E159/9

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' FINAL TRIAL SUBMISSION WITH ANNEXES 1 - 5

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THE ESSENCE OF THE CASE

1. Kaing Guek Eav, alias Duch (the 'Accused'), is on trial for his role in the establishment and operation of S-21, Democratic Kampuchea's (DK) most notorious torture and execution centre in which thousands of victims were illegally detained, tortured, subjected to physical and psychological abuse and executed.

2. S-21 was central in the implementation of DK regime's policy of rooting out perceived enemies and other undesirable elements through widespread arrests, torture and executions of suspects in the entire country. Its mode of operation was highly organised, systematic and shockingly effective. Its scale of operations was massive: employing over 2,000 staff in three separate large sites. S-21 eliminated, on average, more than 10 people a day for the nearly 1,200 days of its existence.

3. Initially as Deputy Secretary and then as Secretary of S-21, who commanded the prison with utmost efficiency, the Accused is criminally responsible for the deaths of all its victims – at least 12,273 men, women and children. He engineered and perfected the prison's operational methodology: torturing prisoners to confirm their guilt (which was predetermined by the fact of their arrest), and to obtain "confessions" implicating additional suspects; then arresting new suspects based on the confessions, and subjecting them to the same treatment. Each wave of arrests produced new victims in a self-perpetuating, widening vicious cycle. All victims were summarily executed when their confessions were deemed complete.

4. The Accused performed his duties with zeal and enthusiasm: managing the centre, supervising interrogations, analysing confessions, developing lists of traitors, and giving advice on purges to the most senior members of the DK regime. He spent thousands of hours studying confessions of S-21 prisoners, and assembling and reporting lists of "traitors." Those he singled out were inevitably arrested and sent to S-21 for torture and execution.

5. The Accused handpicked his staff, indoctrinated them with DK's political ideology, trained them on the most effective torture techniques, and moulded them into ruthless, cold-blooded killers. He and his subordinates did not just murder their victims: they took away their dignity, humiliated them, tortured their bodies and minds, and ultimately disposed of them like useless objects.

6. The Accused's absolute commitment to the political ideology of the Communist Party of Kampuchea (CPK), his expertise in torture and interrogation, his industrious management style, and his ability to commit atrocious crimes, propelled him into one of the most sensitive roles in the DK regime. He was promoted and protected in a key role within the security apparatus while numerous senior cadre were being purged. He was entrusted with managing the arrests and interrogations of officials belonging to the regime's highest echelons. Unaffected by his crimes, he remained dedicated to CPK's cause until the 1990s.

7. The Accused is charged with the crimes of homicide and torture under the 1956 Penal Code of Cambodia, and with crimes against humanity and grave breaches of the Geneva Conventions under the Law on the Extraordinary Chambers in the Courts of Cambodia (ECCC). The crimes that took place at S-21 are well-documented and have been proved beyond reasonable doubt.

8. The Accused has agreed to the facts of most of the underlying crimes, accepted his overall responsibility, generally co-operated with the authorities, and offered his apologies to the victims and their families. These are important concessions, which should have a mitigating factor on his sentence if he is convicted.

9. However, the Accused has sought to minimise his active role in the crimes, claiming that he acted, unwillingly, on strict superior orders and found himself caught up in a regime from which he could not escape. This is in stark contrast to the totality of the evidence which demonstrates his desire and willingness to provide leadership throughout S-21's 41 month period of operation. If he is convicted, the Chamber must impose a sentence which is sufficiently severe to reflect the gravity of his crimes, the exceptionally aggravating circumstances in which they were committed, and the Accused's continued refusal to accept full responsibility.

PRELIMINARY MATTERS

INTRODUCTION

10. This Final Trial Submission ('Submission') is filed pursuant to the Trial Chamber's Direction on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions issued on 27 August 2009. Its purpose is to assist the Chamber in assessing the evidence before it, reaching its judgment, and determining the

appropriate sentence if the Accused is convicted. The Submission covers the relevant contextual facts, the crimes, the Accused's role and individual responsibility, the legal characterisation of the alleged facts, and sentencing considerations.

11. Several submissions, analyses and summaries filed by the Co-Prosecutors in this case are useful companions and reference points to this Submission. These include the Co-Prosecutors' Rule 66 Final Submission,[1] the Witness Statement Analysis,[2] and the Revised S-21 Prisoners List.[3]

12. Nearly all witness statements produced by the Co-Investigating Judges have been put before the Trial Chamber. The Witness Statement Analysis will assist the Chamber in assessing trial evidence against those statements. Of course, the analysis does not constitute evidence, but it is a useful reference tool in locating testimonial evidence relating to particular issues. The significant evidentiary value of witness statements is discussed in the ***Evidence Evaluation*** Section, and in the Co-Prosecutors' Request for the Admission of Relevant Testimonial Statements and Annotated S-21 Documents Collected During the Judicial Investigation.[4]

13. To avoid lengthy referencing in this Submission, four reference Annexes are attached:

    (a) **Annex 1** is a glossary of terms and abbreviations

    (b) **Annex 2** is a list of trial witnesses indicating the days on which they testified

    (c) **Annex 3** is a list of the witness statements which have been put before the Chamber; and

    (d) **Annex 4** contains the brief descriptions of 50 Annexes attached to the Revised S-21 Prisoner List.

    Throughout the Submission, Evidence Reference Numbers (ERN) relate to English language versions of documents for brevity. The Court's electronic document system provides a quick method for accessing all available translations for any document on the case-file.

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[1] *Rule 66 Final Submission Regarding Kaing Guek Eav alias "Duch"* : D96
[2] *Rule 92 Motion of Co-Prosecutors to Submit Analyses of Witness Statements* : E21
[3] *Co-Prosecutors' Rule 92 Motion to Disclose Analysis of the Revised S-21 Prisoner List* : E68
[4] *Co-Prosecutors' Request for the Admission of Relevant Testimonial Statements and Annotated S-21 Documents Collected During the Judicial Investigation* : E152

Annex 5 is an aerial photograph of S-21 main compound indicating Buildings **A** to **E**.[5]

BURDEN OF PROOF

14. The Co-Prosecutors bear the onus of proving the guilt of the Accused, which must be established beyond reasonable doubt.[6] In determining whether the Prosecution has met this burden with respect to each count, the Chamber has to consider whether the evidence that has been admitted is open to any reasonable interpretation other than the guilt of the Accused – if there is such a reasonable interpretation, then the Prosecution has not satisfied its burden.[7] Any ambiguity or doubt has to be resolved in favour of the Accused in accordance with the principle of *in dubio pro reo*.

15. In this case, the Defence has sought to cast doubt on a number of specific allegations against the Accused, and the Trial Chamber must therefore ask itself whether the conclusions put forward by the Defence are reasonable in light of all the evidence before the Court. In this regard, the Defence must present conclusions which, when considered against all of the evidence in the case, are sufficiently grounded on a real and tangible basis that a reasonable person would be able to reach them.

AGREED OR UNDISPUTED FACTS

16. A significant feature of this case is that the Accused agrees to, or does not dispute, the majority of the facts alleged in the Closing Order. These 238 facts[8] span a wide range of issues relating to the historical and political context, establishment and operation of S-21, implementation of CPK policy at S-21, as well as the underlying crimes committed at the prison. On the other hand, the area of disagreement between the parties concerns the Accused's intent when committing these crimes, as well as

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[5] *Co-Prosecutors' Rule 92 Submission Regarding Notification of Documents it Requests to be Put Before the Trial Chamber*: E53 with Annex A E53.1, hereinafter "Photo Book 1" at E53.1/4 (31)
[6] ECCC Internal Rule 87(1)
[7] Halilovic TJ : para 12
[8] The following summary provides a brief history of the agreement on facts in this case. On 31 January 2009, the Co-Prosecutors forwarded to the Defence extracts of the Closing Order separated into 351 individual factual allegations, seeking their agreement and/or comments : *Response of the Co-Prosecutors Regarding Agreement on Facts*, 11 February 2009 : E5/11/2, [Agreed Fact Filing]. This document was filed with the Trial Chamber on 11 February 2009. The Defence was asked to state its position in relation to each allegation as "agree", "partly agree", "disagree" or "not disputed". The Co-Prosecutors received the Defence's response on 19 March 2009 in French and on 26 March 2009 in Khmer : *Defence Position on the Facts Contained in the Closing Order*, 1 April 2009 : E5/11/6.1. All the factual allegations which the Defence agrees with, or does not dispute, were then read out in Court on 1 April 2009.

his physical participation in them. These are the main issues on which the parties remained in disagreement throughout the trial.

17. The existence of agreement on facts can limit the extent of the evidence necessary to be put before the Chamber. However, such agreement does not, by itself, constitute proof beyond a reasonable doubt. In this regard, the Co-Prosecutors submit that the factual allegations which are agreed to or not contested by the Defence are independently established by extensive evidence which is on the case file, and which has been referred to both in the Co-Prosecutors' Rule 66 Submission and the Closing Order.

18. The charges in the Closing Order arise out of thousands of individual events taking place over a period of more than three years, and require determination of numerous jurisdictional issues and contextual facts. The materials before the Chamber include transcripts of 72 days in trial, thousands of pages of documentary evidence, and photographic and video material. It is obviously impossible to provide a comprehensive analysis of all of these materials within a limited written submission. The Co-Prosecutors have therefore attempted to refer to the most reliable and persuasive evidence in this Submission, rather than providing an exhaustive analysis of all the evidence. Factual and legal arguments are, nevertheless, based on the Co-Prosecutors' view of the entirety of the evidence, including the agreed facts.

19. In light of the space limitations, where there is substantial agreement on facts, this Submission identifies it, and refers to testimonies, statements and documentary evidence which prove or further corroborate the relevant facts. Where a witness's testimony at trial or a witness statement is referred to, unless a specific reference is required, the details of the relevant document are not footnoted, but can be found in Annexes 2 and 3. Conversely, where there is disagreement between the parties on a fact or issue, a more detailed examination of the evidence is provided.

EVIDENCE EVALUATION

20. It is the Trial Chamber's primary responsibility to assess the relevance, reliability and probative value of individual pieces of evidence as they relate to the factual allegations in the Closing Order. Although this responsibility must be discharged across all factual issues in the case (whether or not they are agreed to), it is obviously

particularly important when judging the evidence on factual allegations which are in dispute.

21. In this case, the following categories of evidence are particularly significant due to their sources, relevance, and/or the circumstances of their creation: a) contemporaneous S-21 documents and related DK-era written materials; b) trial testimonies of the Accused, witnesses, experts and civil parties; and c) statements given by the Accused and witnesses before the Co-Investigating Judges.

22. S-21 documents, as well as DK-era photographs and documentation represent some of the most compelling evidence relating to the operations of S-21, and the Accused's authority and actions as the Deputy Secretary and Secretary of the prison. These documents illuminate key issues in the case, such as the intent of the Accused and his direct participation in the crimes. Many of these documents were created and / or annotated by the Accused and other DK officials in positions of authority at a time when the CPK controlled Cambodia. These individuals would have had no reason to fear prosecution before a court of law at the time. This context makes the evidence more probative on issues such as the Accused's participation and his state of mind at the time of the commission of the crimes.

23. With regard to testimonies, the Co-Prosecutors submit that multiple factors must be considered in order to arrive at an accurate determination of the probative value of the account given by each witness, especially in the case of those who appear to have committed crimes at S-21. These factors include the fact that witnesses may testify truthfully on some areas while exaggerating, being evasive, or dishonest, or simply refusing to answer questions, on other issues. This is particularly obvious when it comes to the testimonies of former guards and interrogators at S-21, and, as the Chamber will have observed, the Accused himself. The assessment of credibility of witnesses, and the Accused, must be informed both by an evaluation of their demeanour, and the truthfulness of their testimony when tested against the totality of the evidence relating to a given fact.

24. The Co-Prosecutors recommend that the Trial Chamber exercise caution when dealing with testimonies of former S-21 guards and interrogators. While some of them appeared to testify candidly on general operations of S-21, they were reluctant on specific areas in which evidence may have implicated them – a matter of which

they were repeatedly reminded by the Defence. The fear of, or remaining allegiance towards, the Accused was also apparent with a number of these witnesses. This does not make the testimonies worthless, but does require a more careful examination against the totality of the evidence, including the witnesses' prior statements.

25. In some cases, witnesses may misrepresent facts without ill-intent. The passage of a long period of time between the events and their examination before the Court can lead to witnesses having faded memories, forgetting specific details and replacing empty "spots" with beliefs which may or may not be grounded in facts. This, in the Co-Prosecutors' submission, means that each testimony must be examined on its merits, due consideration being given to the fact that a witness may give reliable evidence on one issue while being unable to recall facts, or being less than candid, on other issues.

26. Statements given by the Accused and witnesses before the Co-Investigating Judges also have significant evidentiary value. They can assist the Chamber in judging the credibility, consistency and reliability of witness accounts. Clearly, a more comprehensive record of a witness's recollection of the events is established when all their statements are considered.[9] Further, in some cases, statements given before the Co-Investigating Judges may be particularly helpful because witnesses were generally questioned by only two persons in a less formal setting, which can be more conducive to elucidating clear answers and dealing with issues comprehensively. While evidence at trial is clearly invaluable, in some cases it may not be exhaustive due to the limited allocations of time, the fact that witnesses are questioned by multiple examiners, and the fact that they may be unsettled by the formal decorum of the large trial courtroom.

27. Altogether, these three forms of evidence create layers of information which the Chamber should examine in accordance with the principle of free evaluation of evidence which underpins the criminal procedure before the ECCC.[10] If a piece of evidence or testimony is corroborated by, or consistent with, other evidence, it should obviously be deemed more credible. Probative value can also be attached to evidence or testimony which, while not directly corroborated by other evidence, is

[9] *See generally, Co-Prosecutors' Request for the Admission of Relevant Testimonial Statements and Annotated S-21 Documents Collected During the Judicial Investigation*: E152
[10] ECCC Internal Rule 87

found by the judges to be independently credible, and consistent with patterns of conduct or established facts.

FACTS

EARLY YEARS

28. The Accused was born on 17 November 1942 in Chayok Village, Kampong Chen Tbaung Subdistrict, Stung District, Kampong Thom Province, Cambodia.[11] As a student at primary school, he quickly progressed with the help of his teacher, Ke Kim Huot.[12] The Accused received a scholarship to study in Phnom Penh at *Lycée Sisowath*.[13] In 1964, he attended the *Institut de Pédagogie* to gain his teaching certificate under Chhay Kim Huor[14] (years later, both Ke Kim Huot and Chhay Kim Huor were tortured and killed at S-21 during the Accused's tenure at the prison).[15] As a teacher, the Accused was committed and disciplined in his work,[16] a trait which continued throughout his career at security centres M-13 and S-21.

29. In his youth, the Accused was attracted to communist ideals and the communist approach to issues of social injustice.[17] Three events acted as a catalyst for his decision to set aside his textbooks and focus on furthering the Marxist ideology in 1964: a failed relationship, the theft of his bicycle and the arrest of his mentor, Chhay Kim Huor.[18] The Accused went into hiding on the orders of the Party on 29 October 1967.[19] The following year, on 5 January 1968, he was sentenced to 20 years imprisonment for breaching State security. However, after being released on 18 March 1970, he soon resumed his revolutionary activities.[20]

30. As will be illustrated in the ***Accused's Criminal Role at S-21*** Section, the Accused's commitment to the extremist communist goals of the CPK defined a significant part of his life and gave him the ideological grounding on which he built his professional

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[11] Accused Statement : D7 : at ERN 00147461; Nic Dunlop, *The Lost Executioner* : E160.1 at 28-29; David Chandler, *Voices from S-21* : E3/427 at 20
[12] Nic Dunlop, *The Lost Executioner* : E160.1 at 29-30
[13] Nic Dunlop, *The Lost Executioner* : E160.1 at 29-30, 55; David Chandler, *Voices from S-21* : E3/427 at 20
[14] Nic Dunlop, *The Lost Executioner* : E160.1 at 55
[15] Nic Dunlop, *The Lost Executioner* : E160.1 at 56
[16] Sou Sath : 1 September 09 : T.34-48; Tep Sem : 1 September 09 : T.49-65; Tep Sok : 1 September 09 : T.66-84
[17] Psychological Report on Duch : B1/IV : at ERN 00211099
[18] Agreed Fact Filing : E5/11/6.1 : para 4
[19] Agreed Fact Filing : E5/11/6.1 : para 4
[20] Agreed Fact Filing : E5/11/6.1 : para 4

profile as a high level interrogation and security expert responsible for purging the CPK's most serious enemies.

M-13 SECURITY CENTRE

31. Prior to becoming the Secretary of S-21, the Accused honed his skills at the M-13 security centre both as the head of the detention camp and its chief interrogator. His time at M-13 not only gave him the requisite experience to apply later at S-21, but distinguished him in the eyes of the CPK upper echelon as a committed and effective revolutionary. He chaired M-13 for three and a half years between July 1971 and January 1975.[21] For the first two years, until mid-July 1973 he was acting under the orders of Penh Thouk, alias Vorn Vet, and for the remaining period he was under the orders of Son Sen, alias Khieu, alias Brother 89.

32. Former M-13 prisoners, Francois Bizot and Uch San, and former guards Chan Khan and Chan Voeun gave testimonial evidence relating to the Accused's role at M-13 and the nature of its operation . A report prepared by the Khmer Republic forces based on an interview with a former M-13 prisoner, Chheun Sothy, was also put before the Chamber.[22]

33. M-13 was, in nearly every way, a precursor to S-21. It was focused on implementing CPK's policy of eliminating persons deemed to be enemies of the CPK.[23] Its tasks were to receive people who were arrested, interrogate them, and "smash" them after the interrogations were completed.[24] Prisoners were sent to M-13 because they were accused of being Lon Nol's soldiers, traitors or spies, or of committing immoral or other offences within the CPK controlled areas.[25]

34. The illegal detention, torture and executions began as soon as M-13 opened, and the Accused understood at that time that his actions were criminal.[26] Originally, the

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[21] Accused Statement : D70 : at ERN 00185475; Accused : 6 April 09 : T.20; Accused Statement : D21 : at ERN 00149916. The exact date that the Accused became Secretary of M-13 in unknown as he has offered different dates. It appears that he began his tenure at the prison in late July 1971.
[22] *Written Record of Proceedings*, 20 May 2009, E1/22, p.3 : ERN 00172202-00172207
[23] Accused : 6 April 09 : T.78; Agreed Fact Filing : E5/11/6.1 : para 20
[24] Accused : 6 April 09 : T.71, T.79; Accused Statement : D87 : at ERN 00195575; Accused Statement : D63 : at ERN 00194549
[25] Chan Khan : 20 April 09 : T.91; Chan Khan : 21 April 09 : T.17
[26] Accused : 6 April 09 : T.43

prison was comprised of one centre, but the Accused later split it into two separate camps: M-13A and M-13B.[27]

35. M-13A was first located in Anlong Veng, Thmor Kup Amleang Commune, Kompong Speu Province, but was moved twice by the Accused until finally relocating to Trapaing Chrap, Thma Kup village, Amleang Subdistrict, Thpong District, Kampong Speu Province in March or April 1973.[28] M-13B was located in Stock Start, in Stock Toul Commune, Angsnoul District, Kampong Speu Province.[29]

36. Although the Accused lived and worked at M-13A, he commanded M-13B via his deputy, Ta Sum.[30] The Accused claims that he established M-13B in 1972 as a means of freeing people.[31] However the 250-300 low-level prisoners[32] sent to M-13B were never free. Instead, they were "re-educated."[33] Prisoners worked long hours throughout the day under the surveillance of armed guards,[34] and received two inadequate meals per day.[35] Little else is known about the conditions at M-13B because the Accused refused to reveal them during trial.

37. Conditions of M-13A changed as its locations changed. At M-13A, prisoners were usually packed into huts[36] or pits[37] and were shackled in groups to a metal bar.[38] The pits were prone to flooding, which resulted on one occasion in prisoners drowning.[39] Prisoners were not allowed to bathe and had to urinate into large bamboo cups.[40] To defecate, they had to squat over a 1.5 meter-wide hole full of feces.[41] Food was

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[27] Accused : 6 April 09 : T.76
[28] Accused : 7 April 09 : T.75-76
[29] Accused : 6 April 09 : T.76
[30] Accused : 6 April 09 : T.76-77; Accused : 7 April 09 : T.59-60; Chheun Sothy Statement : *Written Record of Proceedings*, 20 May 2009, E1/22, p.3 : ERN 00172205
[31] Accused : 6 April 09 : T.77; Accused Statement : D87 : at ERN 00195575
[32] Chheun Sothy Statement : *Written Record of Proceedings*, 20 May 2009, E1/22, p.3 :at ERN 00172205
[33] Accused : 6 April 09 : T.79
[34] Chheun Sothy Statement : *Written Record of Proceedings*, 20 May 2009, E1/22, p.3 :at ERN 00172205
[35] Chheun Sothy Statement : *Written Record of Proceedings*, 20 May 2009, E1/22, p.3 :at ERN 00172205
[36] Francois Bizot : 8 April 09 : T.76-77
[37] Chan Voeun : 20 April 09 : T.10; Uch San : 9 April 09 : T.61-62; Chan Khan : 20 April 09 : T.91; Accused : 9 April 09 : T.82
[38] Uch San : 9 April 09 : T.62; Chan Khan : 20 April 09 : T.94; Accused : 7 April 09 : T.3-4; Francois Bizot : 8 April 09 : T.77
[39] Chan Voeun : 20 April 09 : T.12; Chan Khan : 20 April 09 : T.97
[40] Francois Bizot : 8 April 09 : T.77; Uch San : 9 April 09 : T.98
[41] Francois Bizot : 8 April 09 : T.77

insufficient, with prisoners receiving gruel or rice twice a day.[42] Prisoners died every day from starvation, illness, torture or execution.[43]

38. The total number of prisoners that were detained and executed at M-13 is impossible to determine. The population of the prison constantly fluctuated as prisoners entered, died or were removed for execution on a daily basis. No documents from M-13 have survived[44] and each witness is only able to testify to the number of prisoners that they saw during their time at M-13. Additionally, guards at M-13 were only allowed to go to certain places in the camp, due to the Accused's command of strict secrecy, [45] making it nearly impossible for a guard to see all the prisoners.

39. Torture was commonplace at M-13.[46] Although the exact number of prisoners whom the Accused tortured personally remains unknown, [47] testimonies before the Chamber indicate that he tortured at least two prisoners.[48] One such incident is described in the ***Accused's Cruelty and Lack of Mercy*** Section.

40. Prisoners were executed in the same method that was later employed at S-21; they were forced to kneel at the edge of a large pit, then struck in the back of the neck with a hoe handle and kicked into the pit.[49] Execution locations were kept secret.[50] Numerous additional methods of operation, which the Accused later implemented at S-21, were originally used at M-13. These include various torture techniques,[51] use of interrogation houses located separately from the prison,[52] and the recruitment of children as guards.[53]

41. As with the factual allegations relating to S-21, the Accused admits responsibility for the crimes which occurred at M-13, including acts of torture and execution,[54] but steadfastly denies, or tries to minimise, his direct personal involvement. The Co-

[42] Chan Khan : 20 April 09 : T.93; Chan Voeun : 20 April 09 : T.11; Uch San : 9 April 09 : T.63; Francois Bizot : 8 April 09 : T.77-78
[43] Uch San : 9 April 09 : T.64; Chan Khan : 20 April 09 : T.94
[44] Accused : 7 April 09 : T.83
[45] Chan Khan : 20 April 09 : T.106; Chan Khan : 21 April 09 : T.24
[46] Chan Khan : 20 April 09 : T.99
[47] Accused : 7 April 09 : T.90
[48] Accused : 7 April 09 : T.90; Francois Bizot : 8 April 09 : T.70-71; Chan Voeun : 20 April 09 : T.13-14
[49] Uch San : 9 April 09 : T.70; Accused : 7 April 09 : T.26
[50] Chan Khan : 21 April 09 : T.50
[51] Accused : 7 April 09 : T.14; Accused : 16 June 09 : T.37; Saom Met : 11 August 09 : T.4
[52] Chan Khan : 21 April 09 : T.23-24
[53] Accused : 7 April 09 : T.24, 92; Accused : 9 April 09 : T.19; Chan Khan : 21 April 09 : T.33-36
[54] Accused : 6 April 09 : T.22, 24-25; Accused : 7 April 09 : T.23-24; Accused Statement : D11 : at ERN 00147525; Accused Statement : D20 : at ERN 00147603

Prosecutors submit, however, that his actions at M-13 demonstrate both his enthusiasm for the work of interrogating and "smashing" enemies, and his ruthlessness. As stated above, it was his excellent performance at M-13 which led to his appointment as Deputy Secretary and then Secretary of S-21.

