	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/11	Mr. KHUON Sarin	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/12	Mr. CHRAING Sam-Ean	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/13	Mr. SEANG Vanndi	[Redacted]	[Redacted]	[Redacted]	[Redacted]

D25/14	Mr. TOCH Monin	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/15	Mr. SUON Seang	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/16	Ms. CHUM Neou	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/17	Ms. KAUN Sunthara	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/18	Mr. MAN Saut	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/19	Ms. KONG Teis	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/20	Ms. NGETH Sok	[Redacted]	[Redacted]	[Redacted]	[Redacted]

D25/21	Mr. TATH Lorn	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/22	Mr. Timothy Scott DEEDS	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/23	Mr. YIM Leng	[Redacted]	[Redacted]	[Redacted]	Farmer
D25/24	Mr. UM Pyseth (successor of Ms. SUOS Sarin, deceased)	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/25	Mr. KE Khon	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/26	Ms. KIMARI Nevinka	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/27	Ms.TIOULONG Antonya	[Redacted]	[Redacted]	[Redacted]	[Redacted]
D25/28	Ms. TIOULONG - ROHMER Neva	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/21	Ms. IEM Soy	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/22	Mr. CHHOEM Sitha	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/23	Mr. LAY Chan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/24	Ms. UL Say *alias* Riem	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/25	Mr. SIN Lim Sea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/26	Mr. OU Savrith	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/27	Ms. OU Kamela	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/28	Ms. ROS Chuor Siy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/29	Ms. KIMARI Visaka	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/30	Ms. NHOEM	[Redacted]	[Redacted]	[Redacted]	[Redacted]

	Kim Hoeurn				
E2/31	Ms. NHEK OU Davy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/32	Ms. NAM Mon	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/33	Mr. PHAOK Khan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/34	Ms. SO Saung	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/35	Ms. CHHAY Kan *alias* LIENG Kan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/37	Mr. KLAN Fit	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/38	Mr. HIET Tey Chov	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/39	Ms. SUON Sokhomaly	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/41	Ms. SIN Sinet *alias* Srun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/42	Ms. ROUN Sreynob	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/43	Ms. EL Li Mah	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/44	Ms. SMAN Nob	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/45	Ms. SMAN Sar	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/46	Ms. KE Samaut	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/47	Ms. MEN Lay	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/48	Ms. NHEM Sophan	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/50	Mr. NETH Phally	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/51	Ms. MAN Mas *alias* MAN Malymas	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/52	Ms. KOM Men *alias* KUM Men	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/53	Ms. TRY Ngech Leang	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/54	Ms. HENG Ngech Hong	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/55	Mr. BENG Chanthorn	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/56	Mr. YUN Chhoeun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/57	Mr. LY Khiek	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/58	Mr. PUOL Punloek *alias* Nget	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/59	Mr. CHANN Krouch	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/60	Ms. NORNG Kim Leang	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/61	Mr. LY Hor	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/62	[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/63	Ms. PANN Pech	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/64	Ms. NHEB Kimsrea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/66	Ms. PENH Sokkhun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/69	Ms. LIM Yon	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/70	Ms. CHAN Yoeurng	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/71	Ms. SOEM Pov	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/72	Ms. KAN San	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/73	Mr. NORNG Sarath *alias* Por	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/74	Ms. NGET Uy	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/75	Ms. THIEV Neab *alias* KHIEV Neab	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/76	Ms. UNG Voeurn *alias* HUL Voeurn	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/78	Ms. MEAS Saroeurn	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/79	Ms. SEK Siek	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/80	Ms. CHIN Met	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/81	Mr. CHHAT Kim Chhun	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/82	Mr. MORN Sothea	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/83	Ms. HONG Savath	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/84	Mr. UK Vasorthin	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/85	Ms. Martine LEFEUVRE	[Redacted]	[Redacted]	[Redacted]	[Redacted]

E2/86	Mr. Jeffrey JAMES	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/87	Mr. Robert HAMILL	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/88	Mr. Joshua ROTHSCHILD	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/89	Miss. OUK Neary	[Redacted]	[Redacted]	[Redacted]	[Redacted]
CIVIL PARTY APPLICATIONS WITHDRAWN DURING THE COURSE OF TRIAL					
E2/49	Mr. ENG Sitha	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/65	Ms. BUN Srey	[Redacted]	[Redacted]	[Redacted]	[Redacted]
E2/77	Ms. KEANG Vannary	[Redacted]	[Redacted]	[Redacted]	[Redacted]