ARMED CONFLICT

42. The Closing Order states that, beginning in April 1975, with the exception of several respites, there was escalating and increasingly frequent armed violence between DK and Vietnam.[55] The determination of whether or not this amounted to an armed conflict between the two countries is relevant both for the full ascertainment of the truth in this case, and also because it may affect the legal qualification of crimes committed against Vietnamese prisoners of war and civilians at S-21.

43. The parties are in agreement as to the existence of this armed conflict from 31 December 1977, and the Defence chose to defer to the "wisdom of the Chamber"[56] on the issue of the existence of the conflict prior to that date. At trial, however, it objected vehemently to detailed questioning of expert witness Nayan Chanda on this issue, an objection which the Chamber overruled.[57]

44. The expert witness expressed the opinion that Cambodia and Vietnam were "at war right from 1975,"[58] and several days later the Accused himself accepted this fact.[59] More particularly, the Accused does not dispute that at least 400 Vietnamese citizens were imprisoned at S-21[60] and that they arrived in greater numbers as the conflict with Vietnam escalated.[61] He does not dispute that the first *recorded* arrest of an individual identified as being of Vietnamese nationality occurred on 7 February 1976[62] nearly two years before the date he initially acknowledged the existence of an armed conflict with Vietnam.[63] He agrees that Vietnamese prisoners were interrogated to obtain confessions showing that Vietnam invaded Cambodia with the

[55] Closing Order : paras 17-18
[56] Agreed Fact Filing : E5/11/6.1 : para 6
[57] Francois Roux : 25 May 09 : T.95-104
[58] Nayan Chanda : 26 May 09 : T.42
[59] Accused : 9 June 09 : T.75
[60] Agreed Fact Filing : E5/11/6.1 : para 108(a)
[61] Agreed Fact Filing : E5/11/6.1 : para 108(c)
[62] Agreed Fact Filing : E5/11/6.1 : para 108(b)
[63] Agreed Fact Filing : E5/11/6.1 : para 28

intent of annexing it.[64] The Accused also acknowledges his awareness of two of the locations in which the conflict originally took place, namely in the far southeast of Mondulkiri and along the Brévié Line around the island of Koh Tral (Phu-Qhoc).[65]

45. The Co-Prosecutors submit that the opinion of expert witness Nayan Chanda is highly reliable on the issue of the existence of an armed conflict between Cambodia and Vietnam from 1975 to 1979. Chanda's direct experiences as a journalist reporting extensively on the conflict and a professional specialising in South East Asian relations, particularly relations between Vietnam and DK, make him uniquely qualified to enlighten the Court on this issue.[66] The opinion he expressed at trial is consistent with the documentary evidence before the Chamber.

OVERVIEW

46. From April 1975 until January 1979, the armed forces of the two countries engaged each other in direct combat and carried out attacks, counter-attacks and cross-border incursions, taking turns in capturing each other's territory. The conflict had varying levels of intensity, which ultimately increased from 1976, leading to a full scale invasion of Cambodia by the Vietnamese forces in December 1978.[67]

47. Chanda testified that while numerous media and public sources reported the existence of the conflict, it was kept secret by both sides until 31 December 1977[68] when DK officially severed its relations with Vietnam, citing the latter's occupation of parts of Cambodia.[69]

48. The causes of the armed conflict are both historical and complex, but are rooted in large part in territorial claims between the two countries. In 1975, the Khmer Rouge

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[64] Agreed Fact Filing : E5/11/6.1 : para 209
[65] Agreed Fact Filing : E5/11/6.1 : para 108(d)
[66] Nayan Chanda spent almost 30 years working as a correspondent and editor for the *Far Eastern Economic Review*, the region's most influential newspaper. As a correspondent he travelled extensively throughout Vietnam, Laos and Cambodia from the mid to late 1970s. He authored *Brother Enemy: The War After the War*, a political history of South East Asia post 1975. Additionally, he has conducted one-on-one interviews with Ieng Sary, (then) Prince Norodom Sihanouk and several senior officials from Vietnam, including the Prime Minister and Foreign Minister, during the relevant periods. Chanda's career includes significant professional achievements, such as being a senior member of the Carnegie Endowment for International Peace, and working as publisher of the Asian Wall Street Journal Weekly. He currently holds the position of Director of Publications at the Yale Centre for the Study of Globalization. Nayan Chanda : 25 May 09 : T.5, 7-8, 77-78
[67] Nayan Chanda : 25 May 09 : T.71
[68] Nayan Chanda : 25 May 09 : T.71
[69] Nayan Chanda : 25 May 09 : T.49-50; David Chandler, *Voices from S-21* : E3/427 at 61; David Chandler : 6 August 09 : T.17-18

were especially concerned with what they perceived as Vietnam's expansionist policies and a desire to create an Indochinese federation, which would undermine Cambodia's sovereignty.[70] Other sources of the tensions between the two communist regimes in 1975 were:

(a) A territorial dispute arising from the drawing of the Brevié Line in 1939, which delimited the maritime border between Cambodia and Vietnam and, in DK regime's view, unjustly favoured Vietnam.[71]

(b) Vietnam's participation in the negotiations of the Geneva Agreements in 1954 from which the communist faction which later formed the CPK was excluded. The negotiations ended the First Indochina War and returned full sovereignty to Cambodia, recognising the regime of Norodom Sihanouk and effectively sidelining Cambodia's communist movement.[72]

(c) Vietnam's signing of a peace treaty with the United States of America in 1973, which, in the eyes of the Khmer Rouge, freed up the American Air Force to inflict massive bombardments on Cambodia.[73]

BETWEEN 17 APRIL 1975 AND 31 DECEMBER 1977

49. The armed conflict between Cambodian and Vietnamese forces[74] began in April 1975, with skirmishes when the Khmer Rouge attempted to seise the Vietnamese islands of Phu-Quoc and Tho Chu.[75] At that time, North Vietnam had numerous troops (at least 20,000) and supply bases in Cambodia, which led to the Khmer Rouge banning such military bases.[76]

50. On 4 May 1975, the DK armed forces attacked two major Vietnamese islands, Koh Tral (Phu-Quoc) and Krachark Ses which DK claimed were part of Cambodia.[77] In reprisal for these attacks, the Vietnamese captured the Cambodian island of Puolo

[70] Nayan Chanda : 25 May 09 : T.27
[71] Nayan Chanda : 25 May 09 : T.82
[72] Nayan Chanda : 26 May 09 : T.13
[73] Nayan Chanda : 25 May 09 : T.55
[74] Nayan Chanda : 26 May 09 : T.42; The Times, *Vietnam Cambodia in Fierce Clash*, 14 June 1975 : E61.1/27
[75] Nayan Chanda, *Brother Enemy: the War after the War* : E3/193 at 13
[76] NY Times, *Cambodia Bars Foreign Bases: Move Believed Aimed at Hanoi and Khmer Upheaval*, 29 April 1975 : E61.1/24
[77] Nayan Chanda : 25 May 09 : T.63

Wai on 14 June 1975. Around 80 people were killed during this attack.[78] The Vietnamese maintained control over the island for a few months before returning it to the DK.[79] In June 1975, skirmishes between the two armed forces continued in the Parrot's Beak area in Svay Rieng Province.[80] Fighting at the border continued in December 1975 between the armies, resulting in a series of border skirmishes in the highland provinces of Kontum and Daklak, south Vietnam.[81]

51. Despite DK's attempt to keep the armed engagements with Vietnam a secret, numerous DK-era documents demonstrate the ceaseless armed encounters between DK forces and their Vietnamese counterparts. For example, five meeting minutes from the CPK Standing Committee, dated between 9 January 1976 and 14 May 1976, discuss numerous armed engagements with Vietnamese forces.[82] The meeting minutes from 11 March 1976 recorded that the Committee resolved to militarily confront the Vietnamese encroachments into Ratanakiri, Takeo and Kratie Provinces.[83]

52. DK military reports and telegrams from this time period further confirm the protracted violence between the armed forces of DK and Vietnam. On 23 January 1976, a DK military report described an attack by Vietnamese forces near Pou Nhak Mountain, O Vay.[84] Further incidents and Vietnamese encroachments on DK territory were reported in February 1976,[85] especially in Ratanakiri Province, Kaam Samna in Kandal Province,[86] and Chan Trea District in Svay Rieng Province.[87] At this time, several grenade attacks were launched in Ou Reang, Mondulkiri Province.[88] One month earlier, in January 1976,[89] negotiations regarding these

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[78] Nayan Chanda : 25 May 09 : T.59
[79] Nayan Chanda : 25 May 09 : T.9
[80] NY Times, *Vietnamese forces Reported in Clash with Cambodia,* 22 June 1975 : E61.1/28; Oswald Johnston, *Cambodian and Vietnamese Said to Battle Over Islands,* 14 June 1975 : E61.1/25; Fact on File World News Digest, *Vietnamese, Thai clashes,* 26 July 1975 : E61.1/30
[81] Nayan Chanda : 25 May 09 : T.43
[82] Rule 92 Submission, Notification of Armed Conflict Documents to be put Before the Trial Chamber Pursuant to Rule 87 (2), 29 April 09 with Annex A [hereinafter, "Armed Conflict Submission—Annex A"] E61.1/250-254
[83] CPK Standing Committee Meeting Minutes, *Record of Meeting of the Standing Committee*, 11 March 1976 : E61.1/252
[84] DK Military Telegram, *Telegram via Kolaing, To Uncle 89*, 23 February 1976 : E61.1/324
[85] DK Government Telegram, *To Respected Brother 89*, 8 February 1976 : E61.1/307
[86] DK Government Meeting Minutes, *Minutes, Meeting of Standing Committee, evening of 22 February 1976*, 22 February 1976 : E61.1/251
[87] DK Government Report, *Report from Sector 23 to East Zone*, 20 February 1976 : E61.1/ 277
[88] DK Military Telegram, *To Beloved Brother 89*, 29 February 1976 : E 61.1/327
[89] CPK Standing Committee *Telegram 78 - To Brother Mo870 and Brother, Vi,* 26 January 1976 : E61.1/303

border incidents were held between CPK and Vietnamese officials, focusing on the Saob valley (Ratanakiri Province), O Vay and Route 19 (Kratie Province).

53. In response to the increasing violence, high-level DK officials issued instructions relating to military matters such as gunpowder production, training, ordnance transfer from Vietnam, and the establishment of an airfield, ordnance factories and a military hospital.[90] A DK military report, dated 9 March 1976, describes the existence of a Vietnamese front line consisting of 240 troops inside Cambodian territory and outlines its plans to launch attacks against them.[91] In total, 93 reports and telegrams from the Standing Committee, the DK Government and the DK Military[92] demonstrate the scale and intensity of the ongoing armed conflict between Vietnam and DK, of which almost 30 were published in 1975 and 1976.

54. Starting in the spring of 1975, numerous international media outlets reported battles in this ongoing conflict. At least 142 such media reports and articles[93] were published between April 1975 and December 1977.

55. In a speech given in December 1976, DK Foreign Affairs Minister Ieng Sary alluded that the Vietnamese aggression against Cambodia would be resisted.[94] During the conflict, the DK government published propaganda against the Vietnamese people as a whole, describing them as aggressive and enemies of the DK.[95]

56. From the beginning of 1977, the armed conflict escalated and relations between the two countries deteriorated.[96] In April 1977, the DK mounted attacks on a string of villages in the Mekong delta in Vietnam, including Tin Bienh township. During his visit to the area one or two days after the attacks, Nayan Chanda witnessed scores of dead bodies and other signs of a horrific attack.[97] This was followed by another major DK attack on An Phu village in Tay Ninh Province on 24 September 1977.[98] When he visited a few months after the hostilities, Chanda described that the village

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[90] DK Government Telegram, *Minutes, Meeting of Standing Committee, evening of 22 February 1976*, 22 February 1976 : E61.1/251
[91] Military Report, *To beloved Brother 89*, 9 March 1976 : E61.1/260
[92] Armed Conflict Submission - Annex A : E61.1
[93] Armed Conflict Submission - Annex A : E61.1
[94] Nayan Chanda : 25 May 09 : T.110
[95] Nayan Chanda : 25 May 09 : T.34-35, 110
[96] Nayan Chanda : 25 May 09 : T.13
[97] Nayan Chanda : 25 May 09 : T.12
[98] Nayan Chanda : 25 May 09 : T.15-16, 46

looked like it "had been hit by a storm."[99] These attacks by the DK military were followed by Vietnamese attacks on the Cambodian territory. The first Vietnamese incursion in October 1977 went 15 miles into Svay Rieng Province.[100] This attack was followed by a series of further attacks along the border with two principal prongs heading towards Phnom Penh, starting in late 1977 and continuing into 1978.[101]

57. From November and December 1977, the conflict reached a new level in terms of both intensity and sophistication of weapons used. Intelligence sources indicated that at some time in November, the Cambodian forces launched a "major attack" into Vietnam's Tay Ninh Province,[102] leaving an estimated 2,000 civilians and soldiers dead or wounded.[103] In early December, Vietnam responded with a retaliatory strike into Svay Rieng Province at the Parrot's Beak,[104] employing heavy armour and rolling back four divisions of the Cambodian border army.[105] By the second half of December, Vietnamese troops fully occupied the area to a point just short of Svay Rieng, the provincial capital.[106] On 22 December 1977, an American-built plane was shot down over Cambodian territory.[107] American jets of all varieties that the Vietnamese had captured in 1975 were now being regularly deployed against the Cambodians.[108]

BETWEEN 31 DECEMBER 1977 AND 6 JANUARY 1979

58. On 31 December 1977, the DK Ministry of Foreign Affairs publicly announced a break of diplomatic relations with Vietnam due to what it described as Vietnam's acts of aggression and invasion, and expelled Vietnamese diplomatic and embassy

[99] Nayan Chanda : 25 May 09 : T.15-16
[100] Nayan Chanda : 25 May 09 : T.19, 106
[101] Nayan Chanda : 25 May 09 : T.20
[102] NY Times, *Raids from Cambodia are Worrying Thais*, 23 December 1977 : E61.1/45
[103] NY Times, *Cambodia Cuts Ties with Vietnam*, 31 December 1977 : E61.1/52
[104] NY Times, *Raids from Cambodia are Worrying Thais*, 23 December 1977 : E61.1/45
[105] LA Times, *Cambodians Counterattack into Vietnam*, 16 January 1978 : E61.1/82
[106] NY Times, *Raids from Cambodia are Worrying Thais*, 23 December 1977 : E61.1/45
[107] NY Times, *Raids from Cambodia are Worrying Thais*, 23 December 1977 : E61.1/45
[108] NY Times, *Vietnamese Said to Use Warplanes in Battles Along Cambodia Border*, 25 December 1977 : E61.1/46

personnel.[109] The existence of a large scale armed conflict from at least this date, if not earlier, is widely accepted amongst academics and experts.[110]

59. Following a withdrawal of Vietnamese forces from Svay Rieng in January 1978, the CPK formally declared victory over Vietnam and in a speech delivered shortly thereafter, Pol Pot called for an all-out war against Vietnam.[111] By February 1978, the Vietnamese had already made plans to overthrow the DK government, and further fighting between the two countries followed in March and May.[112] In June, the Vietnamese forces started bombing Cambodian territory.[113] The DK government then launched attacks on Vietnam on 20 and 21 December 1978. This led the Vietnamese authorities to bring forward their planned invasion date of Cambodia to 23 December 1978, leading to the capture of Phnom Penh on 7 January 1979.[114]

60. A total of 274 media reports published between January 1978 and January 1979 detail the intense fighting between Vietnam and DK.[115] Hundreds of DK government and military reports and telegrams from the period highlight the large scale of the conflict and the constant battles being waged.[116]

61. Despite periods of respite, the clashes and fighting between the forces of DK and Vietnam from April 1975 until at least 7 January 1979 amounted to an international armed conflict as a matter of international law. This conclusion arises from the engagement of the armed forces and from the frequency, longevity, intensity, and severity of these clashes. An analysis of the applicable legal criteria is provided in the ***Grave Breaches of the Geneva Conventions*** Section.

CPK POLICIES

62. The Accused has agreed to or not disputed many factual allegations in the Closing Order which relate to the policies implemented by the CPK during the DK period.[117] These are summarised in **paragraphs 63 to 66.**

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[109] DK Ministry of Foreign Affairs, *Declaration du Ministere des Affaires Etrangeres du Kampuchea Democratique,* 31 December 1977 : E61.1/264
[110] Nayan Chanda : 26 May 09 : T.42; David Chandler, *Voices from S-21* : E3/427 at 1
[111] David Chandler, *Voices from S-21* : E3/427 at 71
[112] David Chandler, *Voices from S-21* : E3/427 at 72
[113] Nayan Chanda : 25 May 09 : T.28-29
[114] Nayan Chanda : 25 May 09 : T.48
[115] *See* Armed Conflict Submission—Annex A : E61.1
[116] *See* Armed Conflict Submission—Annex A : E61.1
[117] Agreed Fact Filing : E5/11/6.1 : paras 10-27, 62-66

63. After defeating the armed forces of the Khmer Republic and assuming power in April 1975, the CPK exercised effective authority over Cambodia, wielding control of the country through the Revolutionary Army of Kampuchea (RAK), CPK administrative bodies and DK State organizations. Although the 1976 Constitution gave the CPK Central Committee wide powers, in practice a sub-committee of the Central Committee known as the Standing Committee, also known as "Angkar," the "organisation," or the "Party Centre," acted as the highest and the most authoritative unit in DK. By a decision dated 9 October 1975 the Standing Committee granted Pol Pot general authority over the military and appointed Son Sen the head of the General Staff, placing him in charge of security.

64. The CPK pursued a policy of completely disintegrating the economic, political and judicial structures of the Khmer Republic in order to create a new revolutionary state. Until the end of the regime, this program was implemented by eliminating all enemies – including officials and supporters of the former regime – and subjecting citizens to forced labour in agricultural production cooperatives.

65. An important feature of CPK rule was the use of extra-judicial killings and detention. The CPK destroyed the legal and judicial structures of the Khmer Republic, which were not replaced despite provisions to do so in the January 1976 Constitution. Rather, it established re-education, interrogation and security centres where those accused of offences against the CPK, former Khmer Republic officials (and others linked to the former Republic's social class foundation) and others perceived as class enemies were detained and executed. The policy of killing enemies in this manner had been institutionalized prior to 17 April 1975 at M-13 and other security institutions. In February 1975, the CPK had announced its intention to summarily execute seven high-level Khmer Republic officials upon coming to power, and warned lower level personnel that those who did not defect would be subjected to similar treatment. There was no judicial recourse for captured enemy combatants or civilians, and like all CPK prisoners, they were subjected to the totally arbitrary application of punishment.

66. Another important feature of CPK rule was the establishment of Party-controlled agricultural production cooperatives aimed at increasing agricultural production. After 17 April 1975, civilians residing in Phnom Penh and other Khmer Republic

strongholds were forcibly transferred to the countryside. Once there, CPK policy called for the transformation of these "new people" into peasants, who, alongside "base" peasants from areas which had been under CPK control during the Khmer Republic period, were forced to labour under extremely difficult conditions.

67. Expert witnesses Craig Etcheson and David Chandler gave detailed testimonies in relation to the above facts.[118] Both experts are highly qualified scholars in their respective areas of specialisation. Craig Etcheson is an expert on the political and administrative structure of DK who has been actively researching Cambodia for over 30 years. An authority on South East Asia and genocide, he has published four significant works on DK.[119] Etcheson has held positions at the University of Southern California, Yale University, George Washington University and the School for International Studies at Johns Hopkins University.[120]

68. David Chandler is generally regarded as one of the foremost academic experts on Cambodian history, on DK generally, and S-21 in particular.[121] He has published numerous works on DK, including *Voices from S-21*, a history of S-21, which is the product of four years of extensive research, including a comprehensive review of S-21's archives, as well as interviews with S-21 staff and the survivor Vann Nath.[122] As the Defence has pointed out, his testimony was "capital for the ascertainment of the truth."[123]

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[118] Craig Etcheson, *Written Record of Analysis* : E3/32 at paras 24-30 on security, at 31-35 on economics; Craig Etcheson : 18 May : T.86 on security; Craig Etcheson : 21 May : T.44-45 on second round forced movement to the Northwestern Zone; David Chandler, *Voices from S-21* : E3/427 at 41-45; David Chandler : 6 Aug : T.22 on security, T.31-32 on biographies and their uses

[119] *The Rise and Demise of Democratic Kampuchea* (1984), *Reconciliation in Cambodia: Theory and Practice* (2004), *After the Killing Fields: Lessons from the Cambodian Genocide* (2005) and "*Overview of Hierarchy of Democratic Kampuchea*" (2007). The latter work is based on an extensive review sources including: minutes of the DK Standing Committee; the RAK and the Council of Ministers; the journals *Revolutionary Flag* and *Revolutionary Youth*; media reports; academic publications; interviews with relevant parties; and documents from S-21, including confessions, prisoners lists and notebooks.

[120] Craig Etcheson : 18 May 09 : T.62-65

[121] Craig Etcheson : 20 May 09 : T.47; Statement by Roux describing Chandler while discussing Etcheson; Chandler is a professor of history emeritus at Monash University, Melbourne Australia, and has served at that school for 25 years. The CPK dominated his academic research from 1976 to 1998.

[122] David Chandler : 6 Aug 09 : T.2-5

[123] David Chandler : 6 Aug 09 : T.104, Statement by Roux

DK AUTHORITY STRUCTURE

69. Expert witness Craig Etcheson testified to the authority structure of the DK regime and has submitted an expert report with a total of 148 supporting documents.[124] The essence of his testimony is as follows. The CPK controlled Cambodia throughout the DK period. It exercised its authority and control using three channels: the CPK administrative bodies, the RAK, and state organisations. During the DK-era, the country was divided geographically into zones.[125] These zones were subdivided into units known as sectors, which were in turn divided into districts. A district was composed of several communes or sub-districts."[126] CPK administrative units were established at each echelon of this hierarchy throughout the territory of DK.[127]

70. Communication in DK was generally organised in a strict vertical fashion, so that, for example, leaders of sectors in different zones were not permitted to communicate with one another but were required to route their communications up through their own zone leadership to the Party Centre, which acted as a central communications node.[128] The CPK ruled Cambodia in a strict hierarchical fashion.[129] There were no elections and representatives were chosen by the upper echelon.[130] The leaders of the CPK placed a high value on secrecy, making confidentiality a State policy to the extent that for nearly two and a half years after it seised power, the Party's leaders did not publicly acknowledge that the Party even existed.[131]

71. Etcheson confirmed the agreed fact that, although the Central Committee of the CPK was theoretically the most authoritative organ of DK,[132] in practice, its Standing Committee acted as the highest authority within the CPK and in DK. At the outset of the DK regime, the Standing Committee consisted of Pol Pot as Secretary, Nuon

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[124] Craig Etcheson, *Written Record of Analysis* : E3/32. All facts described herein under DK Authority Structure are thoroughly documented in the Written Record of Analysis and its accompanying supporting documents

[125] After 17 April 1975, the Northern Zone was renamed as the Central Zone, and a new Northern Zone was created out of Sectors 103 and 106, bringing the total number of Zones to seven

[126] Over the course of the DK regime, communes (or sub-districts) were reorganized into an administrative entity known as cooperatives

[127] Craig Etcheson, *Written Record of Analysis* : E3/32

[128] Craig Etcheson : 21 May 09 : T.51

[129] Craig Etcheson : 18 May 09 : T.89

[130] Craig Etcheson : 19 May 09 : T.47

[131] Craig Etcheson : 19 May 09 : T.52

[132] Craig Etcheson : 18 May 09 : T.67; CPK Legal Document, Communist Party of Kampuchea Statute : E3/28 :

Chea as Deputy Secretary, and Sao Phim, Ta Mok, Vorn Vet, Ros Nhim and Ieng Sary as full members. Kong Sophal and Son Sen were candidate members.[133]

72. The Standing Committee "devised policy for all sectors and organisational units of Democratic Kampuchea and monitored the implementation of that policy throughout the country."[134] Once the Standing Committee had decided policy for security, economic and social matters, and had fashioned that policy into "lines," it would oversee the implementation of the Party's lines throughout the country, by: a) giving instructions to all zone, sector and municipal organizations and to the Party organs; b) taking responsibility for various nationwide departments and administering and deploying cadre and Party members within the Party as a whole; c) maintaining a clear and constant grasp on cadre's and Party members' biographies and political, ideological and organizational stances; and d) constantly indoctrinating and educating the members and cadre in terms of politics, ideology and organization.[135]

73. A 30 March 1976 decision which was nominally issued on behalf of the Central Committee authorized four levels of authorities within DK to order the "smashing" of enemies.[136]

CRIMES AT S-21 SECURITY CENTRE

ESTABLISHMENT AND LOCATION

74. The facts discussed in this Section were agreed to or not disputed by the Accused, [137] and additional relevant evidence which has been put before the Chamber is referred to further below.

75. On 15 August 1975, Son Sen convened a meeting with the Accused and In Lorn, alias Nat, of Division 703 at the Phnom Penh train station to plan the establishment of S-21. He appointed Nat Secretary of S-21 and the Accused Deputy Secretary in charge of the Interrogation Unit.

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[133] Craig Etcheson : 18 May 09 : T.70. The composition of the Standing Committee evolved over the course of the DK regime as Vorn Vet, Sao Phim, Ros Nhim and Kong Sophal were purged, while Son Sen was promoted to a full member.
[134] Craig Etcheson : 18 May 09 : T.80
[135] Craig Etcheson : 18 May 2009 : T.67-69, quoting Article 23 of the Communist Party of Kampuchea Statute: E3/28
[136] Central Committee Directive, Decision of the Central Committee Regarding a Number of Matters : E3/13. This document has been attributed to the Standing Committee; Craig Etcheson : 27 May 09 : T.55-56, 63-64
[137] Agreed Fact Filing : E5/11/6.1 : paras 29-57

76. The centre was fully functional by October 1975 and maintained continuous operations until the Vietnamese invasion of Phnom Penh on 7 January 1979. Over the course of its existence, S-21 was in direct communication with the Standing Committee.

77. In March 1976, Nat was reassigned to the RAK General Staff and the Accused was appointed Secretary of S-21, a position for which he was better suited than his predecessor due to his experience at M-13. In his new role as Secretary, the Accused was ultimately responsible for S-21. He organised the prison hierarchically, implementing a reporting structure that ensured that all orders were carried out immediately and precisely. He was feared by all at S-21.

78. The S-21 Committee was composed of the Accused, Khim Vat, alias Hor (whom the Accused confirmed as his Deputy) and Nun Huy, alias Huy Sre, the head of S-24. The initial staff of S-21 were initially composed of members of Division 703 and the Accused's most trusted subordinates at M-13, whom the Accused brought to Phnom Penh. The Accused also recruited additional staff, including children and adolescents, whom he considered easy to indoctrinate.

79. Under the Accused's authority, S-21 was divided into a number of units: the defence section was headed by Khim Vat, alias Hor; the interrogation section remained under the Accused's direct control, but was generally managed by Mam Nai and Pon; the documentation unit was led by Suos Thy, who reported directly to Hor; the "special unit," which was tasked with processing new arrivals and executing prisoners was headed by Him Huy. The Accused has stated that Peng was the first person in charge of this unit.[138] There were various other units responsible for photography, medicine, cooking, and logistics as well as units situated at the execution site at Choeng Ek and the re-education and reform farm at Prey Sar, also known as S-24. The Accused's management of S-21 is dealt with further in the ***Accused's Criminal Role at S-21*** Section. At trial, the Accused testified that under his chairmanship, the S-21 Committee supervised the various units of S-21 and S-24 and issued orders to be carried out by the various units.[139]

[138] Accused : 27 April 09 : T.22
[139] Accused : 17 June 09 : T. 21-22

80. The prison moved between two physical locations during its first year of existence. It was first located in Boeng Keng Kang 3 subdistrict, Chamkar Mon District, Phnom Penh but was moved to the National Police Headquarters on Street 51 in November 1975, before moving back to its original location in January 1976. In April 1976, after the Accused had assumed control of S-21, the facility was moved to its final location at the *Lycée Pohnea Yat*, known today as Tuol Sleng Genocide Museum which sits between streets 113, 131, 320 and 350. From this point, the former school site became the prison's main high-security compound.

81. Within the main compound, the central building, named building **E**, was a processing centre where prisoners were received, registered and photographed. It also contained a room dedicated to creating paintings and sculptures glorifying the DK regime. The other buildings, referred to as **A, B, C and D**, housed prisoners. Buildings **B, C,** and **D** consisted of mass detention cells and/or small cells made of brick or wood, whereas Building **A** and houses to the south of the compound functioned as the "special prison" for important prisoners. The main compound and the "special prison" were the most secure and secretive parts of the entire complex, surrounded by fences and guarded by armed soldiers on the interior and exterior.

82. In addition to the five buildings located within the walls of the main compound, the prison used a number of buildings and houses beyond its walls. In fact, S-21 had exclusive control of a large residential area surrounding the main compound. This area contained interrogation houses, execution sites, mass graves, mess halls, a medical centre, staff residences, houses and offices of the Accused, and a reception hall for prisoners. These buildings were located within a second outer perimeter also protected by armed guards.

83. Choeng Ek, located in Kandal Province, approximately 15 km southwest of Phnom Penh, was established by the Accused between 1976 and May 1977 as S-21's primary execution site, partly to avoid the risk of an epidemic at the main compound. The new execution site consisted of a wooden house where prisoners were held while awaiting execution, and a large area containing pits where executions and burials occurred. Some individuals were executed and buried at the main compound in Phnom Penh even after Choeng Ek was fully operational.

84. S-24 served as S-21's re-education and reform centre, where cadre were sent to farm rice for S-21 and its branches. The facility was located outside Phnom Penh near Choeng Ek in Wat Kdol, Dangkao District of Kandal Province, and was likely larger than witness accounts, which describe it encompassing the area between the Prey Sar prison and Chek Village.

85. Evidence of the above facts, obtained both at the fall of the DK regime and during the course of these proceedings, creates a complete picture which is confirmed by the agreement of the Accused and his statements and testimony. Detailed evidence relating to the establishment, structure and physical location of S-21 was provided by David Chandler.[140] Location, layout and physical characteristics of S-21, Choeng Ek and Prey Sar are also illustrated by photographs and maps put before the Chamber.[141]

IMPORTANCE

86. As noted in the ***CPK Policies*** Section, with security centres operating throughout the country, the security apparatus lay at the heart of CPK's policy of purging its actual and perceived enemies. S-21 was the most important centre in this apparatus. While evidence does not indicate that it had supervisory functions over other security centres, it clearly sat at the apex of the security apparatus and was unique[142] in several respects:

(a) It was the only security centre in the country which had a direct working relationship with the CPK Standing Committee, to which it directly provided advice and recommendations on purges of enemies.[143]

(b) It was the only security centre entrusted with the arrest, interrogation and execution of leading cadre within the CPK, DK ministries and administrative bodies, the RAK, and zone, sector and district offices.[144] In fact, it also functioned as a tool for the purging of the security apparatus itself.[145]

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[140] David Chandler, *Voices from S-21* : E3/427 at 4, 14-40; David Chandler : 6 August 09 : T.44-45
[141] Photo Book 1
[142] Accused Statement : D21 : at ERN 00149907-00149919
[143] Accused Statement : D16 : at ERN 00147583; Craig Etcheson : 19 May 09 : T.46; Craig Etcheson : 28 May 09 : T.46; Meng-Try Ea, *The Chain of Terror- The Khmer Rouge Southwest Zone Security Syste*m : E3/48 at 16; David Chandler, *Voices from S-21* : E3/427 at 15
[144] Craig Etcheson : 19 May 09 : T.45
[145] Chiefs of security offices at the District, Sector and Zone echelons in the Northeastern, Eastern, Southwestern, Western, Northwestern, Northern and Central Zones were executed at S-21: Accused Statement : E3/41 : at ERN 00186221-00186223

(c) As the only security centre in DK whose area of operations was nation-wide in scope and penetrated every echelon of the regime, it gave advice to, and coordinated extensive purges with, military and administrative authorities throughout Cambodia.[146] It received prisoners from virtually every Ministry in the DK including the Ministries of Public Works, Commerce, Energy,[147] Defence,[148] Foreign Affairs,[149] and Social Action.[150]

(d) It had access to extensive resources and developed the most sophisticated procedures for the processing and interrogation of prisoners of any such centre in DK.[151] S-21 was also the largest DK security office in terms of staff.[152]

87. These unique features of S-21 reflect the importance ascribed to it by the regime. Essentially, the centre was designed to focus on enemies who were of the greatest concern and represented, in the eyes of the CPK, the most serious threat to its survival.[153] Consistent with DK regime's modus operandi, S-21 operated with the highest degree of secrecy, so that even the guards within the main compound were never allowed to go beyond its outer perimeter.[154] Secrecy in fact became an additional reason for killing every individual who was imprisoned at S-21, as the requirement to keep the operation secret was assiduously enforced.[155]

88. Expert witness Raoul Marc Jennar in effect disputed the conclusions put forward by Craig Etcheson and David Chandler regarding S-21's importance in the CPK hierarchy in comparison to the other security centres. The Co-Prosecutors submit that the opinions of Etcheson and Chandler are clearly to be preferred given the qualifications of these two experts and their more detailed knowledge of the relevant facts. While Jennar is a distinguished researcher who has written three books on contemporary political affairs in Cambodia, in his own words his research on Cambodia has focused "a great deal more on the period following '79 than on the

[146] Craig Etcheson : 18 May 09 : T.74-75; Craig Etcheson : 19 May 09 : T.43; Craig Etcheson : 28 May 09 : T.46
[147] Craig Etcheson : 19 May 09 : T.9; Craig Etcheson, *Written Record of Analysis* : E3/32 at para 143
[148] Craig Etcheson : 19 May 09 : T.6
[149] Craig Etcheson, *Written Record of Analysis* : E3/32 at paras 139-140
[150] Craig Etcheson, *Written Record of Analysis* : E3/32 at para 138; S-21 Prisoners from DK Government Offices : E68.10
[151] David Chandler : 6 August 09 : T.13-14; Craig Etcheson : 28 May 09 : T.5-7, 91-92
[152] Craig Etcheson : 28 May 09 : T.40-41
[153] Craig Etcheson : 19 May 09 : T.45; Accused Statement : D/72 : at ERN 00204283
[154] Lach Mean : 4 August 09 : T.46, 54
[155] David Chandler : 6 August 09 : T.28

'75-'79 period."[156] He has not published any works related to S-21's role within the security apparatus of DK, and seems to have limited knowledge in this key area.[157] For example, during his testimony Jennar appeared to be unaware that prisoners were routinely sent from lower echelon security offices to S-21.[158] Jennar's expert report[159] is unsourced.[160] When asked about the materials upon which he relied, Jennar could only direct the Court to the DC-Cam archive.[161] This lack of specific evidentiary references and limited knowledge of the underlying facts necessarily limits the strength of Jennar's expert opinion on the issues of the operation and uniqueness of S-21.

IMPLEMENTATION AND DISSEMINATION OF "SMASHING POLICY"

89. **Paragraphs 90 to 94** set out the factual allegations in the Closing Order which the Accused has agreed to or not disputed, and which relate to the implementation of CPK's policy of "smashing" its enemies.[162]

90. S-21 was an integral component of the politico-military structure of the CPK, and the Accused, as its Secretary, was charged with implementing the official policy of "smashing" all enemies. S-21 was essentially linked to the Standing Committee, and the Accused reported directly to Son Sen and Nuon Chea.

91. The definition of the enemy changed during the DK period, depending on domestic conditions and foreign relations. From late 1975 to early 1976, S-21's role was to eliminate officials and supporters of the former Lon Nol government. After 30 March 1976, having eliminated the vestiges of the previous regime, S-21 shifted its attention to internal purges of CPK cadres.

92. This change in policy, which came from the Party Centre was designed to maintain "revolutionary vigilance," "strengthen socialist democracy" and prevent internal enemies from destroying the revolution. Every prisoner arriving at S-21 faced a death sentence and was destined to be "smashed." This task demanded absolute

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[156] Raoul Marc Jennar : 14 September 09 : T.91
[157] Raoul Marc Jennar : 14 September 09 : T.92
[158] Raoul Marc Jennar : 14 September 09 : T.95-96; Vann Nath : 29 June 09 : T.13-21; Ly Hor : 6 July 09 : T.9-14
[159] Raoul Marc Jennar : Expert Report : D82
[160] Raoul Marc Jennar : 14 September 09 : T.93
[161] Raoul Marc Jennar : 14 September 09 : T.93
[162] Agreed Fact Filing : E5/11/6.1 : paras 58-84

secrecy and security, and therefore (as noted in the ***Importance*** Section above) S-21 executed even those imprisoned by mistake.

93. Cadres were identified for arrest and interrogation at S-21 through the confessions of other prisoners, a procedure that usually implicated the colleagues and families of inmates. This ripple effect broadened the geographic scope of S-21 to the countryside. By January 1979, almost every zone, ministry and military unit was affected by these purges and had its members dispatched to S-21.

94. The purges extended to those in the revolutionary ranks accused of being influenced by or under the control of Vietnam through associations with the Vietnamese Communist Party. The number of Vietnamese soldiers and civilians imprisoned at S-21 also grew throughout the DK period.

95. **Paragraphs 96 and 97** contain a summary of factual allegations relating to the dissemination of the CPK policies at S-21 which are agreed to or not disputed by the Accused.[163]

96. S-21 cadres were well versed in CPK policy. The Accused and his subordinates attended training and political education sessions, including: a) sessions convened by Son Sen to discuss the need to purge and "smash" enemies, and b) general political and agricultural production planning meetings organised by the Party Centre. The general policies regarding extra-judicial killings were reinforced at annual meetings and smaller meetings of S-21 sub-units. S-21 staff were also informed of the CPK policies through *Revolutionary Flag* and *Revolutionary Youth* magazines which made cadres aware of their role in implementing the policies.

97. The Accused specifically facilitated the dissemination of CPK policy by leading training sessions at S-21. He also served as the sole conduit for the transmission of information regarding security matters between the Party Centre and S-21. S-21 staff also produced official DK propaganda by collecting confessions which were presented as facts in the *Revolutionary Flag* and *Revolutionary Youth*. Recordings of confessions were disseminated and read or played at meetings outside S-21. The CPK policy experts, Chandler and Etcheson, both gave evidence at trial of the CPK

[163] Agreed Fact Filing : E5/11/6.1 : paras 85-92

policy of "smashing" enemies[164] and dissemination of that policy at S-21,[165] which was consistent with these agreed to or not disputed facts.

USE OF CONFESSIONS AND S-21 PARTICIPATION IN PURGES

98. **Paragraphs 99 to 101** contain a summary of the factual allegations which the Accused has agreed to or not disputed, and which relate to the process of obtaining confessions from prisoners and using them to decide on further arrests.[166]

99. The overriding purposes of S-21 included the collection of confessions, the uncovering of larger networks of supposed traitors and the execution of prisoners. The confessions commonly came in the form of political autobiographies that detailed the prisoner's involvement with foreign agents (primarily the CIA, the KGB and the Vietnamese Communist Party), implicated other CPK cadres, and described the structure and operations of the CPK and DK administrative units. Confessions also served as justification for further arrests and the elimination of perceived obstacles, thereby serving the political interests of those in control of the CPK.

100. S-21 had no judicial function and its operation was incompatible with a judicial process or procedural safeguards of any kind. Guilt was proven by the prisoner's very arrest and justified by his/her subsequent confessions. The names collected by S-21 interrogators were used to arrest other CPK cadre. While a single mention of a name was usually insufficient to precipitate an arrest, it formed a basis for that later determination.

101. The Accused was responsible, inter alia, for reading, analysing, annotating and summarising the confessions of certain prisoners, which were sent along with the original confessions to his supervisors and other high-ranking party members. He was also given instructions concerning information to be collected from specific prisoners, including references to the CIA and KGB.

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[164] Craig Etcheson, *Written Record of Analysis* : E3/32 at paras 24-26; Craig Etcheson : 21 May 09 : T.14-16 on death and re-education, T.41-43 on sweeping and purging, T.46-47 on smashing; Craig Etcheson : 27 May 09 : T.54-56 on smashing in the RAK ranks, T.63-64 on authority to smash; David Chandler, *Voices from S- 21* : E3/427 at 139-142

[165] David Chandler, *Voices from S-21* : E3/427 at 49, 50, on rationale for S-21 archive; at 6, 81, 109, 128, on strings of traitors; David Chandler : 6 August 09 : T.23-24, 27, 52-55; Craig Etcheson : 28 May 09 : T.4-5, 13-14, 24-25, 69-72

[166] Agreed Fact Filing : E5/11/6.1 : para 93-101

102. Evidence put before the Chamber which establishes the above facts includes the statements and testimonies of the Accused and S-21 staff (particularly the interrogators), as well as the testimonies of expert witnesses David Chandler and Craig Etcheson whose comprehensive assessments were based on large amounts of S-21 and other DK-era documentation.[167]

103. The evidence shows that S-21 took part in purges of military divisions, zones and ministries throughout Democratic Kampuchea.[168] Purges of senior cadre at the various levels were usually preceded by arrests and interrogation of their subordinates, who, once tortured and interrogated at S-21, would inevitably give confessions confirming the suspicions of their superiors' culpability - as the Accused has noted, "before cutting the bamboo, one must trim the thorns."[169] S-21 was thus instrumental in purges within the entire DK military, including at the General Staff, in the Centre divisions, the Zone divisions and regiments, and the militia.[170] As discussed below in the ***Role In Arresting CPK Enemies*** Section, S-21 was involved in purges of divisions as early as 1976.[171] These purges typically paved the way for further purging of civilian cadre.

104. The purges of the Northwestern and Eastern Zones were particularly brutal. At least 1,211 people were arrested from the Northwestern Zone and sent to S-21,[172] with arrests peaking between the third quarter of 1977 and the first quarter of 1978.[173] At least 1,165 people were arrested from the East Zone and sent to S-21,[174] with arrests peaking in the second quarter of 1978.[175]

105. Turning to purges of DK ministries in which S-21 participated,[176] both the central DK ministries situated in and around Phnom Penh and ministries attached to the zones were targeted.[177] The Revised S-21 Prisoner List shows that no fewer than

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[167] Craig Etcheson : 28 May 09 : T.17-18, 20-22; David Chandler : 6 August 09 : T.3-5
[168] Revised S-21 Prisoner List : E68.1
[169] Agreed Fact Filing : E5/11/6.1 : para 81 (paragraph 38 of the Closing Order)
[170] The Revised S-21 Prisoner List contains at least 5,609 former RAK members. S-21 Prisoners from the RAK : E68.9
[171] *See* Craig Etcheson : 19 May 09 : T.6-7; Meeting Minutes of Secretaries and Deputy Secretaries of Divisions and Independent Regiments (1 March 1977) : E3/39; DK Military Meeting Minutes entitled Meeting of Comrade Tal Division 290 and Division 170 : E3/160
[172] S-21 Prisoners from the Northwestern Zone : E68.49
[173] Arrests from the Northwestern Zone by Month : E68.50; Craig Etcheson : 19 May 09 : T.40
[174] S-21 Prisoners from the Eastern Zone : E68.45
[175] Arrests from the Eastern Zone by Month : E68.46 ; Craig Etcheson : 19 May 09 : T.40
[176] S-21 Prisoners from DK Government Offices : E68.10
[177] Origin of DK government workers sent to S-21 : E68.21

2,552 staff from central ministries[178] and 1,595 staff from zonal ministries[179] were arrested and sent to S-21. Certain central ministries suffered particularly heavy attrition at S-21, including the Ministry of Public Works (at least 532 S-21 victims), the Ministry of Commerce (at least 386 S-21 victims), the Ministry of Energy (at least 268 S-21 victims), and the Ministry of Railroads (at least 251 S-21 victims).[180]

PRISONERS

ARREST AND PROCESSING

106. The Accused has agreed to or not disputed the facts set out in **paragraphs 107 to 110**, which relate to the arrest and processing of prisoners at S-21.[181] His personal responsibility in relation to the arrests is addressed in more detail in the ***Role in Arresting CPK Enemies*** Section.

107. The arrests of people who were brought to S-21 were often based on S-21 confessions which implicated them as traitors. The decision-making body for arresting people differed depending on the role and seniority of the suspects. Only the Standing Committee could order the arrest of Central Committee members. For lesser cadre Nuon Chea made a joint decision with the head of the relevant unit. For cadre from other regions the Central Committee made the decision and then contacted the relevant zones, sectors or districts.

108. Prisoners were brought to S-21 by their own units or by S-21 staff using a special "laissez passer" issued by Son Sen. In some cases the Accused was present at arrests, and took "personal charge" of important prisoners after their arrest. While S-21 was not involved in the arrests of Vietnamese prisoners, the Accused was informed of their arrivals through a list transmitted by Nuon Chea or Lin, his direct subordinate.

109. The Accused was the only cadre at S-21 authorized to communicate with the upper echelon and was included in discussions on important arrests. Where S-21 staff were involved in arrests he was in charge of implementing and disseminating arrest orders. He provided the names of those to be arrested, the place of arrest and the

[178] S-21 prisoners from DK offices reporting to the Centre : E68.18
[179] S-21 prisoners from DK offices not reporting to the Centre : E68.19
[180] Craig Etcheson : 19 May 09 : T.9
[181] Agreed Fact Filing : E5/11/6.1 : paras 111-137

numbers of personnel needed for the operation. Since arrests required secrecy and subterfuge to prevent leaks, the Accused often sent Hor to the relevant unit to calm the personnel and facilitate orderly arrests.

110. S-21 staff were also subject to arrest, and were either sent to Prey Sar for re-education or detained at S-21 for more serious offences. In some circumstances S-21 cadre were sent to Prey Sar for minor mistakes or for monitoring, or if a relative of theirs was brought to the prison. Evidence which was led at trial and taken during the judicial investigation and which provides further proof of these facts includes the testimonies and statements of Him Huy, Prak Khan, Suos Thy and the Accused.

COMPOSITION OF PRISONERS AT S-21 AND S-24

111. Consistent with the evolving patterns of CPK's targeting of different enemies, at various stages in the life of S-21, its prisoners included former Khmer Republic soldiers and officials, members of the CPK, DK officials at all levels of administration, military cadre, intellectuals, Cambodians returning from overseas, and foreign citizens, including Vietnamese solders and civilians. The facts set out in **paragraphs 112 and 113** relating to the composition of the prisoners have been agreed to or are not disputed by the Accused.[182]

112. At least 12,380[183] prisoners were sent to S-21, the vast majority being Cambodians, including minority groups (such as the Cham). The single largest group of prisoners were cadre from DK government offices, numbering at least 5,000. The second largest group came from DK military units, totalling over 4,500 prisoners. These prisoners came from all zones and autonomous sectors and virtually every office and unit. The prisoners included high ranking CPK cadre, as indicated below. There were numerous cases of combatants and government personnel being imprisoned together with their family members. As indicated above, numerous S-21 and S-24 staff members were also arrested and imprisoned at S-21.[184]

113. The largest group of foreigners at S-21 was Vietnamese. The first recorded arrest of a prisoner described as "Vietnamese" was on 7 February 1976. As the conflict

[182] Agreed Fact Filing : E5/11/6.1 : paras 102-110

[183] The Revised S-21 Prisoner List, which was produced after the issuance of the Closing Order, names 12,273 prisoners.