9 ANNEX IV: GLOSSSARY AND LIST OF ABBREVIATIONS

1956 Penal Code	Criminal Code of the Kingdom of Cambodia (1956), promulgated on 21 February 1955 by the King (Kram no. 933NS); Kingdom of Cambodia, Recueil Judiciaire, Special Edition, 1956, pp. 11-403
1993 (SOC) Code of Criminal Procedure	Law on Criminal Procedure, 8 March 1993, adopted by the National Assembly of the State of Cambodia on 28 January 1993, promulgated by Decree No. 21 on 8 March 1993.
1993 Constitution of the Kingdom of Cambodia	Constitution of the Kingdom of Cambodia (1993), adopted by the Constitutional Assembly and signed by the President on 21 September 1993.
2007 Code of Criminal Procedure	Code of Criminal Procedure of the Kingdom of Cambodia, promulgated by the King on 10 August 2007.
2009 Penal Code	Criminal Code of the Kingdom of Cambodia, promulgated by the King on 30 November 2009 (Part I directly in force; the other parts of the Code in force one year after promulgation).
Accused	Kaing Guek Eav *alias* Duch
Accused JCE Response	Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, 17 September 2009
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978
Amended Closing Order	Closing Order indicting Kaing Guek Eav *alias* Duch, D99, 8 August 2008, as amended by the Pre-Trial Chamber's Decision on Appeal Against the Closing Order, dated 5 December 2008
cf	compare
Chamber	Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia
Civil Parties	90 individuals who participated in the trial proceedings as Civil Parties, organised into four Civil Party groups

Closing Order	Closing Order indicting Kaing Guek Eav *alias* Duch, D99, 8 August 2008
Common Article 2	Article 2 common to the four Geneva Conventions of 12 August 1949
Control Council Law No. 10	Control Council Law 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, signed in Berlin, 20 December 1945, published in (1946) 3 Official Gazette Control Council for Germany at 50-55
CPK	Communist Party of Kampuchea
CPK Statute	Communist Party of Kampuchea: Statute, E3/28, January 1976
DC-Cam	Documentation Center of Cambodia, a Cambodian Non-Governmental Organization.
Defence	Defence for the Accused
DK	Democratic Kampuchea
DK Constitution	Constitution of Democratic Kampuchea, E3/27, 5 January 1976
e.g.	for example
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Agreement	Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005
ECCC Law	Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)
ECHR	European Convention on Human Rights and Fundamental Freedoms
ERN	Evidence Reference Number

fn.	footnote
FULRO	United Front for the Liberation of the Oppressed Races
Geneva Convention I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, entered into force 21 October 1950
Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, entered into force 21 October 1950
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135, entered into force 21 October 1950
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287, entered into force 21 October 1950
Geneva Conventions	The four Geneva Conventions of 1949 dated 12 August 1949
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
infra	below

Internal Rules	ECCC Internal Rules, fourth revision of 11 September 2009, entered into force on 21 September 2009
JCE	Joint Criminal Enterprise
KNUFNS	Kampuchean National United Front for National Salvation
KPNLAF	Kampuchea People's National Liberation Armed Forces
KPRA	Kampuchean People's Representative Assembly
KRA	Khmer Republic Army
M-13	Security centre in the Kampong Speu province
n/a	not applicable
no.	number
Nuremberg Charter	Charter of the International Military Tribunal for the Trial of the Major War Criminals - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), of 8 August 1945, 82 UNTC 280
Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal
Nuremberg Tribunal	International Military Tribunal for the Trial of the Major War Criminals
OCP	Office of the Co-Prosecutors
OCP JCE Request	Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73, 8 June 2009
OCIJ	Office of the Co-Investigating Judges
p., pp.	Page, pages
para., paras	Paragraph, paragraphs
PTC	Pre-Trial Chamber
RAK	Revolutionary Army of Kampuchea

Rome Statute	Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9th, adopted at Rome on 17 July 1998, entered into force 1 July 2002.
RPE	Rules of Procedure and Evidence
S-21 or S-21 complex	The area of S-21 in Phnom Penh, including, unless the context otherwise requires, both the S-21 buildings at the current Tuol Sleng Genocide Museum site, as well as associated sites of Choeung Ek and S-24
S-24	Re-education Camp Prey Sar
SCSL	Special Court for Sierra Leone
supra	above
Tokyo Charter	Charter of the International Military Tribunal for the Far East of 19 January 1946, T.I.A.S No. 1589
Tokyo Tribunal	International Military Tribunal for the Far East of 19 January 1946
T.	Transcript
TPO	Trans-Cultural Psychosocial Organisation Cambodia, a Cambodian Non-Governmental Organization.