[184] The Accused does not dispute that more than 200 staff were imprisoned at S-21; the Revised S-21 Prisoners List contains 155 names: E68.39

between Vietnam and Cambodia escalated, more Vietnamese prisoners were captured and brought to S-21. Altogether, at least 400 Vietnamese passed through S-21, of whom 150 were recorded as "prisoners of war" and at least 100 as civilians. Other foreigners, such as Thais, Laotians, Indians, and "Westerners" were also imprisoned at S-21.

114. A number of individuals who testified at trial and gave statements in the judicial investigation confirmed or corroborated the above agreed facts relating to the composition of prisoners at S-21. These include: expert witness David Chandler[185] prisoners Chum Mey, Vann Nath and Bou Meng; interrogators Mam Nai and Lach Mean; guards Him Huy, Cheam Soeur, Saom Met, Kok Sros and Chhun Phal; head of the documentation unit, Suos Thy; and medic Sek Dan. Other witnesses who did not testify at trial but gave statements during the judicial investigation corroborated these facts to varying degrees. These were: prisoner Sokh Sophat; guards Ches Khiev, Han Iem, Nhep Hau, Pess Matt and Kung Phai; other staff or guards Redacted, Redacted, and Redacted; medic Makk Sithim, and photographer Nhem En.

115. The most thorough analysis of the number and identity of prisoners held and killed at S-21 is given in the Revised S-21 Prisoner List with its 50 Annexes.[186] This list indicates that 12,273 persons were arrested and killed at S-21. It also provides information, where available, of the gender, age, nationality and position of individual prisoners, as well as the dates of their entry and execution. It is clear that the actual number of prisoners is higher, due to the fact that not all prisoners were registered, and that some records have been lost over the years. The Revised S-21 Prisoner List was derived from the original S-21 documentation left behind at the prison, including prisoner lists, medical treatment lists and execution logs.

116. The high level CPK, RAK and DK government officials who were imprisoned, interrogated, tortured and executed at S-21 included: Ros Nhim, Secretary of the Northwestern Zone and Member of the Standing Committee; Chan Sam alias Kang Chap alias Sae, Secretary of the New Northern Zone, Kong Sophal, Deputy

[185] No statement was taken from David Chandler during the judicial investigation.
[186] This revised list was derived from the original combined prisoner list put before the Chamber which contained entries for 12,380 prisoners. The Revised List was filed as it was discovered that there were 107 duplicate entries in the combined prisoner list.

Secretary of the Northwestern Zone; Chan Chakrei, Secretary of Division 170; Penh Thouk, alias Vorn Vet, Deputy Prime Minister of Economy and the Accused's former superior;[187] Ly Vay, Deputy Secretary of Division 170; Ly Phen, Secretary of the Committee of Division 170; Ros Phuong member of the Committee of Division 170; Chou Chet, Secretary of the Western Zone; Suas Neou, Secretary of Sector 24 in the Eastern Zone; Ney Saran, alias Men San, alias Ya, Secretary of the Northeastern Zone;[188] Keo Meas, veteran revolutionary and original member of CPK Central Committee; Non Suon, who had previously served as the *de facto* DK Secretary of Agriculture; Sean An, DK Ambassador to Vietnam; Hak Seang Lay Ni, Foreign Ministry official; Koy Thuon, Secretary of the Northern Zone;[189] Touch Phoeun, Minister of Public Works; Sua Va Si, alias Douen, Secretary of Office 870; Hu Nim, alias Phoas, Minister of Information and Propaganda; Siet Chhe (Seat Chhae), alias Tum, Deputy Head of the RAK General Staff and former Secretary of Sector 22 in the Eastern Zone; Khek Pen, alias Sou, Secretary of Sector 4 of the Northwestern Zone; as well as the secretaries and their assistants from all seven sectors of the Northwestern Zone.[190]

117. The Accused has agreed to or did not dispute the following facts that relate to the composition of prisoners at S-24.[191] Several hundred prisoners were held at Prey Sar at any one time. The two main categories of prisoners were relatives of individuals considered to be suspects and subordinates of arrested cadre. Combatants from various DK units, personnel from numerous DK ministries and offices around Phnom Penh and their family members were imprisoned at S-24.

118. Witness Bou Thon provided testimony on this topic at trial, and further evidence as to the composition of prisoners at Prey Sar is contained in the statements taken from former prisoners (Redacted, Phach Siek, Uk Bunseng and Sokh Sophat) and S-21 guards (Saom Met and Tay Teng) during the judicial investigation.

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[187] Accused : 9 June 09 : T.45
[188] Accused : 22 June 09 : T.32
[189] Phaok Khan : 7 July 09 : T.59
[190] *See*: David Chandler, *Voices from S-21* : E3/427 at 52-69, 73; Craig Etcheson : 28 May 09 : T.33; Accused : 15 June 09 : T.28; Revised S-21 Prisoner List E68.1
[191] Agreed Fact Filing : E5/11/6.1 : paras 109-110

INHUMANE CONDITIONS

Prisoners who "arrived in the trucks were already garbage; they're already non-humans. The objective was to keep them in that condition [...] to break them down and mercy would have had no place in the prison."[192]

S-21

119. The mistreatment to which prisoners were subjected at S-21 included extremely harsh detention conditions, insufficient food and medical care, and physical abuse. **Paragraphs 120 to 126** provide a summary of facts relating to these and other conditions, which the Accused has either agreed to or has not disputed.[193]

120. The detention conditions at S-21 severely impaired the physical and psychological health of prisoners, and in many cases led to their deaths or suicide attempts. Specific inhumane conditions included the torture and arbitrary and cruel punishment of prisoners, failure to provide proper nutrition, hygiene, medical care, sanitation and sleeping facilities, as well as the use of prisoners for medical experiments. The death of prisoners was commonplace: former prisoner Vann Nath described the death of eight or nine fellow prisoners in one month in his cell alone.

121. Prisoners arrived nearly every day at S-21, blindfolded and handcuffed. Upon arrival, they were processed, photographed and stripped of their clothes, leaving just their underwear. They were rarely informed of the cause of their arrest.

122. Prisoners were held either in individual cells or in large rooms, restrained nearly 24 hours a day. Male prisoners were kept shackled and handcuffed, and as a result were unable to stand up. Those held in large rooms were chained side by side, their legs shackled to a common bar. Female prisoners were not shackled unless they created problems.

123. S-21 exerted total control over prisoners' lives. They were not allowed to speak with each other or with the guards. They were not permitted to exercise or leave their cells. They were not afforded lavatory or bathing facilities. Instead, prisoners defecated and urinated in jerry cans and ammunition boxes and were "bathed" by guards spraying water from the doorway to the cells. In both individual and common cells prisoners lay directly on the bare, concrete floor, without any kind of

[192] David Chandler : 6 August 09 : T.88
[193] Agreed Fact Filing : E5/11/6.1 : paras 138-171

mattress or padding. Prisoners who disobeyed the rules were punished, often by caning.

124. Starvation was a deliberate policy of the CPK. Prisoners were given insufficient food despite the fact that surplus food produced at S-24 was being delivered to the Central Committee. Prisoners at S-21 were usually given two starvation rations per day consisting of gruel. These meager rations led to severe weight loss and physical deterioration, and in some cases resulted in the death of prisoners. Guards and important prisoners were given better rations.

125. While many prisoners suffered from illness or injury, the purpose of the medical care given to them was merely to keep them alive for further interrogation. Many in need of medical attention were left unattended, or were treated by a team of three to five untrained medics, without the supervision of doctors. Some members of the medical team were children. Medicines were in short supply. To the extent that medicines were available, they were produced locally by unskilled workers.

126. Prisoners were also subjected to medical tests and experiments. Research on poisons was carried out at the request of the Central Committee (more precisely, Nuon Chea), autopsies were performed on living persons, and prisoners were subjected to forced blood-drawing, which resulted in death in numerous cases (the blood was likely destined for nearby hospitals).[194] Prisoners receiving intravenous fluids in the evening were found dead the following morning.

127. Former S-21 prisoners Bou Meng, Chum Mey and Vann Nath gave compelling evidence as to the inhumane conditions at S-21 they had endured or witnessed. The S-21 staff who were, to varying degrees, responsible for maintaining those conditions also gave corroborative testimonies and statements during the judicial investigation. These witnesses included: guards Him Huy, Saom Met and Chhun Phal; interrogators Prak Khan and Lach Mean; head of the documentation unit Suos Thy; and medic Sek Dan. Further evidence of the inhumane conditions at S-21 is contained in the statements given during the judicial investigation by former guards (Redacted, Han Iem, Ches Khiev, Nhep Hau, and Tay Teng) medic Makk Sithim, documentalist Redacted, and a local resident Redacted.

[194] Agreed Fact Filing : E5/11/6.1 : paras 259

128. Photographs of S-21, showing, inter alia, the cells in which the prisoners were housed, further corroborate the witness testimonies relating to the conditions in which prisoners were kept.[195] The paintings of Vann Nath, former S-21 prisoner and artist, also provide graphic representations of events he observed or heard of from other prisoners. Specifically, this evidence shows:

(a) larger private cells which housed important inmates, containing beds on which the prisoners slept and the shackles used to restrain them[196]

(b) small private cells and the corridor connecting the cell blocks[197]

(c) large rooms where prisoners were held collectively[198] and

(d) ammunition boxes and jerry cans which prisoners used to relieve themselves, piles of clothes taken from prisoners and interrogators' desks.[199]

PREY SAR

129. While the conditions in which prisoners were held at Prey Sar were not as severe as those at S-21, they were inhumane, degrading and cruel. **Paragraphs 130 to 133** outline the relevant facts which the Accused agrees to or does not dispute.[200]

130. Prisoners were sent to Prey Sar for re-education through punitive hard work, or "tempering." They lived and worked in conditions which weakened their physical and psychological well-being, and created a state of constant fear of punishment by beatings, insults, starvation, or being sent away for execution.

131. Prisoners at S-24, including women and children, were forced to work seven days a week and were not permitted to rest during work hours which generally began between 4am and 7am and finished late at night (between 10pm and 12am). They were subjected to various forms of forced labour, which included working in the rice fields or vegetable patches, fishing, building paddy dikes, digging canals or carrying soil to build ponds. They were unable to move freely without authorisation and were

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[195] Photo Book 2
[196] Photo Book 1 : E53.1/4 (39-41); Photo Book 2 : E63.1/17-28 Alt. E53.1/4 (39), 4 (40), 4 (41); E63.1/17, 18, 19, 20, 21, 21, 22, 23, 24, 25, 26, 27, 28
[197] Photo Book 1 : E53.1/4 (46), 4 (47), 4 (49), 20, 21; Photo Book 2 : E63.1/15, 16, 29
[198] Photo Book 1 : E53.1/4 (48); Photo Book 2 : E63.1/1
[199] Photo Book 2 : E63.1/24, 25, 32, 35, 65
[200] Agreed Fact Filing : E5/11/6.1 : paras 172-190, 232-234

kept under guard day and night. They were punished for being ill, arriving late at work, performing unsatisfactory work, "stealing" and "sexual misconduct."

132. The prisoners were classified into three levels: the first for light tempering; second, which was an intermediate level; and third for the most serious cases. The severity of treatment the prisoners endured generally reflected the level into which they were classified. Those in the third category suffered the most severe restrictions and received less food than others.

133. At re-education meetings prisoners were ordered to work quickly and efficiently, and were forced to participate in self-criticism sessions. Prisoners believed that if they did not improve themselves they would be killed. Indeed, some S-24 prisoners were transferred to Choeng Ek for execution, and approximately 571 individuals were transferred to S-21 (although it is not clear how many of these were prisoners and how many were Prey Sar staff).

134. Testimonies and statements obtained during the judicial investigation of former prisoner Bou Thon and former guard Saom Met, confirmed these descriptions of inhumane conditions at Prey Sar. Other witnesses, who were not called at trial, but who gave statements during the judicial investigation confirming these conditions to varying degrees are Tay Tang, Redacted, Phach Siek, Redacted, Redacted and Meas Peng Kri.

INTERROGATION AND TORTURE

"Torture cannot be avoided.
It only differs as to whether it is a little or a lot, that's all."[201]

S-21

135. Torture and interrogation of prisoners were part of the core business of S-21. **Paragraphs 136 to 143** contain a summary of the factual allegations which the Accused agrees to or does not dispute.[202] His personal involvement in relation to interrogation and torture is dealt with further in the ***Accused's Criminal Role at S-21*** Section.

[201] Statistical List, *Statistical List of Security Office S21, Politics, Ideology, and Organisation* : E3/426 at 12
[202] Agreed Fact Filing : E5/11/6.1 : paras 191-234

136. Prisoners entering S-21 were systematically interrogated on their biographies, their accomplices and activities which led to their arrest. Three interrogation methods were employed to extract confessions: the "cold method," in which propaganda was used to pressure prisoners into confessing, but which did not include the use of torture; the intermediate or "chewing method" which entailed heightened pressure on the prisoner, as well as the use of torture; and the "hot method," which consisted of torture and the use of insults. Many, but not all, sessions resulted in written confessions.

137. Interrogators were authorised to use torture if prisoners did not answer, or failed to give detailed answers or name accomplices. Torture increased if a prisoner's confession was not satisfactory.

138. The methods employed at S-21 were based on knowledge gained at M-13, and were recorded in staff notebooks. A number of different torture methods were available to interrogators: beating, electrocution of ears and genitals, asphyxiation with a plastic bag, and pouring water in the prisoner's nose. Individual interrogators would also puncture or remove finger and toe nails, apply cold water and fans, or force prisoners to eat feces or pay homage to dogs. The most popular method of torture was beating by stick, which was preferred because it produced results most quickly. Some prisoners died as a result of torture. At least one woman was raped.

139. Interrogation sessions were scheduled three times per day, from 7 to 11am, 2 to 5pm and 7 to 11pm. There was no general limitation on how long the sessions could last, and interrogations generally came to an end only when confessions were considered completed. Some prisoners were tortured multiple times a day for up to two weeks in a row.

140. The prisoners scheduled for interrogation were taken from their cells, blindfolded and handcuffed by guards and marched to an interrogation room, where they were shackled to a table. Handcuffs and blindfolds were removed for questioning and torture. On some occasions, prisoners were given the choice of torture they would endure.

141. The practice of torture was known among staff members not participating in interrogations. Guards could see or hear the torture being carried out. Others could

identify torture victims by their swollen faces, burnt ears, lacerations, bruises and missing toe or finger nails.

142. The Accused's role included forming interrogation teams and assigning particular prisoners to those teams for interrogation. The Accused met with interrogators individually to provide advice or correct their mistakes. In some cases he gave specific instructions to interrogators, and admits to having personally participated in the interrogation of Koy Thuon, the Secretary of the Northern Zone.

143. Vietnamese prisoners were interrogated with the aim of extracting confessions purporting to show that Vietnam had invaded Cambodia and intended to form a greater Indochinese federation. These confessions were often tape-recorded and sometimes broadcast on the radio.

144. Testimonies at trial and statements given in the judicial investigation indicated that all interrogations at S-21 involved severe torture where necessary.[203] Former prisoners Bou Meng, Chum Mey and Vann Nath gave compelling accounts of interrogation and torture. Testimonies were also heard from interrogators and guards who had differing abilities to observe prisoners being taken for interrogation and torture, the actual interrogation and torture being applied, and consequences of it. The following S-21 staff testified to varying degrees to the above agreed facts: guards Him Huy, Chhun Phal, Saom Met; interrogators Prak Khan and Lach Mean; head of the documentation unit Suos Thy; and medic Sek Dan.

145. Chum Mey, a civil party, was interrogated and tortured for 12 days and 12 nights at S-21.[204] Each day and night, guards took him from his cell and placed him in an interrogation room where he was ordered to sit on the floor, with his legs shackled.[205] He was repeatedly asked about his associations with, and links to, the CIA and KGB.[206]

146. Chum Mey was beaten with bamboo sticks during each interrogation session.[207] He was beaten so often and so ferociously that numerous bamboo sticks broke during each session, and the interrogators kept extra sticks on a table inside the interrogation

[203] Accused : 16 June 09 : T.18-19; Prak Khan : 21 July 09 : T.21, 71
[204] Chum Mey : 30 June 09 : T.14
[205] Chum Mey : 30 June 09 : T.23
[206] Chum Mey : 30 June 09 : T.11
[207] Chum Mey : 30 June 09 : T.24

room.[208] During one interrogation session, in the midst of a severe beating, he put up his hands to protect himself and his fingers were broken.[209] Because Chum Mey continued to respond in the same way – that he knew nothing about the KGB or CIA – the interrogators changed torture techniques. The interrogator, Seng, took pliers and started twisting Chum Mey's toenail until it was ripped from his foot.[210]

147. Chum Mey was also subjected to electrocutions during these interrogations.[211] Interrogators attached wires to his ears and connected them to a power source in the wall. He received such strong and violent shocks that he immediately fell unconscious. The interrogation sessions only stopped after he "confessed" to being a member of the KGB and CIA.[212]

148. Bou Meng suffered similar torture during interrogations which occurred twice a day, once in the morning and once in the afternoon.[213] He was taken from his cell to an interrogation room where he was handcuffed and forced to lie facedown on the floor. He was then beaten with sticks and whipped repeatedly on his back, so that by the end of the interrogation session his back was covered in wounds and blood.[214] Sometimes he was beaten by five interrogators at the same time.[215] Bou Meng was also electrocuted with wires attached on the inner thigh near his genitals.[216] The wires were connected to a power source in the wall and he immediately fell unconscious. Water was poured over his head to wake him up.[217]

149. Other witnesses who gave statements which corroborated the evidence relating to interrogations and use of torture include: former prisoners Redacted, Uk Bunseng, and Sokh Sophat; guards or staff Tay Teng, Kung Phai, Nhep Hau, Ches Khieu, Redacted and Uch Sorn;[218] local residents Redacted, Redacted and Redacted; medic Mak Sithim; photographer Nhem En; documentalist Redacted; and Tuol Sleng museum worker Redacted.

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[208] Chum Mey : 30 June 09 : T.24
[209] Chum Mey : 30 June 09 : T.11
[210] Chum Mey : 30 June 09 : T.25-26
[211] Chum Mey : 30 June 09 : T.27
[212] Chum Mey : 30 June 09 : T.29
[213] Bou Meng : 1 July 09 : T.16
[214] Bou Meng : 1 July 09 : T.13
[215] Bou Meng : 1 July 09 : T.32
[216] Bou Meng : 1 July 09 : T.73
[217] Bou Meng : 1 July 09 : T.73
[218] Uch Sorn also testified at trial.

150. Paintings made by Vann Nath,[219] and photographs on the file corroborate these accounts and confirm the practice of interrogations and torture at S-21. The photographs depict:

(a) a gallows to hang inmates by their arms and necks, as well as racks, shovels and water boarding equipment used for torture; and[220]

(b) prisoners who died at S-21(these photographs show, inter alia, prisoners who died during torture or were deliberately executed).[221]

PREY SAR

151. The Accused has agreed to or not disputed the following facts, which relate to the interrogation and torture of prisoners at Prey Sar.[222] Prisoners were subjected to beatings and insults when they were unable to work properly. The facility included a room dedicated to the interrogation of prisoners, and torture was applied primarily through electrocution. Prisoners returning from Prey Sar showed signs of torture, including scars from beatings, whippings and electric shocks applied during interrogations.

EXECUTIONS

152. All prisoners at S-21 were destined to be executed, and hundreds of prisoners at Prey Sar were also killed. The facts summarised in **paragraphs 153 to 155** are agreed to or not disputed by the Accused.[223] His personal responsibility for, and role in, the executions at S-21 is examined in the ***Supervision/Ordering of Executions Generally*** Section.

153. The Accused had authority over all the executions which were conducted at Choeng Ek and within the S-21 Compound. He approved executions once he was satisfied that a full confession had been extracted. In exceptional cases prisoners with special talents, particularly translators and artisans were kept alive after the Accused ordered their execution stayed for the period of their usefulness to S-21.

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[219] Photo Book 2 : E63.1/4-9, 12
[220] Photo Book 2 : E63.1/30, 37, 46, 58, 62-63
[221] Photo Book 2 : E63.1/39-62
[222] Agreed Fact Filing : E5/11/6.1 : paras 232-234
[223] Agreed Fact Filing : E5/11/6.1 : paras 235-262

154. Two to three times a month, sixty to eighty prisoners were transported to Choeng Ek for execution. They were blindfolded and handcuffed behind their backs, and taken from S-21. Upon arrival at the execution site, Him Huy recorded the prisoners, who were then led one-by-one to the nearby pits. At the rim of a mass grave, each prisoner was struck on the base of his/her neck with a steel club, cart axle or a water pipe, and then kicked into the pit, following which his/her handcuffs were removed. Testimonial evidence at trial also indicated that, after the blow to the back of the neck, prisoners' throats were slit to ensure they were dead.[224] Mass executions were carried out at Choeng Ek on several occasions, including 300 prisoners in December 1978, 200 in January 1979 and 160 children in July 1977. In a statement before the Co-Investigating Judges, the Accused recalled that on four other occasions, he was ordered by Son Sen and Nuon Chea to send the majority of prisoners from the S-21 central compound to Choeng Ek for execution, to create space for incoming prisoners (the Co-Prosecutors challenge the correctness of assertions relating to such supposed orders in the ***Supervision/Ordering of Executions Generally*** Section).

155. Executions also took place within the greater S-21 compound. Important prisoners were particularly likely to be executed at the prison, and those included Koy Thuon, Penh Thouk, alias Vorn Vet, Chhay Kim Hour, Nat, and foreigners. Some prisoners died after having excessive quantities of blood drawn. Four foreign prisoners were executed and immolated nearby. The children of S-21 prisoners were often separated from their parents and killed and buried directly at the prison. In the waning hours of S-21's existence on 7 January 1979, the very last remaining prisoners who had not been taken to Choeng Ek were executed and left unburied in the compound. These included the four combatants killed by bayonet and left chained to beds in Building A.

156. The Accused, Suos Thy and Him Huy gave direct evidence on executions at S-21. The Accused testified that he ordered the executions (though claiming he did so under strict superior orders), Suos Thy testified that he signed over the prisoners to be executed and Him Huy testified that he supervised and participated in the executions of prisoners at Choeng Ek. Other witnesses who testified and gave statements in the judicial investigation as to executions at S-21 were: prisoners Bou

[224] Him Huy : 16 July 09 : T.77,102

Meng and Vann Nath; guards Kok Sros and Cheam Sour; interrogators Mam Nai, Prak Khan and Lach Mean; and medic Sek Dan.

157. Statements of the following witnesses given during the judicial investigation also provide evidence of the executions at S-21: prisoners Bou Thon and Redacted; guards Han Iem, Nhep Hau, Pes Math, Tay Teng, Redacted and Redacted; local residents Redacted, Redacted, Redacted and Redacted; documentalist Redacted; and medic Mak Sithim.

158. Photographic and other documentary evidence corroborates the practice of executions at S-21, S-24 and Choeng Ek. This includes a group of photographs of dead prisoners taken by S-21 staff.[225] Evidence also includes photographs, taken shortly after S-21 was discovered, which show the bodies of the last prisoners executed within the compound. A document recording the results of exhumations at Choeng Ek prior to 1989 shows that 8,985 bodies were exhumed from 86 out of a total of 129 mass graves at that location.[226] Photographs of the mass graves unearthed at Choeng Ek also confirm the mass scale of killings that took place on the site.[227] Some of these remains are still visible in the Choeng Ek Stupa.[228]

159. As illustrated in the ***Prisoners*** Section, the most accurate analysis of the number of prisoners killed at S-21 is given in the Revised S-21 Prisoner List. Taken in context, this list proves that at least 12,273 prisoners were killed in a variety of ways at S-21. When the List is considered together with the testimonies of the Accused and witnesses, it is clear that the actual number of deaths at S-21 exceeded 13,000.

ACCUSED'S CRIMINAL ROLE AT S-21

DISAGREEMENT BETWEEN THE PARTIES

160. There are significant disagreements between the Prosecution and the Accused regarding the extent of his involvement in the crimes. The Accused accepts his criminal responsibility as Deputy Secretary and Secretary of S-21, a position which is, in the Co-Prosecutors' submission, unavoidable given the overwhelming physical and testimonial evidence against him. However, beyond accepting responsibility which is otherwise easily established, the Accused has sought to minimise his role in

[225] Photo Book 2 : E63.1/39-62
[226] *See Genocidal Centre at Choeung Ek*, Phnom Penh, 1989, E3/317, at ERN 00032991
[227] Photo Book 2 : E63.1/117-121, 125, 126, 133-148
[228] Photo Book 2 : E63.1/151-158

the crimes by arguing that he followed strict orders, acted out of fear for his life and was unable to flee. He has also sought to distance himself from the horrific daily events at S-21 and the killings at Choeng Ek. The Co-Prosecutors submit that these claims do not stand up to any serious scrutiny, particularly when tested against the available evidence.

161. The evidence establishes, beyond a reasonable doubt, that although the Accused acted as part of a larger machinery, he was, throughout his tenure at S-21, a willing, committed and active participant in this criminal enterprise. He was the architect of S-21's interrogation methods, a meticulous analyst who recommended the arrests of thousands of innocent individuals, a trainer and supervisor in interrogation and torture, and a commander of executions who showed no mercy for even the most defenceless victims.[229] Far from being a coward or a dog (as he described himself)[230] who merely followed orders, the Accused was a driving force and a creator of conspiracy theories[231] that fed the paranoia of the Standing Committee and justified country-wide purges of suspect elements.[232] He worked directly for Son Sen and the Standing Committee, a group for whom he had a great deal of respect and whom he wanted to please.[233] They, in turn, entrusted him with managing the regime's most important security centre, giving him the power to identify suspected enemies, advise on and coordinate arrests, and supervise interrogation and execution of high-ranking officials.[234]

162. Given the parties' positions on these issues, key matters to be determined by the Trial Chamber revolve around, on the one hand, the level of power, discretion and choice the Accused had (as well as the degree of voluntariness with which he took part in the crimes), and, on the other hand, the extent to which he may have been an unwilling participant, operating under duress and/or strict superior orders. The Accused has been extremely evasive when questioned on his discretion in the management of S-21, and the enthusiasm with which he exercised it. The reason for this is simple: while S-21 operated under the supervision and orders of the upper

[229] Prak Khan : 22 July 09 : T.24-25; David Chandler : 6 August 09 : T.50
[230] Accused : 27 April 09 : T.94
[231] David Chandler, *Voices from S-21* : E3/427 at 81
[232] Accused : 9 June 09 : T.18-19
[233] David Chandler : 6 August 09 : T.56
[234] For instance, his recommendations for arrests were always approved: Accused Statement : D71 : at ERN 00185499

echelon, the Accused's zealous performance as its chief played a crucial role in the prison's efficiency. That efficiency led to the arrest, torture and death of thousands of individuals who otherwise may not have become victims of S-21, and it is this fact that the Accused has consistently sought to avoid.

163. At trial, the Accused summarised his duties at S-21 as follows: "One, to teach or to train. Two, to send the confessions to my superior. . . And three, to manage and resolve all the matters or the issues at S-21, as I was overall in charge."[235] The three sections immediately below address each of these areas and examine the veracity of the Accused's claims where differences exist between the parties.

ACCUSED'S FUNCTIONS AT S-21

ROLE IN GENERAL MANAGEMENT

"[H]e wanted S-21 to be seen by his superiors and ... by the international community as a ... highly professional and efficient organisation of which he, as its administrator, could be justly proud."[236]

164. As shown in the ***M-13 Security Centre*** Section above, having proven his credentials as Secretary of M-13, the Accused played a key role in the establishment of S-21. His promotion to the position of Secretary[237] from March 1976 was driven by a recognition of his superiority to In Lorn, alias Nat, both in understanding the "proletarian theory"[238] and in the skill of interrogation."[239] He was considered both highly competent and trustworthy.[240]

165. Once appointed Secretary of S-21, the Accused had authority over every aspect of its operations, including arrests, interrogations, torture and execution of prisoners, and overall management of the prison.[241] He proceeded to exercise his managerial authority with diligence and initiative almost immediately: one of his earliest decisions was to move the prison to a new, more suitable location which he had identified.[242] He then managed the conversion of the compound to a high security prison, ordering, inter alia, the subdivision of large classrooms of the former high

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[235] Accused : 9 June 09 : T.24
[236] David Chandler : 6 August 09 : T.50
[237] Accused : 30 April 09 : T.11
[238] Accused : 22 April 09 : T.79-80
[239] Accused : 27 April 09 : T.91
[240] Accused : 27 April 09 : T.94; Accused : 28 April 09 : T.22, 56; Accused : 29 April 09 : T.36; Accused : 27 May 09 : T.44
[241] Accused : 9 June 09 : T.24; Him Huy : 20 July 09 : T.10
[242] Accused : 28 April 09 : T.9-11

school into small cells to detain prisoners.[243] He took this decision without having to report it to the upper echelon.[244]

166. Crucially, the Accused decided to set up the execution and burial site at Choeng Ek of his own motion and without the need to obtain prior approval.[245] The fact that he was able to make a decision of this degree of importance – converting a large site located at a distance of several kilometres from the main compound into a massive killing and burial field – reflects the high degree of authority he had and initiative with which he used it. It is one in a series of facts which contradict his assertions as to his absolute subordination in all matters to his superiors. His specific claims as to his non-attendance at Choeng Ek are examined in the ***Supervision/Ordering of Executions Generally*** Section below.

167. There are numerous other examples of initiative by the Accused in managing S-21: his orders in relation to interrogations, torture and executions;[246] the decisions to create a team of female interrogators[247] and bring in and select young teenagers who could be trained as guards;[248] the decision to construct a training centre;[249] the Accused's concern to exhume bodies and conceal evidence of crimes at Ta Kmao prior to it being handed over to the Ministry of Social Affairs;[250] his insistence on retaining the Choeng Ek site when requested by Nuon Chea to move S-21 to Kab Srov in 1978 (out of fear that Choeng Ek would be discovered);[251] and the fierce discipline with which he managed his staff.[252]

Management and Purges of S-21 Staff

168. As noted in the ***Establishment and Location*** Section, the Accused established a hierarchy and reporting systems within S-21 to ensure that his orders were carried out immediately and precisely.[253] He also developed and maintained a high level of mutual trust with his subordinate managers Hor and Huy Sre (whose arrest the

[243] Accused : 28 April 09 : T.37-38
[244] Accused : 28 April 09 : T.9
[245] Accused : 28 April 09 : T.9
[246] See the *Accused's Criminal Role at S-21* Section
[247] Accused : 23 April 09 : T.35
[248] Accused : 29 April 09 : T.9
[249] Accused : 8 June 09 : T.48
[250] Accused : 22 April 09 : T.84
[251] Accused : 28 April 09 : T.10
[252] Accused : 15 June 09 : T.21; Him Huy : 16 July 09 : T.44
[253] Agreed Fact Filing : E5/11/6.1 : para 39

Accused eventually ordered.)[254] However, he continued to exercise a high level of control over S-21, keeping a tight reign over his staff and maintaining the highest level of "discipline."[255] He was recognised by S-21 staff as the final authority on all matters[256] and was feared both by the staff[257] and by the prisoners.[258] When asked at trial if he had complete and effective control over Hor's and Huy Sre's actions, the Accused responded, "my authority was full. If I want to know anything, I can do that. I can ask anyone to report. I can stop anything I want to direct anything, I can do that."[259]

169. The Accused was authorised to order disciplinary action in cases of staff misconduct. This consisted of either sending them to Prey Sar for re-education, or having them arrested, imprisoned and executed at S-21.[260] Although orders for the arrests of staff often came through Hor, only the Accused had the power to issue them.[261] He has testified that while he had the authority to order re-education at Prey Sar, he needed the explicit "approval" of his superiors for each S-21 staff member killed.[262]

170. The Revised S-21 Prisoner List shows that at least 155 S-21 staff members were imprisoned and executed. Even if the Accused's version of events is accepted, it leads to the conclusion that he had at least 155 of his own staff executed – because imprisonment at S-21 meant that death was inevitable. Son Sen or Nuon Chea would have had no particular interest in pursuing individual cases of disciplinary action against S-21 staff. Such cases could only have arisen on the Accused's initiative or with his approval. This conclusion is supported by the Accused's own testimony on the procedures for arrests of RAK cadre. He has testified that Son Sen would make such decisions, but "he had to work with the respective unit chairman" which meant "consult[ing] with the units' chairmen whether to agree on the [arrest]

[254] Accused: 8 June 09 : T.67; Accused : 24 June 09 : T.27
[255] Him Huy : 20 July 09 : T.51; Him Huy : 16 July 09 : T.44
[256] Him Huy : 20 July 09 : T.10; Him Huy : 16 July 09 : T.44
[257] Saom Met: 11 August 09 : T.12
[258] Vann Nath recalls that during his stay in the workshop at S-21 he "was so afraid and nervous because [he] was afraid that [the Accused] would be angry with [him]: Vann Nath : 29 June 09 : T.76
[259] Accused : 25 June 09 : T.14
[260] Accused :15 June 09 : T.19-32
[261] Accused : 25 June 09 : T. 19; Him Huy : 16 July 09 : T.44
[262] Accused : 22 June 09 : T.68

request or not."[263] As the Secretary of S-21, the Accused therefore had a direct role in the arrests and killing of his own staff.

171. The Accused exercised this power in relation to his staff in a manner designed to maintain a high level of discipline and the continued effective operation of S-21. While he had some staff members arrested for minor breaches such as falling asleep on duty,[264] he chose not to discipline others because he deemed them useful. For instance, he chose to keep Pon as an interrogator after the latter impermissibly applied electrical shocks to the genitals of a prisoner,[265] because he thought him to be irreplaceable as an interrogator. The Accused also decided not to arrest an interrogator after he had raped a female prisoner.[266] In this context it is also interesting to note that, of the initial staff at S-21 (see the ***Crimes at S-21 Security Centre*** Section), large numbers of former Division 703 cadre were purged,[267] while most of the Accused's former staff from M-13 survived.

172. The Accused's authority over the staff extended to controlling their private lives to the extent that he even organised marriages among S-21 staff.[268] Within the prison he was called *ta* ("grandfather"), a highly deferential title for a man who at the time was only in his early thirties.[269]

Supervision / Ordering of Executions Generally

173. Although all prisoners at S-21 were destined for execution,[270] the manner and timing of their death was determined by the Accused, who, as described in the ***Executions*** Section, was the only one authorised to issue execution orders.[271] By supervising the progress of prisoners' interrogations, the Accused determined or confirmed when they had fully admitted their traitorous activities and were ready to be "smashed."[272] He admitted having this extraordinary power at various stages of the proceedings,[273]

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[263] Accused : 27 May 09 : T.47
[264] Krok Sos : 27 July 09 : T.9
[265] Accused : 8 June 09 : T.109-110
[266] Accused : 16 June 09 : T.79-80
[267] Saom Met : 11 August 09 : T.17
[268] Him Huy : 20 July 09 : T.10
[269] David Chandler, *Voices from S-21* : E3/427 at 18
[270] Accused Statement : D66 : at ERN 00177608-00177609; Accused Statement : E3/15 : at ERN 00153569 (stating "I can confirm that every person incarcerated at S-21 was supposed to be eliminated.")
[271] *See also*: Him Huy : 20 July 09 : T.6, 34, 78; Suos Thy : 27 July 09 : T.95-96
[272] *See, e.g.,* Accused : 17 June 09 : T.22-23
[273] Accused Statement : D70 : at ERN 00185477. Duch's handwritten order: "Uncle Peng, kill them all": S-21 Prisoner List : 00001890. Duch admits writing this: Accused Statement : D70 : at ERN 00185476.

for example by explaining that "in general if I found that it is completed in the confession, so I make the arrangement to kill that person."[274]

174. Executions were conducted in a highly organised manner and always under the Accused's authority (which he alleges to have delegated to Hor in some instances). Where the Accused personally selected prisoners to be killed, he would identify them by signing execution lists or annotating existing prisoner logs with the word "smash" next to their names. The logs were passed on to Hor, and then to Suos Thy, who recorded the names, cell numbers, and buildings of those to be executed in a new list. This information was then given to S-21 guards who would bring the selected prisoners to the front gate, where Suos Thy verified that the right prisoners were brought down. The prisoners were then transported to Choeng Ek and executed.[275]

175. Contemporaneous S-21 documents presented at trial, and confirmed by the Accused as bearing his annotations, illustrate the precision, ruthlessness and routine with which he performed this task. On a list containing the names of 17 prisoners, including nine children, he wrote the order "Uncle Peng, kill them all."[276] On a longer list of prisoners, the Accused's annotation reads "smash: 115; keep: 44 persons."[277] The text below this annotation reads: "Comrade Duch proposed to Angkar; Angkar agreed." On a list of 20 female prisoners, the Accused wrote annotations determining the destiny of each woman, ordering: "take away for execution," "keep for interrogation" or "medical experiment."[278]

176. When questioned on his authority to order the killings, the Accused claimed that he had no choice: all prisoners were executed by decisions of the "upper echelon," and his subsequent execution orders were therefore perfunctory.[279] He claimed that his annotations ordering both torture and executions were made under the direct and specific direction of Son Sen, to whom he spoke by telephone daily.[280] In the Co-

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Accused Statement : D13 : at ERN 00147567-00147568; Accused Statement : D20 : at ERN 00147602-000147603; Accused Statement : D30 : at ERN 00154201; Accused : 23 April 09 : T.33

[274] Accused : 22 June 09 : T.28

[275] Suos Thy : 27 July 09 : T.69-70, 90-91; Suos Thy : 28 July 09 : T.21

[276] Accused : 22 June 09 : T.25-26

[277] Accused : 22 June 09 : T.27-28

[278] Accused : 22 June 09 : T.28-30; List of Female Prisoners : D57 : at ERN 00181789-00181790

[279] Accused : 17 June 09 : T.11. The Accused states that "the upper echelon would ask me to bring the list to them and then they would make a decision as whom -- which prisoners would be taken out."

[280] Accused : 23 June 09 : T.29

Prosecutors' submission, this is not a truthful account. The evidence certainly supports the proposition that the Accused acted under the general orders, and with the full knowledge and approval, of his superiors. But the argument that senior officials of the regime would have discussed thousands of individual confessions with the Accused, and approved individual killings on a daily or weekly basis simply does not stand. Craig Etcheson testified that it is highly unlikely that Son Sen (an individual who held the posts of Minister of Defence, Chief of General Staff of the RAK, and member of the CPK Standing Committee), issued orders in relation to individual confessions of thousands of prisoners that passed through S-21.[281] The Accused himself testified to the many hours he spent analysing and annotating the confessions,[282] and the notion that Son Sen (or later Nuon Chea) would have closely supervised him in this endeavour simply does not withstand any serious scrutiny.

177. The Accused has effectively confirmed that he had standing authorisation to implement the policy on the execution of enemies at S-21 – at least in relation to executions of unimportant prisoners.[283] For example, when questioned by the Chamber about his responsibility for the killings of over 12,000 people, he replied: "I would not deny the killing and the responsibility, but, in principle, *the line from the upper echelon for S-21 had to be implemented*" (emphasis added).[284] The Accused's choice of words would appear to confirm the Co-Prosecutors' interpretation of the evidence. It should also be noted that the Accused claims that he delegated the power to order executions at Prey Sar to Huy Sre.[285] Clearly, the ability to delegate confirms the fact that the Accused himself had the requisite authority over executions.

178. The only rational conclusion from the totality of the evidence relating to the organisation of S-21, and the roles of the Accused and his superiors and subordinates, is that the Accused had the requisite degree of authority to determine which prisoners would be killed at what time – stated another way, within the overall guideline that all prisoners were to be killed, he was entrusted with "implementing

[281] Craig Etcheson : 28 May 09 : T.22
[282] Accused : 8 June : T.94
[283] Accused : 22 June 09 : T.22, 26 (discussing executions, the Accused said that Angkar "decided already that S-21 had to imprison them, interrogated them, and finally had to smash them. And we had to follow this implementation …"). *See also* Accused Statement : D42 : at ERN 00160724
[284] Accused : 17 June 09 : T.23
[285] Accused : 25 June 09 : T.20-21

the party line"[286] by ordering and supervising the killings. Only the very important prisoners appear to have been an exception to this rule,[287] and of course the upper echelon was kept fully informed by the Accused of the implementation of the purges under their orders.

179. There were good reasons for giving the Accused this level of authority under the supervision of the DK/CPK leadership: he was a highly trusted cadre who performed his work with utmost efficiency and precision, investing considerable amounts of time supervising interrogations, analysing confessions and proposing and coordinating arrests. He was in the best position to decide when individual prisoners were ready for execution. As illustrations of this division of roles between the Accused and his seniors, the Co-Prosecutors recall, for example, that some prisoners were killed in order not to overburden the prison during peaks in the population[288] – the likelihood of senior members of the regime being involved at this level of daily management of S-21 is very low. As indicated above, there are further examples of individuals who would have been of no interest to the upper echelon but who were executed at S-21, such as spouses, children and other family members of "traitors."

180. Returning to the Accused's assertions, there are obvious gaps in the logic he is asking the Court to accept: he claims, for example, that he had telephone calls with Son Sen at the same time every day or almost every day.[289] Even assuming this was generally the case, which is unlikely given Son Sen's position, it does not account for periods when the latter would have been unavailable or away from Phnom Penh due to his responsibilities as Chief of General Staff of RAK and Minister of Defence. There is no evidence that S-21 suffered periods of inefficiency due to lack of orders during such periods. The same applies for the period after Nuon Chea took over from Son Sen as the Accused's supervisor. In the Accused's own words, Nuon Chea only held meetings with him once every three to five days, without telephone communication.[290]

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[286] Accused : 25 June 09 : T.40

[287] Accused : 22 June 09 : T.28. He said "for the victims who were interested by the upper echelon, they keep asking, 'Did you finish the confession?" And later they told me that, please remove that. This is the mission against the key prisoners."

[288] Accused : 17 June 09 : T.23-24

[289] Accused : 27 May 09 : T.42-43; 9 June 09 : T.05; 23 June 09 : T.29

[290] Accused : 9 June 09 : T.82

181. The Accused has been similarly evasive on the issue of his presence at Choeng Ek, which, as a meticulous manager of S-21, he undoubtedly visited far more often than he is willing to admit. Him Huy testified that the Accused visited Choeng Ek at least once.[291] The Accused has claimed that, during the entire period that Choeng Ek was in operation, he only went to the location once at Son Sen's request.[292] He states that he "turned [his] back" and made excuses to leave prior to any killings taking place.[293] He says he saw very little, and if asked by his superiors about his visit, he would give them "cover stories" to make them believe he had seen much more.[294]

182. These assertions cannot be accepted given the importance of the site to the S-21 enterprise, and the Accused's diligent and professional management of the prison. The Accused is putting forward two mutually exclusive (and both implausible) theories. On the one hand, he alleges that he was constantly in fear for his own life and therefore diligently performing all tasks assigned to him. On the other hand, he claims that he was happy to allow others to manage Choeng Ek (in defiance of superior orders), without once attending executions over a period of more than two and a half years. It is impossible to accept that, having established this centrally important site, the Accused would have left it to others to manage with absolutely no direct oversight. To avoid attending the site regularly, at least to ensure that security procedures were being followed and that prisoners were not able to escape, would have been immensely negligent on his part. The fact that he had at least 155 of his own staff executed contradicts the notion that he would have simply left Choeng Ek effectively unsupervised.

ROLE IN EDUCATION AND TRAINING

"Beat [the prisoner] until he tells everything, beat him to get at the deep things."[295]

183. A crucial aspect of the Accused's role in managing S-21's operations was the training in political theory, interrogation and torture which he provided for his staff, and which went hand in hand with his supervision of interrogations. As the DK regime relied on political indoctrination to motivate and control its cadre at all levels,

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[291] Him Huy : 20 July 09 : T.72
[292] Accused : 17 June 09 : T.52-54
[293] Accused : 17 June 09 : T.14; Re-enactment at Choeng Ek : D48/1 : at ERN 00197996; Accused Statement : D11/11 : at ERN 00147526
[294] Accused : 17 June 09 : T.52-54
[295] Quote attributed to the Accused: David Chandler, *Voices from S-21* : E3/427 at 132

this sort of training was crucial.[296] The Co-Prosecutors recognise that, in testifying on this aspect of his role at S-21, the Accused was generally more co-operative and consistent.

184. The training took the form of annual political education sessions which generally lasted several days[297] and weekly or fortnightly training sessions on interrogation and torture techniques. The Accused ordered the construction of a special building to be used as a training venue close to his house and was, throughout his tenure, the principal trainer at S-21.[298] Teaching a so-called "fast attack/fast success"[299] training technique, he trained small groups of interrogators in the morning, allowing them to employ his teachings in afternoon interrogation sessions.[300] Training was compulsory,[301] and non-attendance had serious consequences.[302]

185. The Accused has admitted that his work breathed life into CPK policy, stating: "...I educated, I supervised the implementations...of the CPK policies... I sharpened the sword and then I used the sword again."[303] The purposes of training included ensuring that the staff took an absolute class stance[304] and were absolute in eliciting enemies' confessions.[305] The training was also used to "cross-check...revolutionary biographies."[306]

186. The Accused selected children or very young men for his staff because they were "like a blank piece of paper on which one could write whatever one wanted."[307] Infusing them with a "stance against the enemy," he ensured they were effective torturers and interrogators.[308] He thus shaped very young peasants into ruthless interrogators willing to use whatever methods required to confirm a prisoner's traitorous activities.[309] In his own words, the training of interrogators "changed their

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[296] *See e.g.,* Craig Etcheson : 28 May 09 : T.68
[297] Accused : 8 June 09 : T.37, 41
[298] Craig Etcheson : 27 May 09 : T.5; Accused : 9 June 09 : T.23; Accused : 8 June 09, T.46-48
[299] Accused : 8 June 09 : T.50-52
[300] Accused : 8 June 09 : T.50; Accused : 9 June 09 : T.21-22; Accused : 8 June 09 : T.62
[301] Accused : 8 June 09 : T.42
[302] Craig Etcheson : 28 May 09 : T.70
[303] Accused : 8 June 09 : T.45-46
[304] Accused : 30 April 09 : T.39
[305] Him Huy : 16 July 09 : T.76; Prak Khan : 22 July 09 : T.23-24
[306] Accused : 8 June 09 : T.41
[307] Accused : 29 April 09 : T.9-10
[308] Prak Khan : 21 July 09 : T.23-24; Accused : 23 April 09 : T.33; David Chandler : 6 August 09 : T.37-38; Prak Khan : 22 July 09 : T.22
[309] Accused : 27 April 09 : T.88-89; Accused : 23 April 09 : T.33; Prak Khan : 22 July 09 : T.22

nature. They went from gentle to cruel, very extreme in the matter of arresting, cursing and detaining people."[310]

187. On the training in interrogation and torture, the Accused states that his duty was "to make them to interrogate, so that they dare to interrogate, they dare to torture, that they had experience to interrogate, and all this was the result of the arrest of the new people because for these new people we had to have their confessions."[311] The Accused instructed the interrogators to see the prisoners "as animals"[312] and sought to firm up their beliefs, telling them that every prisoner, in every detention centre throughout the country, would be killed.[313] He admits to teaching and allowing four methods of torture: beating, electrocution, placing a plastic bag over the head and pouring water into the nose.[314] He taught the interrogators to use torture techniques which were painful or humiliating, but not life-threatening, as it was important to ensure that a prisoner did not die before a full confession was extracted[315] – these techniques included inserting needles underneath the nails of prisoners,[316] forcing prisoners to eat excrement[317] and forcing them to pay homage to an image of a dog.[318] Cold water and fans were also used to induce shivering.[319]

188. Cadre notebooks originating from staff at S-21 record discussions of various torture techniques and give insight into the training sessions - the Accused has acknowledged that at least two of these (The *Statistical List* and the *Mam Nai Notebook*) reflect some of his teachings.[320] The Pon-Tuy Notebook details that interrogators force prisoners to "pay respect to pictures of two dogs...In a political sense, one dog is America, and the other is the Yuon. If they accept to respect them, this means that they recognize themselves as satellites of these two doctrines."[321] He further noted that one should not "hit enemies while they are getting angry because

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[310] Accused : 27 April 09 : T.89
[311] Accused : 23 April 09 : T.33
[312] Prak Khan : 22 July 09 : T.23-24; Accused : 8 June 09 : T.105-106
[313] Him Huy : 20 July 09 : T.33
[314] Agreed Fact Filing : E5/11/6.1 : para 218; Accused Statement : D20 : at ERN 00147604
[315] Agreed Fact Filing : E5/11/6.1 : para 216.b
[316] Prak Khan : 21 July 09 : T.67, 70
[317] Prak Khan : 21 July 09 : T.70; Note on the interrogation of Ke Kim Hout : at ERN 00242278
[318] Accused : 16 June 09 : T.87-88; Prak Khan : 21 July 09 : T.70-71
[319] Saom Met : 11 August 09 : T.4
[320] Craig Etcheson : 28 May 09 : T.4 ; Accused : 16 June 09 : T.38; Accused Statement : D46 : at ERN 00164331
[321] Pon-Tuy Notebook : at ERN 00184496

they don't hurt while they are getting angry."[322] The Accused confirmed at trial that he initiated the use of pictures of dogs to whom prisoners were forced to pay homage.[323]

SUPERVISION OF TORTURE AND INTERROGATIONS

"You must rid yourselves of the view that beating the prisoners is cruel.
Kindness is misplaced in such cases.
You must beat them for national reasons, class reasons, and international reasons."[324]

189. As indicated in the ***Interrogation and Torture*** Section, the Accused authorised his staff to use torture techniques to extract "confessions."[325] Although in relation to the interrogation of more important prisoners,[326] he closely followed superior orders, he acknowledges that in relation to lower level prisoners he had full discretion to determine the type and extent of torture.[327] He also assigned the more "difficult" prisoners to Tuy, a particularly harsh interrogator who sought to gain favour with the Accused by "introducing the hot torturing techniques initiatively."[328] An example of Tuy's cruelty can be seen in the interrogation of Siet Chhe whom he ordered to write about his "sexual activities" with his own child, writing: "from the standpoint of the masses, this [offence] has been clearly observed. You don't need to deny this. Don't let your body suffer more pain because of these petty matters".[329] David Chandler's book *Voices from S-21* reproduces Siet's reply, an impassioned letter to Angkar, refuting claims of abuse of his daughter.[330] The Accused's own involvement in this interrogation is described below in the ***Accused's Cruelty and Lack of Mercy*** Section.

190. Since interrogation sessions generally concluded only once the Accused was satisfied with the content of the "confession" drawn from a prisoner, he maintained ultimate power over the treatment of every prisoner.[331] He states that "[i]f the prisoners did not give satisfactory confessions, then I would annotate on the confession that they had to use more torture in order to get the confession, and I was

[322] Pon-Tuy Notebook : at ERN 00184496
[323] Accused : 6 August 09 : T.124
[324] Quote of Accused at an S-21 livelihood meeting : David Chandler, *Voices from S-21* : E3/427 at 152
[325] Accused Statement : D20 : at ERN 0014760605; Accused : 16 June 09 : T.24
[326] Agreed Fact Filing : E5/11/6.1 : para 35
[327] Accused : 22 June 09 : T.22
[328] Accused : 16 June 09 : T.42
[329] David Chandler, *Voices from S-21* : E3/427 at 67 and 157
[330] David Chandler, *Voices from S-21* : E3/427 at 157-159
[331] Accused : 16 June 09 : T.27

the one to decide to order the interrogators to torture more."[332] The Accused also ordered subordinates to both increase amounts of torture[333] and to experiment with novel methods of torture after consulting with Hor.[334] He used annotations on the confessions to guide his subordinates, for example by ordering further interrogations and/or torture to force prisoners to talk,[335] to obtain further information[336] and to complete a confession.[337] Instructions were also sent to S-21's interrogators via a messenger or by telephone.[338] There are numerous documents from S-21 that bear evidence of the Accused ordering, supervising or monitoring the use of torture, and/or receiving reports thereof.[339] Some of these are discussed below in the ***Accused's Cruelty and Lack of Mercy*** Section.

191. The Accused kept a close eye on interrogations.[340] He occasionally walked around, physically inspecting interrogation houses in the immediate vicinity of the main compound, and the prisoners held therein.[341] Although he has been reluctant to admit personal involvement in interrogations and torture, he has admitted interrogating prisoners Chhit Iv and Ma Mengkheang, and beating the former.[342] He also admitted in an interview before the Co-Investigating Judges that he would help his staff by intervening in interrogations, sometimes giving "a few slaps" to prisoners.[343] Former guard Saom Met also described at trial how he saw the Accused kick and beat a prisoner, an incident which the Accused did not deny.[344]

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[332] Accused : 16 June 09 : T.85-86
[333] Accused : 16 June 09 : T.41, 54
[334] Accused : 16 June 09 : T.52; Craig Etcheson : 28 May 09 : T.21
[335] Annotation on Heng Sauy Confession : at ERN 00323473
[336] Annotations on Mean Thon Confession : E5/2.4 : ERN 00283976; Accused : 16 June 09 : T.42, 86; Craig Etcheson : 28 May 09 : T.21 ; Annotations on Ly Bun Chheang Confession : E5/2.24 : ERN 00284035
[337] Annotations on Chuong Pheng Confession : E5/2.11 : ERN 00283999-00284000
[338] Prak Khan : 21 July 09 : T.25
[339] *See e.g.,* Confession of Ke Kim Huot : at ERN 00242278-00242279; Confession of Phok Chhay alias Touch : ERN 00068305-00068510 (KHM); Confession of Pol Piseth : ERN 00183296-00183303; Prum Sammneang : E5/2.3: at ERN 00283975; Confession of Sar Phon (or SMANN Sless) : E5/2.1: at ERN 00283973; Confession of Prang : E5/2.51 : ERN 00284079; Confession of Sim Say : E5/2.37 : at ERN 00284394; The Accused ordering torture on prisoner Mot Heng : at ERN 00001904 [ERN is to prisoner photo]; Internal Memo by the Accused to Pon: re Interrogation of Ya : ERN 00008160-00008162; Prisoner List of Female Prisoners : D57.296 : 00181789-00181790
[340] Suos Thy : 27 July 09 : T.63-64
[341] Saom Met : 10 August 09 : T.94-95
[342] The Accused states that he did not have to beat Chhit Iv much because he "gave in" to his interrogation: Accused : 16 June 09 : T.29-30
[343] Accused Statement : D54 : at ERN 00166566
[344] Saom Met : 10 August 09 : T.86; Saom Met : 11 August 09 : T.9 ; Accused : 11 August 09 : T.29-30

ROLE IN ARRESTING CPK ENEMIES

192. The Accused played a central role in sealing the fate of the vast majority of people who became the victims of S-21. A specialist in interrogation,[345] he developed and applied the method of torturing prisoners to obtain confessions implicating additional suspects, then analysing the confessions to develop so-called strings of traitors, and recommending the arrests of further suspects.[346] He had developed this approach between 1972 and 1973 for the purging of Khmer-Hanoi.[347] In the words of David Chandler, he was "obviously innovating" and "improving all the time" his methodology for discovering enemies.[348]

193. It was based on the Accused's analyses, reports and recommendations that the upper echelon decided to arrest new individuals.[349] Put simply, were it not for his meticulous supervision of interrogations, his analysis of confessions, and his production of new strings of traitors, S-21 simply would not have arrested, tortured and killed as many victims as it did. While the final decision to arrest likely came from, or had to be ratified by, the upper echelon, the Accused was indispensable in the creation of the multiplier effect of each wave of arrests and interrogations leading to more arrests.[350] The Accused of course knew that his work would lead to the arrest of additional victims[351] and was also aware that neither the confessions[352] nor the lists of alleged traitors were true.[353] Nevertheless, he persevered in producing lists of traitors until the final stages of the DK regime and his flight from Phnom Penh.[354]

194. As indicated in the ***Arrests and Processing*** Section, the Accused had the sole authority to communicate with the upper echelon, and as such, gave and implemented orders when S-21 staff were involved in arrests outside the compound.[355] He was also the only one permitted to categorise prisoners according

[345] Accused Statement : D11 : at ERN 00147520
[346] Craig Etcheson : 27 May 09 : T.81; *see also* David Chandler : 6 August 09 : T.12-13
[347] David Chandler : 6 August 09 : T.69
[348] David Chandler : 6 August 09 : T.70
[349] Craig Etcheson : 28 May 09 : T.89, 91-92
[350] Accused : 30 April 09 : T.39
[351] Accused : 27 April 09 : T.87
[352] Accused : 16 June 09: T.28-29; 7 April 09: T.22; 8 April 09 : T.105-106; 28 April 09 : T.67; Accused Statement : D67 : at ERN 00177634
[353] David Chandler : 6 August 09 : T.55; Accused: 25 June 09: T.37
[354] Accused's Annotation on Kim Sok's Confession : E5/2.52 : ERN 00284080
[355] Agreed Fact Filing : E5/11/6.1 : para 115; *see also* Him Huy : 16 July 09 : T.12

to levels of importance.[356] He was aware of the arrival of important prisoners in advance, and processed them personally.[357] He acknowledges coordinating arrests in which his staff were involved and also directly participating in the arrests of important prisoners[358] but states that he did this strictly on superior orders.[359]

195. The Accused played an important role in the arrests of a number of high-ranking CPK cadre, including Koy Thoun (Secretary of the Northern Zone and Minister of Commerce), Chhim Sam-Ok (former Secretary of Office 870) and Ney Saran, alias Men San, alias Ya (Secretary of the Northeastern Zone), who were arrested at the Accused's house.[360] Although these three individuals were arrested on separate occasions, the modus operandi was exactly the same: the suspects were invited to the Accused's house– and as soon as they arrived, the Accused ordered his subordinates to arrest them.[361] The Accused also prepared a dossier that formed the basis for the arrest of Suas Neou, alias Chhouk, Secretary of Sector 24 in the Eastern Zone, [362] and personally transferred him to S-21 to be incarcerated.[363]

196. RAK Division secretaries worked closely with the Accused to conduct internal purges as early as March 1977.[364] At a meeting held on 1 March 1977, Son Sen emphasised the importance of arrests and executions of high level "traitors," such as Ya. Even earlier, in September 1976, the Accused met with Son Sen, Comrade Tal and Siet Chhe to discuss a purge of Divisions 290 and 170 and resolved with them that 29 additional individuals should be brought to S-21 – their names having been decided on the advice of S-21.[365] Ironically, Siet Chhe later became a victim of S-21 and was subjected to particularly cruel treatment, as discussed above.[366]

197. In 1977, the Accused also played an active role in a massive purge of RAK Division 502, which he coordinated together with Sou Met, the commander of the Division.

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[356] Prak Khan : 21 July 09 : T.41-42
[357] Suos Thy : 27 July 09 : T.95
[358] Accused : 27 April 09 : T.24
[359] Agreed Fact Filing : E5/11/6.1 : paras 115, 121
[360] Accused : 28 April 09 : T.33; Accused : 22 June 09 : T.31; Agreed Fact Filing : para 127
[361] Accused : 15 June 09 : T.15-16, 82; Accused : 22 June 09 : T.31
[362] Accused Statement : E3/41 : at ERN 00209172
[363] Accused Statement : E3/15 : at ERN 00153571
[364] Craig Etcheson : 19 May 2009 : T.6-7; Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments : 1 March 1977 : ERN 00183949-00183955
[365] Minutes of the Meeting with Comrade Tal Division 290 and Division 170 (16 September 1976) : E3/160 : ERN 00182791-00182792
[366] David Chandler, *Voices from S-21* : E3/427 at 66-67

The two men exchanged at least nine letters between 1 April and 4 October 1977.[367] The letters contain the names of people being sent to S-21 and additional enemies discovered through interrogations at S-21. The Accused has confirmed that a list of traitors compiled by Sou Met was based on the confessions of other Division 502 cadre that the Accused had previously sent him.[368] In one of the letters, Sou Met sought the Accused's advice on whether a prisoner had provided truthful answers in his confession.[369] The Accused has refused to state whether or not he responded to this letter, and simply insisted that he reported all matters to Son Sen.[370]

198. This series of letters is significant because it shows the Accused and Sou Met relying on each other's information and actively cooperating in a major action to search for, arrest, and "smash" internal enemies.[371] While the nature of the Accused's role in the purge is clear from the evidence, the full story did not emerge at trial. The transcript reveals a striking example of the Accused's repeated avoidance of questions by the Co-Prosecutors, and then the Chamber, on the facts of the matter. When questioned on the purge, he insisted that he did not have direct horizontal communication with Sou Met, and that all communications had to be routed through Son Sen.[372] While routing of letters via the Standing Committee is quite plausible,[373] the Accused is playing semantics – regardless of how the letters were delivered, they indicate direct cooperation between Sou Met and the Accused, and, therefore, the Accused's active participation in this purge.

199. The Accused asserted that Son Sen received the Accused's interrogation reports and then made decisions thereon, directing the purge with Sou Met.[374] He further argued that Son Sen continued to direct the purge even after he left to inspect troops in the battlefields.[375] When asked why Son Sen's name did not appear on the letters, he alleged that the reason was that Son Sen's name was being concealed, but failed to

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[367] Sou Met letters: E3/210; E3/211; E3/164; E3/212; E3/40 (E3/165); E3/213; E3/214; E3/215; E3/216 (E3/167)
[368] Accused : 27 May 09 : T.9
[369] E3/214
[370] Accused : 27 May 09 : T.4-7
[371] One letter shows the Accused issuing orders for prompt interrogation of an incoming prisoner : Sou Met letters : *Dear Beloved Brother Duch* : E3/213
[372] Accused : 27 May 09 : T.6-12
[373] Craig Etcheson : 27 May 09 : T.56
[374] Accused: 27 May 09 : T.6-15
[375] Accused : 27 May 09 : T.13-14

give any logical reason for such subterfuge.[376] Other than the Accused's assertions, nothing in the evidence supports the theory of his low-key role in this purge – the evidence clearly shows the contrary.

200. When he was asked whether he communicated with Sou Met before or after the nine letters discussed above, the Accused replied "I don't know whether the letter existed or not."[377] This clearly disingenuous and evasive reply stands in stark contrast to his detailed recollection of the circumstances surrounding the nine letters. The Accused is an intelligent man with excellent mastery of dates and numbers, and a remarkable memory.[378] His evasiveness and supposed inability to recollect facts on this occasion is an example of the attitude he has adopted to testifying about his involvement in the crimes at S-21: in the case of events of which direct evidence has survived, he constructs detailed theories minimising his role; however, where evidence is limited, when he is asked to give specific answers, he is unable to recollect, does not understand the questions, or offers implausible theories.

WILLINGNESS TO COMMIT CRIMES

"Koy Thuon was quick to react ...So I let him calm down...
I smiled to him and I said ... 'Brother, why did you do that?
Do not think that I am fooled by way of your anger and I would beat you to death
until the confession was cut off. I was not stupid to do that.'"[379]

201. As stated above, the Co-Prosecutors submit that the Accused's actions in maintaining efficient management of S-21, training and educating the staff, assisting in the arrest of perceived enemies, and directing torture and executions, were the actions of a willing participant and admirer of the DK regime – and not the actions of a man who had become disillusioned and was morally opposed to his gruesome work.

BELIEF IN THE CPK REVOLUTION

"I meet [Pol Pot] for the first time...but it's hard to describe the feeling at the time....
The strange feelings mean, you know, the good feeling."[380]

202. The Accused's actions before, during and after S-21 show that, far from being unwittingly caught up in the DK's crimes, he was a strong believer in the regime's

[376] Accused : 27 May 09 : T.14-15, 21-24 (claiming that secrecy of the superior's name was required to show "respect").
[377] Accused : 27 May 09 : T.12
[378] Accused : 28 April 09 : T.57
[379] Accused's own account of his interrogation of Koy Thuon, former Secretary of the Northern Zone and Minister of Commerce of DK. Accused : 9 June 2009 : T.16-17
[380] Accused : 8 June 09 : T.77

communist ideals and its ill-conceived revolution. It is this firm political belief and philosophical grounding that gave him the resolve to develop and prove himself both personally and professionally in the spirit of the revolution, and to become an intelligence and security expert on whom the regime relied to such a significant extent. Although he claims that he believed in the revolution early on but felt trapped after 1971,[381] the facts of this case make this position unbelievable.

203. The Accused's joining of the CPK movement is dealt with in the ***Early Years*** Section. At the time of his admission to the Party, he swore "to be sincere to the party, the class and the people...for [his] entire life without being in fear [of sacrificing] anything for the party."[382] The next year, he was imprisoned for his beliefs, and forced to endure the gruesome conditions of a Lon Nol prison.[383] This experience did not shake his commitment, but ironically seems only to have hardened it.

204. Shortly after being released from prison he assumed command of M-13, where he was in charge of interrogating, torturing and executing those believed to be enemies of the CPK. Francois Bizot, one of the few surviving individuals who had the opportunity to observe the Accused's behaviour at M-13, testified that he saw "a Marxist who was prepared to surrender his life...for the revolution"[384] and a man who "committed his life . . . to a cause . . . that was based on the idea that crime was not only legitimate but that it was deserved."[385]

205. As the experts who testified as to the Accused's character have indicated, his mental makeup made him emotionally predisposed to turning himself over with utter devotion to an "ideal" – communism at first and now Christianity – and to playing the role as the CPK's chief torturer and executioner.[386]

206. Although the Accused claims that he only formed the view that the CPK was a criminal movement in 1983, his words and actions described above (and in the ***Accused's Cruelty and Lack of Mercy*** Section below) indicate otherwise. Further, when questioned why he chose to start a family and raise children during his tenure

[381] Accused : 16 September 09 : T.5
[382] Accused : 6 April 09 : T.18
[383] Accused : 6 April 09 : T.18; Accused : 28 April 09 : T.20
[384] Francois Bizot : 8 April 09 : T.71-72
[385] Francois Bizot : 8 April 09 : T.97
[386] Françoise Syroni-Guilbard and Ka Sunbaunat : 31 August 09 : T.13-34

at S-21, he answered that he wanted his children "to be part in the revolutionary line" and "to love the revolution."[387] On his relationship with Son Sen – who had helped his admission as a full rights member of the Party and had been the biggest influence on his political outlooks[388] – the Accused said that, even after 1986, he "still had very great respect and faithfulness to him."[389] Even at the time of the passing of his father in 1990, he felt he could not be a "revolutionary and have feelings."[390]

207. The Accused's actions and statements reveal a very deep loyalty to the CPK, its revolution and its most senior figures – a loyalty which continued for years after the collapse of the regime, unshaken by the carnage the Accused had supervised at S-21. His belief in the Party's ideals had formed the crucial psychological basis for his dedication and pride in his work at S-21, and for his indifference to the suffering of the "enemies," which are dealt with below.

DEDICATION, PRIDE AND ENTHUSIASM

208. There is extensive evidence before the Court as to the dedication, pride and enthusiasm with which the Accused performed his tasks at S-21. David Chandler described him as "an enthusiastic and proud administrator of S-21 who worked out techniques and organisational methodology."[391] Commenting on the Accused's meticulous handwriting on official S-21 documents, including prisoners' confessions, he stated: "[T]he written annotations in red ink [...] I think reveal what can only be described as his professional enthusiasm for the job."[392] These annotations retained "a steady level of professionalism and enthusiasm" throughout 1976 and 1977.[393] This expert opinion is consistent with the testimonies of the Accused's former subordinates, including Prak Khan who saw the Accused as a meticulous and studious person, enthusiastic in his work until the very end.[394]

209. As has already been noted, the Accused zealously indoctrinated his subordinates with the ideology which underpinned the crimes at S-21, forcing and encouraging

[387] Accused : 16 September 09 : T.4
[388] Accused : 6 April 09 : T.35-36
[389] Accused : 16 September 09 : T.30
[390] Françoise Syroni-Guilbard and Ka Sunbaunat : 31 August 09 : T.20
[391] David Chandler : 6 August 09 : T.70
[392] David Chandler : 6 August 09 : T.50
[393] David Chandler : 6 August 09 : T.51
[394] Prak Khan : 22 July 09 : T.24-25

them to develop a "very absolute class stance."[395] At trial, David Chandler rejected the Defence argument that the Accused simply followed the party line, concluding that his conduct "was a part of the party line which the defendant had absolutely no trouble accepting. It suited his own inclinations and his own abilities . . . he was doing not only what was accepted but what he wanted to do."[396]

210. The Accused has in fact recognised the sense of pride that he felt in performing his work. For example, in conducting training at S-21, only he was allowed to address the participants using the microphone.[397] When shown a picture from S-21, depicting him sitting in front of a microphone during a training session, he stated: "if you look now to the picture...it seems like I was rather proud at that time for maintaining the class stand firmly."[398] He was proud of his achievements as the manager of S-21, such as when his proposal to move the prison to the *Lycée Ponhea Yat* compound was approved by Son Sen.[399] When floods severely curtailed the country's rice supply, he was quick to inform a "surprised" Nuon Chea that he had extra rice to provide and was happy "to promote the reputations of Prey Sar and S-21."[400]

211. When discussing his own view of his work at S-21, the Accused informed the psychiatric and psychological experts that he saw himself as the "protector of the Party Centre," and that this role gave him "meaning."[401] This is fully consistent with his zealous work in protecting the Party by "uncovering" traitors' plots,[402] which tragically led to the arrests and execution of thousands of victims.

212. At a more general level, the Accused's pride in, and dedication to, his work are reflected in the thousands of hours he spent educating his staff, reviewing and analysing confessions, supervising interrogations, issuing orders, preparing reports on traitors' activities, and managing one of the most effective torture and execution centres in modern history. These are actions of an extraordinary individual who went above and beyond that which may have been strictly required to keep S-21

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[395] Accused : 30 April 09 : T.39-40
[396] David Chandler : 6 August 09 : T.108-109
[397] Accused : 18 May 09 : T.57
[398] Accused : 17 June 09 : T.91
[399] Accused : 28 April 09 : T.37
[400] Accused Statement : D63 : at ERN 00194550
[401] Psychological Report on Duch : B1/IV : at ERN 00211127
[402] Agreed Fact Filing : E5/11/6.1 : para 77

simply functional. They show a firm personal dedication to the success of S-21, without which the prison could simply not have been as effective as it was.

213. Conspiracy theories formed a crucial part of the Accused's method in analysing confessions and constructing the so-called strings of traitors. These theories were encapsulated by Interrogator Pon in a document called "*The Last Plan*" which "attempted to weave two years' worth of confessions into a comprehensive, diachronic conspiracy that implicated the US, the USSR, Taiwan and Vietnam."[403] It is difficult to ascertain the extent of the Accused's direct involvement in the writing of this document. Nevertheless, a work of this magnitude, written in a strictly controlled environment in which guards and interrogators frequently found themselves victims of arrests due to breaches of discipline, could simply not have been written without either the Accused's order or his approval.

214. There is evidence of the Accused's pride and enthusiasm about his work even in the final stages of the regime: he has testified that in the second half of 1978 he was happy to be able to attend training sessions led "by the first person in the Party" [Pol Pot].[404] Having described this feeling of happiness on two separate occasions during the trial, in the final stages of the trial he disingenuously sought to misrepresent the matter, stating that his happiness was caused by a belief that interrogations and torture at S-21 would no longer be required.[405] This last statement is, in the Co-Prosecutors' submission, clearly untrue.

ACCUSED'S CRUELTY AND LACK OF MERCY

"[T]he people who are inflicting this terrible damage...knew what they were doing ...[they] did not seem to suffer themselves from what was happening. It didn't seem to...lead them to lose sleep. It didn't seem to make their handwriting more unsteady. It didn't seem to lessen their enthusiasm for coming back to work the next day."[406]

215. The Accused was married on 20 December 1975,[407] two months after seeing S-21 commence its operations. By that time, he had already participated in the removal of prisoners from Ta Kmao, and their interrogation at S-21's temporary offices in Phnom Penh prior to their execution.[408] Given his management of M-13 and seminal

[403] David Chandler, *Voices from S-21* : E3/427 at 22
[404] Accused : 22 June 09 : T.81
[405] Accused : 16 September 09 : T.14-15
[406] David Chandler : 6 August 09 : T.63
[407] Accused Statement : E3/3 : at ERN 00185475
[408] Accused : 22 April 09 : T.76-77, T.85

role in the establishment of S-21, he would have had no misapprehension as to the nature of his duties at the newly established prison. Yet, within months of marriage, he and his wife started a family and eventually had two children while he administered S-21.[409] In the same period, he saw thousands of people, including women and children, brought to S-21 and systematically executed.

216. The Accused was obviously able to ignore the immense human suffering he was causing and to continue his work unaffected.[410] At trial, when asked why he did not try to relieve the suffering of his prisoners, he stated: "if I tried to do so I would be in the situation that I could not make a clear distinction between enemies and friends."[411]

217. Even where he had the ability to minimise the suffering of his victims or make decisions that would have led to lives being spared, without any risk to himself, he chose not do so. He failed to ensure that the treatment of prisoners in the cells was humane, at least as far as could be managed in the circumstances. He also failed to intervene to prevent prisoners from Prey Sar being sent to Choeng Ek for execution by his deputies Huy Sre and Hor.[412] This is despite the fact that he maintained complete authority over the deputies,[413] and received regular reports regarding the numbers of people sent from Prey Sar to Choeng Ek.[414] Perhaps most tragically, he failed to take any action to save the children who were summarily executed at S-21 (in fact, as indicated in the ***Supervision / Ordering of Executions Generally*** Section, he personally directly ordered the killing of children).

218. The Accused admitted that he only ever sought mercy for the prisoners with whom he had specific relations – for others, even though they were blameless, he did nothing.[415] However, even close friends could not count on his help. Ke Kim Huot, alias Sot, the Accused's former primary-school teacher with whom he had maintained a close personal relationship, was arrested and detained at S-21 in 1977, where he underwent extreme torture.

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[409] Accused : 22 June 09 : T.47
[410] Accused : 15 June 09 : T.87
[411] Accused : 15 June 09 : T.87
[412] Accused : 25 June 09 : T.20
[413] Accused : 25 June 09 : T.14
[414] Accused : 25 June 09 : T.16-20
[415] Accused Statement : D66 : at ERN 00177609; Accused Statement : D121 : at ERN 00244243

219. The Accused claimed both before the Co-Investigating Judges and at trial that he had instructed the interrogators not to torture Kim Huot.[416] He further claimed that he was unaware that torture methods were being applied during Kim Huot's interrogation.[417] However, an interrogator's report to the Accused, dated 22 July 1977, summarises Kim Huot's interrogation, and indicates that he had been subjected to repeated beatings over several days, and had been forced to eat excrement.[418] The Accused does not contest receiving and annotating this document.[419] When questioned by the Co-Investigating Judges on this matter, he alleged to have read the confession but not the interrogation report and to have made the annotations blindly.[420] He also stated that he may have read the report of interrogation superficially, but did not pay attention to the accounts of torture,[421] claiming that he "would tend to refuse the idea that [he] was aware of it."[422]

220. The Accused's assertion that he was unaware of Ke Kim Huot's torture is obviously a falsehood. His close relationship with Ke Kim Huot, and the fact that he received and annotated the report of interrogation make it impossible to accept that he had not read the report. The Accused would have taken a close interest in this interrogation as Kim Huot implicated him in his confession.[423] However, even if the Accused's version of the events is entertained, it would show a complete lack of interest in the treatment of a man who had helped him at a young age and whom he had held in high regard. On his own account, the Accused neither took the trouble of verifying that torture had not been applied,[424] nor attended the interrogation to make sure that his instructions were complied with.[425] It is indeed difficult to judge which of the two versions is more abhorrent: being aware of and allowing torture of a close friend to continue, or choosing to turn a blind eye in full knowledge that torture was inevitable, and then failing to punish it.[426]

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[416] Accused Statement : D47 : at ERN 00164364; *see also* Accused : 22 June 09 : T.20
[417] Accused : 22 June 09 : T.20-21; Accused Statement : D47 : at ERN 00164364
[418] Confession of Ke Kim Huot, alias Sot : at ERN 00183288
[419] Confession of Ke Kim Huot, alias Sot : at ERN 00183285; Accused : 22 June 09 : T.20; Accused Statement : D47 : at ERN 00164364
[420] Accused Statement : D47 : at ERN 00164364
[421] Accused Statement : D47 : at ERN 00164364; Accused Statement : E3/5 : at ERN 00177633
[422] Accused Statement : E3/5 : at ERN 00177633
[423] Accused Statement : E3/5 : at ERN 00177634; *See also* Nick Dunlop, *The Lost Executioner*, E160.1, at p.174
[424] Accused Statement : D47 : at ERN 00164364
[425] *See* Accused : 22 June 09 : T.20
[426] *See* Accused : 22 June 09 : T.21

221. In addition to showing indifference to the daily suffering of the victims of S-21, the Accused at times actively participated in causing that suffering. Compelling evidence of this can be found in his correspondence with high level prisoners. The orders from the Accused to the interrogator Pon relating to prisoner Ney Saran, alias Men San, alias Ya show the extent to which the Accused would at times insert himself in interrogations.[427] The Accused authorised Pon to make direct threats to Ya about the safety of his wife and children,[428] informed Pon that "the hot method" would be used against Ya without the upper echelon being informed about it,[429] and instructed him to use torture that "might lead to [Ya's] death."[430] The Accused testified that he wrote the orders to be shown to Ya, in order "to make the mental threat so that he make confession."[431] Although he admits that it is reasonable to infer that he was "no longer patient" with Ya's constant retractions and refusals to admit,[432] he claims that the idea to issue the instruction permitting torture to the point of death was a ploy designed by Son Sen to scare Ya into confessing.[433] This explanation is wholly unbelievable. Ya had already undergone at least a week of severe "hot" torture upon the Accused's explicit orders. The further orders were not "bluffs" but instructions of a warden who had lost his patience.

222. As discussed in the ***Supervision of Torture and Interrogations*** Section, the Accused also supervised the interrogation of Siet Chhe. Chhe was subjected to extreme torture at S-21, and begged for mercy, claiming he had been framed as a traitor. The Accused's letter to him states "[s]peaking to be easily understood . . . there has never been a single cadre who has come into *santebal* because of trickery to paint him black . . . .What's your understanding of the problem, brother? . . . . It's my understanding that you haven't been straightforward with the CPK. What's your understanding?"[434]

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[427] *See* Accused : 22 June 09 : T:30-41
[428] Accused : 22 June 09 : T.36
[429] Accused : 22 June 09 : T.39-40
[430] Accused : 22 June 09 : T.38-9
[431] Accused : 22 June 09 : T.32
[432] Accused : 22 June 09 : T.40
[433] Accused : 22 June 09 : T.39; Accused Statement : D31 : at ERN 00154907-00154908
[434] David Chandler, *Voices from S-21* : E3/427 at 67

223. In one incident which has been the subject of testimony before the Court, for no apparent reason, the Accused ordered prisoners Bou Meng and Im Chan to hit each other with black plastic tubes.[435]

224. Some of the most striking examples of the Accused's mercilessness are his handwritten annotations on the confessions, ordering the use of torture against prisoners. The Accused's annotation on the confession of Danh Siyan reads: "More precise questions must be asked and more serious torture must be used in order to make her talk about her strings. Beat her until she stops saying that she has been to Vietnam to have herself healed of amenorrhea and thyroid gland by her grandfather."[436] His order on the confession of Um Soeun simply states: "He has not confessed yet. Employ more torture!"[437] And on the confession of Prum Sammneang the Accused writes: "This 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."[438]

225. All of these instances of the Accused's cruelty towards, and lack of compassion for, victims at S-21 can be put into context if his treatment of prisoners at M-13 is considered. During the trial, the Court heard testimony describing an incident at M-13 in which the Accused beat a female prisoner using a whip, and then laughed at the sight of her fainting as a result of further beating by guards in his presence.[439] Although that incident predates the period covered by the Closing Order, it is certainly relevant for the purposes of assessing the Accused's personality and character.

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[435] Bou Meng : 1 July 09 : T.37
[436] Confession of Danh Siyan : D58/II.2 : at ERN 00225275
[437] Confession of Um Soeun : E3/24 : at ERN 00234676
[438] Confession of Prum Sammneang : E5/2.3 : at ERN 00283975
[439] Uch Sorn : 9 April 09 T.69

ACCUSED'S ALLEGED FEAR VERSUS CHOICES AND PROTECTED STATUS

"[S]ometimes the conversation ended with how we 2 chit-chat to build up the intimacy between he and I."[440]

226. The Accused testified that, throughout his tenure as Deputy Secretary and Secretary of S-21, he acted in fear for his life and could not escape.[441] He has claimed that his obedience is what enabled him to survive the regime.[442] These assertions are contradicted not only by the evidence of the enthusiasm with which he performed his tasks, as discussed above, but also by his status under DK, and the choices he made before, during and after his tenure at S-21.

227. It can be accepted that once the purges led to the arrests of people close to him, and the entire regime became increasingly paranoid, the Accused would have felt a degree of concern for his own safety.[443] However, he also knew, throughout his tenure at S-21, and subsequently, that his dedication to the revolution, his natural mental abilities, and his dedicated performance at M-13 and S-21 protected him. He was clearly an asset to the CPK who needed obedient and trusted cadre in key positions.[444] He was the upper echelon's "eyes and nose"[445] at S-21 and he believed that they trusted him more than anyone.[446] Indeed, he testified: "they need me and [...] I was the most important person for them."[447]

228. Numerous aspects of the Accused's life and decisions during his tenure at S-21 illustrate the fact that he enjoyed a protected and privileged status. In addition to starting a family, and fathering two children during the period, he lived in comfortable homes which he could choose[448] and was able to make arrangements for his wife to be transferred to be closer to him so that they could spend more time together.[449] He enjoyed small but significant benefits for a Khmer Rouge cadre, such as being able to take his wife out to dinner and to drink Chinese beer at Chhay

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[440] Accused describing daily conversations over the telephone with his supervisor Son Sen: 27 May 09 : T.42-43
[441] Accused : 30 April 09 : T.37, 40
[442] Accused : 9 June 09 : T.61
[443] *See* David Chandler : 6 August 09 : T.110
[444] *See* Accused : 30 April 09 : T.54
[445] Accused : 29 April 09 : T.14; Accused Statement : E3/25 : at ERN 00147569
[446] Accused : 27 April 09 :T.91
[447] Accused : 22 June 09 : T.80
[448] "It was very easy for me to move houses and I chose the houses that I liked the most." Accused Statement, E3/15 : at ERN 00153568
[449] Accused : 22 June 09 : T.48-49

Kim Huor's house, and possessing and using a car which was not permitted for officials at his level.[450]

229. The events relating to the arrest of the Accused's brother-in-law Keoly Thong Huot alias Thoeun demonstrate his unique status. Keoly Thong Huot was the deputy head of the Santebal Security Office in Kampong Thom and was arrested in 1977 on the order of Kae Pok, the Secretary of the Central Zone. While detained at Kampong Thom prison, Keoly Thong Huot wrote the Accused a letter informing him of his arrest. The Accused reported this letter and situation to Son Sen. Keoly Thong Huot, his wife and their two children were then allowed to come to Phnom Penh to stay with the Accused. The day after their arrival the Accused received a letter from Son Sen, in the name of Kae Pok, instructing him to host the family, since Kae Pok realised that Keoly Thong Huot was the Accused's in-law.[451]

230. A few months later, the Accused was informed by Son Sen, on the orders of Nuon Chea, that Keoly Thong Huot was to be interrogated.[452] The Accused interpreted this as an order to arrest, shackle, interrogate and "smash" him.[453] However, he continued to spare Keoly Thong Huot from torture even though he was warned by Son Sen that his behaviour was dangerous.[454] It was only after Keoly Thong Huot infringed Khmer Rouge principles on further occasions,[455] that the Accused had him arrested, shackled, interrogated and tortured.[456]

231. A further factor should be highlighted in relation to the Accused's alleged fear and lack of choices in terms of escaping from S-21. David Chandler testified that Cambodians in the "high hundreds" were able to escape to Thailand, and the "low thousands" to Vietnam, a country that "would welcome" escapees.[457] In his book, he stated that one prisoner successfully escaped S-21, and 80 escaped S-24, 27 of whom were not recaptured.[458] The Accused has himself testified that 30 M-13 prisoners

[450] Accused : 22 June 09 : T.48; Accused : 9 June 09 : T.53-54
[451] Accused : 15 September 09 : T.43
[452] Accused : 15 September 09 : T.43
[453] Accused : 15 September 09 : T.44
[454] Accused : 15 September 09 : T.44
[455] Accused : 15 September 09 : T.85
[456] Accused : 15 September 09 : T.44
[457] David Chandler : 6 August 09 : T.66
[458] David Chandler, *Voices from S-21*: E3/427 at 16, 31, 62

managed to escape, which he reported to his then superior, Penh Thouk, alias Vorn Vet.[459]

232. While certainly difficult, escape was possible – especially for the Accused. He had a car, close associates in the highest echelons, and the ability to obtain permits to move around far more freely than the average Cambodian living under the DK regime. Aware of escapes by prisoners with far less resources at their disposal, he appears not to have even contemplated the option. This choice, considering the means available to him, is a relevant issue for the Trial Chamber to take into account when considering the Accused's assertions as to his hopelessness and inability to escape from the regime.

233. It should be recalled that, having completed his duties at M-13 where he saw, and participated in, the unlawful imprisonment, torture and executions of innocent victims, he chose to go to Phnom Penh and wait for a new assignment from a party that had authorised the horrific abuses at M-13.[460] He made the same choice to stay with the Khmer Rouge in 1979 after the toppling of the regime. Clearly at this stage, if not earlier, he had the opportunity to defect to the incoming Vietnamese forces. A decision to save the remaining prisoners and cooperate with the Vietnamese forces and their Cambodian allies upon their takeover of Phnom Penh would have certainly gone a long way in helping secure favourable treatment for him.

234. In 1979, the Accused would have been aware that the leaders of the failed regime may look for persons to blame, and that witnesses of Khmer Rouge's atrocities, such as himself, may be targeted. None of these factors convinced him to seek refuge from the Khmer Rouge. Instead, he chose to follow them for several years, clearly feeling protected by the senior leaders, and apparently still functioning as their subordinate: attending a meeting with Nuon Chea in 1983 where he was criticised for failing to destroy documents at S-21;[461] changing his name and going to China to teach on the orders of Son Sen in 1986;[462] and taking an assignment from Pol Pot in 1992 to oversee economic issues in Banteay Meanchey Province.[463] He continued to

[459] Accused : 7 April 09 : T.8
[460] Accused : 9 June 09 : T.76, 78; Accused : 7 April 09 : T.60; Accused : 22 April 09 : T.71
[461] Accused Statement : D13: at ERN 00147570
[462] Accused : 27 August 09 : T.100; Accused Statement : E3/11 : at ERN 00159556; Accused Statement: D13: at ERN 00147570
[463] Accused Statement : E3/11 : at ERN 00159556

be close to the senior leaders of the Khmer Rouge and to enjoy their protection[464] – this is confirmed by, inter alia, the fact that, despite Nuon Chea's strong criticism, he suffered no harm.

235. The Accused has testified that in the final days of S-21 he felt so hopeless that he could not work or walk.[465] This, in the Co-Prosecutors' submission, is of little relevance to the issue of his wilful participation in the crimes. If true, his depression in the dying days of the DK regime would have had much to do with the failure of the revolution and feelings of insecurity as to his own future. Earlier, he had had no fear and freely participated in the arrests of lower level cadre, feeling he was protected and valuing himself "higher than the others."[466] Amazingly, the Accused's apparently intense feeling of despair did not lead him to feel mercy for his victims, or to question the correctness of what was being done to them. As noted above, he gave the order or permission for even the last prisoners at S-21, who clearly could have been released, to be killed as he and his subordinates made plans to flee Phnom Penh.[467]

236. It is, of course, likely that, as an intelligent and educated man, the Accused would have realised that the machine he helped create and run could eventually turn against him. After all, as indicated above, he played an active role in the arrest and interrogation of cadre at the highest levels of CPK. However, that awareness was not the cause that compelled him to perform his duties with such zeal and enthusiasm. To the extent that the Accused followed orders, that was a consequence of his belief in their legitimacy and not of a fear for his life. As the expert psychologist and psychiatrist have stated: "The motivation for his acts was not the need to obey orders. Obeying orders was a consequence of his acts, the consequence of his need for something to believe in."[468]

237. In addition to his wide discretion in managing S-21, there are numerous examples of the Accused's acts of direct or covert defiance or insubordination which contradict

[464] *See* Nick Dunlop, *The Lost Executioner*, E160.1, at p.199
[465] Accused : 22 June 09 : T.71
[466] Accused : 27 April 09 : T.87
[467] Agreed Fact Filing: E5/11/6.1 : paras 1, 262; Accused Statement : D42 : at ERN 00160720
[468] Psychological Report on Duch : B1/IV : at ERN 00211146

his claims that he was in fear for his life[469] and simply followed orders.[470] They include:

(a) strongly objecting to the arrest of Chhay Kim Huor, one of his previous mentors[471]

(b) refusing an assignment in the transport sector post 1979, a refusal which was apparently accepted[472]

(c) as discussed above, protecting his brother-in-law, Keoly Thong Huot, despite Son Sen's warnings

(d) not visiting the prisoner Ney Saran, alias Men San, alias Ya, in his cell, contrary to Son Sen's orders[473]

(e) failing to test poisonous capsules on S-21 prisoners as ordered by Nuon Chea:[474] he states that he secretly removed the poisonous powder from the capsules, refilled them with paracetamol powder,[475] and then lied to Nuon Chea when asked about the effects of the poisonous capsules, telling him that they had no effect on the prisoners,[476]

(f) refusing to execute S-21's Vietnamese translator on Nuon Chea's orders, since interrogator Mam Nai was not fluent yet in Vietnamese; and

(g) insisting that Choeng Ek be retained when a move to Kab Srov was proposed.[477]

LEGAL CHARACTERISATION

238. The Accused is charged with: imprisonment, other inhumane acts, enslavement, torture, murder, extermination and persecution as crimes against humanity under Article 5 of the Law on the ECCC; unlawful confinement, wilful deprivation of the right to fair trial, wilfully causing great suffering, torture or inhumane treatment and

[469] Accused Statement : D21 : at ERN 00149916; Accused Statement : E3/12 : at ERN 00204286
[470] Accused Statement : D68 : at ERN 00204284
[471] Accused : 30 April 09 : T.12
[472] Accused Statement : D72 : at ERN 00204291
[473] Accused Statement : D47 : at ERN 00164363
[474] Accused Statement : D31 : at ERN 00154913; Accused : 16 June 09 : T.96-99
[475] Accused : 16 June 09 : T.96
[476] Accused : 16 June 09 : T.98
[477] Accused : 28 April 09 : T.10

wilful killing as war crimes under Article 6 of the Law on the ECCC; and torture and murder as crimes set forth in the 1956 Penal Code, according to Article 3 of the Law on the ECCC. Having analysed the factual basis of the crimes committed and the Accused's role at S-21, the Co-Prosecutors now turn to the legal characterisation of, and the Accused's individual criminal responsibility for, these crimes in accordance with the charges. The Co-Prosecutors finish the sections on various offences or modes of liability with brief conclusions on the application of the facts to the legal standards.

PERSONAL JURISDICTION [ART.2]

239. The Law on ECCC limits the Court's personal jurisdiction to "senior leaders of Democratic Kampuchea and those who were most responsible" for the international and national crimes committed in Cambodia from 1975-79.[478] Although these terms are not defined in the legislation or jurisprudence, the Accused falls within the personal jurisdiction of the ECCC as established by the legislative history of the ECCC and international jurisprudence.

240. The Accused's role as Secretary of S-21, which entailed managing and supervising the arrest, torture and execution of thousands of perceived DK enemies, proves the Accused was a "senior leader" and was one of "those who were most responsible" for crimes committed during the temporal jurisdiction of the ECCC.

241. The 1999 UN Group of Experts, which was tasked with investigating the possibility of a Khmer Rouge tribunal, concluded that such a tribunal should prosecute former DK-era officials including top political and party officials, zone level leaders and officials at torture and interrogation centres.[479] Additionally, the Report stressed that *de jure* titles should not prevent the tribunal from prosecuting those who possessed a *de facto* authoritative role in the crimes.[480]

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[478] ECCC Law : Art. 2; ECCC Agreement : Art. 1

[479] 1999 Group of Experts Report at para 103-111

[480] 1999 Group of Experts Report at para 109 stating that "[t]he 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." Such a focus 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. Id. at para 110.

242. At the International Criminal Tribunal for the former Yugoslavia (ICTY), the tribunal's completion strategy requires the court to prosecute only "the most senior leaders suspected of being most responsible,"[481] which an ICTY Referral Bench defined by (1) the gravity of the crimes charged, and (2) the level of responsibility of the accused.[482]

243. As for the level of responsibility, the ICTY Referral Bench has not concluded that "most senior leaders" meant only policy leaders, but has instead given relevant factors for consideration, such as, *inter alia*, permanency of position,[483] temporal scope,[484] number of subordinates,[485] rank of the accused within the hierarchical structure,[486]and the actual criminal role of the accused.[487] When analysing gravity of the crimes, factors to be considered are temporal scope,[488] geographical scope,[489] number of victims affected,[490] how many separate incidents an accused is charged with,[491] and the manner in which the criminal conduct was committed.[492]

244. Applying the above jurisprudence to the present case, the Accused is clearly a most "senior leader" and "most responsible" for the crimes committed during the period of Democratic Kampuchea. He was the *de jure* and *de facto* head of S-21, the principal detention facility in DK. His participation in the mass crimes at S-21 was comprehensive, from establishing and implementing prison policy to personally ordering and overseeing torture and executions.

245. The Accused: a) was the permanent Secretary of S-21 for almost its entire three year existence; b) interacted almost daily with the Standing Committee; c) employed

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[481] *See* United Nations Security Council Resolution 1534 : paras 5-6; United Nations Security Council Resolution 1503
[482] Lukic Referral Decision : para 26
[483] Milosevic Referral Decision : para 23
[484] Milosevic Referral Decision : para 23
[485] Milosevic Referral Decision : para 23
[486] Ademi Referral Decision : para 29; Kovacevic Referral Decision : para 20; Milosevic Referral Decision : para 23; Lukic Referral Decision : para 28
[487] Ademi Referral Decision : para 29; Lukic Referral Decision : para 28
[488] Jankovic Referral Decision : para 22; Todovic Referral Decision : para 13; Ljubicic Referral Decision : para 18; Ademi Referral Decision : para 28; Kovacevic Referral Decision : para 20; Lukic Referral Decision : para 27
[489] Jankovic Referral Decision : para 22; Todovic Referral Decision : para 16; Ademi Referral Decision : para 28; Ljubicic Referral Decision : para 18; Kovacevic Referral Decision : para 20; Lukic Referral Decision : para 27
[490] Jankovic Referral Decision : para 22; Kovacevic Referral Decision : para 20; Lukic Referral Decision : para 27
[491] Lukic Referral Decision : para 27
[492] Lukic Referral Decision : para 27

hundreds of subordinates; and d) was responsible for a whole host of horrific crimes committed systematically against thousands of individual victims. The crimes at S-21 were some of the gravest in the history of international criminal jurisprudence – over three years of operation in three separate locations resulting in countless incidents of torture, deprivations of human rights, and the execution of more than 12,273 prisoners.

CRIMES AGAINST HUMANITY [ART.5]

246. Article 5 of the ECCC Law authorises the ECCC to try individuals suspected of committing crimes against humanity. The specific offences listed in Article 5 include murder, extermination, enslavement, imprisonment, torture, persecution on political, racial or religious grounds, and other inhumane acts. The ICTY,[493] International Criminal Tribunal for Rwanda (ICTR),[494] Special Court for Sierra Leone (SCSL)[495] and International Criminal Court (ICC)[496] all have the power to prosecute the same specific crimes as provided by Article 5, namely murder,[497] extermination,[498] enslavement,[499] imprisonment,[500] torture,[501] persecutions on political, racial and religious grounds,[502] and other inhumane acts.[503] The elements of each of these offences are discussed below.

247. For the commission of these offences to constitute crimes against humanity, certain jurisdictional elements must also be present.[504] The specific offences must be committed: (1) as part of; (2) a widespread or systematic; (3) attack; (4) directed against a civilian population; (5) on national, political, ethnical, racial or religious grounds.

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[493] ICTY Statute : Art. 5
[494] ICTR Statute : Art. 3
[495] SCSL Statute : Art. 2
[496] Rome Statute : Art. 7
[497] ICTY Statute : Art. 5(a); ICTR Statute : Art. 3(a); SCSL Statute : Art. 2(a); Rome Statute : Art. 7(a)
[498] ICTY Statute : Art. 5(b); ICTR Statute : Art. 3(b); SCSL Statute : Art. 2(b); Rome Statute : Art. 7(b)
[499] ICTY Statute : Art. 5(c); ICTR Statute : Art. 3(c); SCSL Statute : Art. 2(c); Rome Statute : Art. 7(c)
[500] ICTY Statute : Art. 5(e); ICTR Statute : Art. 3(e); SCSL Statute : Art. 2(e); Rome Statute : Art. 7(e)
[501] ICTY Statute : Art. 5(f); ICTR Statute : Art. 3(f); SCSL Statute : Art. 2(f); Rome Statute : Art. 7(f)
[502] ICTY Statute : Art. 5(h); ICTR Statute : Art. 3(h); SCSL Statute : Art. 2(h); Rome Statute : Art. 7(h)
[503] ICTY Statute : Art. 5(i); ICTR Statute : Art. 3(i); SCSL Statute : Art. 2(i); Rome Statute : Art. 7(k)
[504] The jurisdictional requirements are not elements of the specific offences, but the specific offences must be "part of" an attack that meets the jurisdictional requirements. *See* Deronjic AJ : para 109, "[T]his requirement [of a widespread or systematic attack] only applies to the attack and not to the individual acts of the accused"; Kordic and Cerkez AJ : para 94, "Only the attack, not the individual acts of the accused, must be widespread or systematic."; Kayishema and Ruzindana TJ : para 135

JURISDICTIONAL REQUIREMENTS

1. WIDESPREAD OR SYSTEMATIC

248. The attack must be either widespread or systematic. These requirements are disjunctive.[505] The term "widespread" refers to "the large-scale nature of the attack and the number of targeted persons"[506] and may be established by the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[507] An attack can therefore be constituted by a single act, but it must have had a substantial effect or affect a large number of people.

249. The term "systematic" does not require the attack to be large-scale but relates to the "organised nature of the acts of violence and the improbability of their random occurrence."[508] Systematicity may be established by evidence of a "non-accidental repetition of similar criminal conduct."[509]

250. Other indicators which would tend to prove the occurrence of a widespread or systematic attack are "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."[510] Whilst no plan or policy is required to prove a widespread or systematic attack, the existence of such a plan may be further evidence of the nature of the attack.[511]

Widespread

251. The evidence before the Chamber establishes that the attack on the civilian population in this case (discussed *infra*) was both widespread and systematic. It was widespread because of the large-scale nature of the crimes committed against the population and the number of victims affected. The attack covered the entire country, and included the use of forced movements, the unlawful confinement of virtually the whole population to rural cooperatives and worksites, and the creation of a network of security centres across the whole of DK.

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[505] Kunarac et al AJ : para 93; Brima et al TJ : para 215
[506] Kordic AJ : para 94
[507] Blagojevic and Jokic TJ : para 545
[508] Kordic AJ : para 94
[509] Kordic AJ : para 94
[510] Kunarac AJ : para 95; *see also* Limaj et al TJ : para 183
[511] Kunarac AJ : para 98

252. Throughout DK, victims were taken to security and re-education centres where they were imprisoned, tortured and executed. The CPK's policies thus resulted in the victimisation and killings of vast numbers of civilians in all parts of the country, and at least 12,273 people within S-21.

Systematic

253. The torture and killing implemented during the DK's reign were systematic by any definition because they were organised acts of violence, which were not random or capable of being replicated in a non-accidental manner. The concerted forced evacuations of all urban areas, the confinement of virtually the whole population in rural cooperatives and worksites and the similarity of the inhumane conditions at those cooperatives and worksites demonstrate that the attack as a whole was systematic. The functioning of the network of security centres across the entire country, and of S-21 in particular, also constituted a systematic attack because of the highly organised and repetitive nature of the violence and repression. The network of security centres operated hierarchically with the most high-ranking important prisoners being sent to S-21.

254. All security centres functioned in a similar manner. Prisoners were detained in inhumane conditions, tortured during interrogation to extract "confessions" and killed. The killings were methodical and highly organised, with many dozens or more prisoners killed at any one time and buried in mass graves. Those who had been implicated in the "confessions" were in turn arrested, tortured and killed, resulting in ever-widening purges. Such a process cannot reasonably be characterised as either random or accidental. The Accused ensured that this process operated within S-21 in a disciplined and organised manner, including implementing a comprehensive system of record-keeping and documentation.

2. ATTACK

255. Acts constituting crimes against humanity must be committed as part of an "attack." An attack has been defined as "a course of conduct involving the commission of acts of violence"[512] such as murder, extermination and enslavement. The notion of "attack" for the purposes of establishing crimes against humanity is not limited to the

[512] Blagojevic TJ : para 543

use of armed force; it encompasses any mistreatment of the civilian population.[513] Moreover, an "attack" is not required to be a military attack nor be part of an armed conflict.[514]

256. The evidence before the Chamber establishes that there was an attack constituted through the operation of the cooperatives, worksites and security centres across the entire country, and within S-21 itself. At S-21, there was a course of conduct that involved and centered around the commission of violent acts including but not limited to beating, torture, killing and other inhumane acts. Additionally, the creation, management and operation of security centres throughout the country, amounted to orchestrated repression on a massive scale. Implemented systematically, such repression in itself constituted an attack for the purposes of Article 5 of the ECCC Law.

3. Directed Against a Civilian Population

257. A crime against humanity must be "directed against" a civilian population which requires that the civilian population be the primary object of the attack.[515] The factors determining whether an attack was directed against a civilian population 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; 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.[516]

258. The notion of "civilian population" for the purposes of the jurisdictional element of crimes against humanity refers to all persons who are not members of the armed forces.[517] However, the "civilian population" is not required to include the entire population of the particular geographical area attacked.[518] Similarly, a "civilian

[513] Kunarac AJ : para 86
[514] Brima et al TJ : para 214; Vasiljevic TJ : para 30
[515] Mrksic et al TJ : para 440 (citing Kunarac AJ : para 91); Kordic AJ : para 96; Limaj TJ : para 185; Brdjanin TJ : para 134; Galic TJ : para 142; Stakic TJ : para 624; Naletilic et al TJ : para 235
[516] Mrksic TJ : para 440; Kunarac AJ : para 91; Blaskic AJ : para 106
[517] Martic AJ : para 302
[518] Kunarac AJ : para 90

population" may include non-civilians without forfeiting its civilian character, as long as the population is predominately civilian.[519]

259. The evidence before the Chamber establishes that the attack, in cities and urban areas, cooperatives, worksites, security centres and S-21 itself, was directed against the entire population of Cambodia, which was predominantly civilian. The attack began with the forced evacuation of the entire civilian population of Phnom Penh and other cities, the enslavement of the country's population in cooperatives and worksites, and the elimination of all intellectuals, capitalists, and persons associated with the former government. Once this was achieved, the attacks focused on individuals within the cooperatives, worksites and CPK organisation who were deemed to be potential enemies of the State. Even within S-21, the targets of the attack were predominantly civilian, as evidenced in the Revised S-21 Prisoner List.

4. DISCRIMINATORY GROUNDS

260. Article 5 of the ECCC Law requires that the attack against a civilian population in the case of crimes against humanity be based on national, political, ethnical, racial or religious grounds.[520] This element refers to the nature of the attack and is not an element of the specific offences.[521]

261. The evidence before the Chamber establishes that the attack was carried out on political, religious and ethnic grounds in cooperatives, worksites, and security centres throughout the whole of Cambodia including S-21. The attack was driven by the CPK's political ideology, which dictated that all undesirable elements of society had to be destroyed. In carrying out their radical re-shaping of Cambodian society, the CPK systematically engaged in political persecution by actively searching for, imprisoning and executing, all those considered to be "enemies" or otherwise undesirable, which included former Khmer Republic soldiers and officials, CPK cadres, communists and sympathisers returning from abroad, combatants and workers. The CPK also systematically engaged in religious persecution by suppressing all religions, which included Islam, Buddhism and Christianity, and pursued a policy of discriminating against ethnic Vietnamese (including persons of

[519] Mrksic TJ : para 442, citing Jelisic TJ : para 54; Kupreskic et al TJ : paras 547-549; Blagojevic TJ : para 544

[520] ECCC Law : Art. 5

[521] Akayesu AJ : para 466 (stating "discrimination is not a requirement for the various crimes against humanity, except where persecution is concerned"); Baglishema TJ : para 81

mixed Khmer/Vietnamese backgrounds), attempting to purge the country of all those believed to support Vietnam.

5. KNOWLEDGE OF THE ATTACK

262. In order for the specific offences to be "part of" a crime against humanity, the perpetrator must have *knowledge of the existence of the attack* and must know that his or her acts are part of that attack.[522] Knowledge of the details of the attack is not required,[523] but it will be sufficient if the perpetrator knew of the overall context within which his acts took place.[524] The motive of the perpetrator is irrelevant,[525] and it is not necessary for the perpetrator to have approved of the attack.[526]

263. The evidence before the Chamber establishes that the Accused knew the crimes that occurred at S-21 were part of a widespread and systematic attack that took place throughout Cambodia. He knew that the crimes committed at S-21 were part of a wider policy which was being implemented at various security centres in the country. The Accused was in regular communication with his superiors in the CPK hierarchy and participated in meetings with the units of the DK government and military. These meetings and connections informed him about the conditions in the CPK, DK government and military structures, and in all parts of Cambodia, and provided him sufficient knowledge of the overall context to be aware of the attack. Furthermore, the Accused knew that his acts were part of that attack - for example, he knew that S-21 helped carry out the purges and that he contributed to those purges by identifying alleged disloyal CPK cadres and workers on the basis of "confessions" obtained at S-21.

SPECIFIC OFFENCES

1. IMPRISONMENT

264. Imprisonment as a crime against humanity requires three elements to be established, namely that: (1) an individual is deprived of his or her liberty; (2) the deprivation of liberty is imposed arbitrarily; and (3) the act or omission by which the individual is

[522] Kunarac AJ : para 99; Kordic AJ : para 99; Kayishema TJ : para 133-134
[523] Kunarac AJ : para 102 (stating "[t]his requirement [that the accused have knowledge of the attack] does not entail knowledge of the details of the attack;" Blagojevic TJ : para 548, "The *mens rea* requirement . . . does not entail knowledge of the details of the attack")
[524] Limaj TJ : para 190
[525] Kordic AJ : para 99
[526] Limaj TJ : para 190

deprived of his or her physical liberty is performed by the accused, or a person or persons for whom the accused bears criminal responsibility, with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.[527] Imprisonment is defined as arbitrary where it is imposed without a justifiable legal basis and without due process of law.[528] Those in charge of a prison with effective or constructive knowledge that the prisoners were unlawfully detained may be held liable of imprisonment as a crime against humanity.[529]

265. The evidence before the Chamber establishes that at least 12,273 people were imprisoned at S-21 and thousands more at S-24. The total number of victims at S-21 is likely much higher due to a loss of records and non-recording of names of certain prisoners, as corroborated by Sous Thy. Imprisonments were arbitrary – all prisoners at S-21 were arrested without a justifiable legal basis. They were mainly arrested because they were considered "enemies" or "undesirable elements," or because they were named in other prisoners' coerced confessions. Such putative offences were never described by any legal decree, law or statute. Prisoners at S-21 could never challenge their imprisonment, because there was no functioning legal system in Cambodia during the DK period.

266. As commander of S-21, the Accused arbitrarily deprived prisoners of their liberty. He and those under his command knew that the prisoners were unlawfully detained and destined for execution. The Accused knew that the acts allegedly committed by the prisoners that led to their arrest and imprisonment were not criminalised by legal decree, law or statute. The Accused knew that there was neither a functioning legal system nor a legal process by which prisoners at S-21 could challenge their imprisonment. He nevertheless ordered and oversaw the imprisonment of more than 12,273 prisoners at S-21 and thousands more at S-24.

2. OTHER INHUMANE ACTS

267. "Other inhumane acts" is a residual category of crimes against humanity which criminalises acts of similar gravity to those that are specifically enumerated.[530] The

[527] Simic et al TJ : para 64; *see also* Krnojelac TJ : para 115
[528] Kordic AJ : para 116; Simic TJ : para 64; Kordic and Cerkez TJ : para 302
[529] *See* Krnojelac TJ : para 124
[530] Blagojevic TJ : para 624; Kordic AJ : para 117; Galic TJ : para 152

following elements are required for an act to be considered as inhumane: (1) the victim must have suffered serious bodily or mental harm (the degree of severity being assessed on a case-by-case basis with due regard for the individual circumstances); (2) the suffering must be the result of an act or omission of the accused or his subordinate; and (3) when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.[531] The severity of the act must be of "similar seriousness" to the enumerated crimes against humanity,[532] but the victim does not need to suffer long-term effects.[533]

268. Jurisprudence specifically relating to prison camps has established that serious physical or psychological harm including beatings, torture, sexual violence, humiliation, harassment, mental abuse and detention in deplorable conditions constitute inhumane acts.[534] Regular beatings, mistreatment of prisoners during their interrogation, recurring brutality and the constant fear of being beaten have also been held to constitute inhumane treatment.[535]

269. The evidence before the Chamber establishes that the prisoners at S-21 suffered serious bodily and/or mental harm from inhumane acts which included:

(a) the creation of inhumane conditions of detention, in particular through overcrowding and a lack of adequate food, sanitation and medical treatment

(b) forcible, invasive and collective restraint during detention

(c) physical violence during and outside interrogation

(d) medical experimentation and blood-drawing

(e) the creation of a climate of fear which arose out of the inevitability of torture and execution as well as the harsh system of discipline, intimidation and threats, and

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[531] Kordic AJ : para 117
[532] Vasiljevic AJ : para 165; Blagojevic TJ : para 627
[533] Vasiljevic AJ : para 165; Blagojevic TJ : para 627
[534] Krnojelac TJ : para 133; Kvocka TJ : paras 164-165, 720
[535] Aleksovski TJ : para 228. In this case those acts were qualified as "outrage upon personal dignity" within Article 3 of the ICTY Statute, this mirrors common Article 3 of Geneva Conventions. In the Judgment at para 54, the Trial Chamber considers that "outrage upon personal dignity" is a species of "inhuman treatment". The Trial Chamber considers also that those acts constitute degrading or humiliating treatment.

(f) being forced to witness deaths of other prisoners from torture, disease, or malnutrition (or a combination of all three).

Some prisoners attempted suicide rather than continue to suffer this inhumane treatment at S-21.

270. All such inhumane acts, whether viewed individually or cumulatively, are properly characterised as severe. These acts were committed by the Accused as the Deputy Secretary and Secretary of S-21 and by his subordinates under his authority. He has admitted wilfully ignoring the conditions of detention at S-21.

271. The Accused intended to inflict serious bodily or mental harm upon the prisoners. He gave direct orders to his subordinates to torture, intimidate and threaten them. As Secretary of S-21, he intentionally created and managed a system of ill-treatment which he knew or had reason to know was comprised of the specific inhumane acts described above.

3. ENSLAVEMENT

272. Enslavement is defined as the intentional exercise of powers of ownership over a person.[536] The consent or free will of the victim is absent.[537] Factors which indicate the existence of enslavement include: "the 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."[538]

273. The evidence before the Chamber establishes that every aspect of the lives of the prisoners at S-21 was controlled. Prisoners were kept in cells and constantly guarded. They were restrained with handcuffs and shackles. Discipline was extremely strict; prisoners were not permitted to speak, make any noise or move without permission from the guards. They lived in squalid unsanitary conditions and had to ask for permission to urinate or defecate. They were forced to urinate and defecate while chained in their cells, into jerry cans and ammunition boxes. Drinking water was given at the discretion of the guards. Food was woefully inadequate. These detention conditions go far beyond what is reasonable or

[536] Kunarac AJ : para 116
[537] Kunarac et al TJ : para 542
[538] Kunarac AJ : para 119 (citing Kunarac TJ : para 543)

necessary at a prison. This level of control over the prisoners deprived them entirely of any control of their lives or exercise of their free will.

274. Prisoners at S-24 were forced to work in gruelling conditions under the constant threat of torture and execution. Non-compliance with the work quotas by any prisoner led to severe physical punishment, even for women and children. The prisoners were subjected to cruel treatment, a lack of sufficient food and rest as well as an excessive workload, which often included working before dawn and continuing late into the night. The Accused was aware that these prisoners were considered simply as objects and means of production.

275. The Accused personally and through his subordinates intended to exercise ownership and total control over the prisoners. He enforced the rules which deprived the prisoners of any freedom or control over their own lives.

4. TORTURE

276. Torture as a crime against humanity requires three elements: (1) there must be an act or omission inflicting severe pain or suffering, whether physical or mental; (2) the act or omission must be intentional; and (3) the act or omission must have been carried out with a specific purpose such as to obtain information or a "confession," to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.[539] Permanent injury is not a requirement for torture,[540] nor is a minimum level of pain which must be inflicted: torture depends on the circumstances of each individual case.[541] Additionally, the perpetrator need not have acted in an official capacity.[542]

277. Jurisprudence specifically relating to prison camps has established that conditions of detention, absence of medical care and repetitive and systematic abuse of prisoners can be indicia of torture.[543] Extreme abuse during interrogation, coupled with an intention to extract a "confession" or information from the prisoner, also amounts to torture as a crime against humanity.[544] Prison commanders have a responsibility

[539] Limaj TJ : para 235; Kunarac AJ : paras 142, 144 (citing Kunarac TJ : para 497); *see also* Brdjanin TJ : para 481; Krnojelac TJ : para 179
[540] Brdjanin TJ : para 484
[541] Brdjanin TJ : para 483
[542] Kunarac AJ : para 148
[543] Kvocka TJ : para 151
[544] Krnojelac TJ : para 255

under international law to protect prisoners from unlawful abuse and to ensure that living conditions are humane. Prison commanders who personally mistreat prisoners set an example for their subordinates, contributing to "an environment of impunity," and may thus be criminally responsible.[545]

278. The evidence before the Chamber establishes that torture was inflicted on S-21 prisoners, and that the Accused instigated, ordered and supervised the use of torture. The purpose of torture was to extract "confessions" from prisoners. These acts caused severe mental and physical pain and suffering, sometimes resulting in death. The effects of torture were obvious to both prisoners and S-21 staff, as victims' screams could be heard and the wounds resulting from torture could be seen on the victims following interrogation.

279. The Accused trained his staff to utilise torture techniques to efficiently extract "reliable" confessions. He ordered, demanded and/or authorised beatings, torture, medical experiments, forcible extraction of blood and, ultimately, execution. Significantly, by committing acts of torture, teaching torture techniques and mistreating prisoners himself, the Accused set an example to his subordinates that these unlawful acts were both permitted and required.

5. MURDER

280. Murder as a crime against humanity requires three elements: (1) the death of the victim; (2) the death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and (3) the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he/she bears criminal responsibility, with an intent to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[546] The victim's body is not required as evidence to prove death.[547]

281. The evidence before the Chamber establishes that at least 12,273 individuals were murdered at S-21. The Accused has admitted that this figure underestimates the actual number of deaths. Although the bodies of those executed have not been

[545] Nikolic TJ : para 179
[546] Brdjanin TJ : para 381
[547] Brdjanin TJ : para 383

individually identified, 8,985 human remains have been exhumed from mass graves at Choeng Ek. Witness testimonies also indicate the existence of hundreds and possibly thousands of additional human remains buried in and around the S-21 compound.

282. The evidence before the Chamber demonstrates that the deaths resulted from violent and deliberate acts of killing inflicted by S-21 staff members under the Accused's command. The vast majority of prisoners were executed by being clubbed and knifed to death at Choeng Ek. Those killed in or near the S-21 compound appear to have suffered a similar fate.

283. The forcible extraction of blood, surgery on living prisoners and other pseudo-medical experiments leading to death were premeditated and intentional. Killing by torture during interrogation was similarly committed with the reasonable knowledge that the torture was likely to cause death and with the intent to inflict grievous bodily harm or serious injury. The same applies to the infliction of inhumane conditions at S-21 which caused the deaths of a large number of prisoners.

284. The Accused and his subordinates specifically intended to kill the victims at S-21 knowing that as a matter of CPK policy, everyone detained had to be executed. It was the Accused's job to ensure that this policy was carried out. The Accused admitted that he signed lists of prisoners to be executed and annotated other lists with the word "smash" beside the names of the prisoners to be killed. For particular groups of prisoners, the Accused personally oversaw the executions, such as in the case of Vietnamese prisoners of war, high-ranking CPK cadres, and a small number of Westerners who were captured and sent to S-21.

6. EXTERMINATION

285. Extermination as a crime against humanity requires two elements to substantiate the offence: (1) that an act or omission resulted in the death of persons on a massive scale; and (2) the accused intended to kill persons on a massive scale or to create conditions of life that lead to the death of a large number of people.[548] Mass killings may be proved by evidence that victims were subjected to conditions that contributed to their death, such as the deprivation of food and medicine, which was calculated to

[548] Blagojevic TJ : para 572; Brdjanin TJ : para 388

cause the destruction of part of the population.[549] There is no minimum number of victims needed to satisfy the requirement that the scale of deaths must be "massive"; this must be assessed on a case-by-case basis in light of the proven criminal conduct and all relevant factors.[550]

286. The evidence before the Chamber of killing on a mass scale in this case establishes extermination. As described above, more than 12,273 people were executed at S-21 and Choeng Ek. These deaths were the result of a deliberate policy to kill prisoners, which was implemented by the Accused and his subordinates.

7. PERSECUTION

287. Persecution is a crime defined by discrimination on "political, racial and religious grounds." To substantiate the offence two elements must be satisfied: (1) the act or omission discriminated in fact and either denied or infringed upon a fundamental right defined in either customary international law or treaty law; and (2) the act or omission was carried out deliberately with the intention to discriminate on one of the listed grounds.[551] A single act may be sufficient to constitute persecution as long as both elements are proved,[552] but the particular persecutory acts must be specified.[553]

288. Persecutory acts include acts which are of equal gravity to the enumerated acts of crimes against humanity[554] and thus include murder, extermination, enslavement, imprisonment and torture. Humiliating treatment can constitute persecution,[555] and being forced to witness or hear torture, interrogation and random brutality in a prison camp has been found to constitute psychological abuse and a form of persecution.[556] Prolonged imprisonment may also constitute persecution where it is clearly carried out with the intent to discriminate on religious, political, or ethnic grounds.[557] Beatings or torture committed because of the political or religious affiliation of the

[549] Brdjanin TJ : para 389; *see also* Krstic TJ : para 503
[550] Blagojevic TJ : para 573; Brdjanin TJ : para 391; Stakic TJ : para 640; Krajisnik TJ : para 716
[551] Deronjic AJ : para 109; *see also* Kvocka et al AJ : paras 320, 454; Kordic AJ : para 101; Blaskic AJ : para 131; Vasiljevic AJ : para 113; Krnojelac AJ : para 185; Blagojevic TJ : para 579; Brdjanin TJ : para 992; Simic TJ : para 47
[552] Kordic AJ : para 102; Blaskic, AJ : para 135; Vasiljevic AJ : para 113; Blagojevic TJ : para 582
[553] Blaskic AJ : para 139
[554] Kordic AJ : paras 102, 671; *see also* Kvocka AJ : para 321; Blaskic AJ : para 135
[555] Humiliating treatment has been defined as acts that are intended to inflict psychological harm, including keeping prisoners in cramped and dirty conditions, making them beg for water, and subjecting them to constant beating, threats and demoralizing treatment. Kvocka TJ : para 190; Kvocka AJ : paras 324-325; Nikolic TJ : para 69
[556] Kvocka TJ : para 192
[557] Krnojelac TJ : para 438

victims can prove the requisite discriminatory intent.[558] The discriminatory intent required can also be inferred from the discriminatory character of a detention centre as a whole.[559]

289. The evidence before the Chamber establishes that the imprisonment, enslavement, torture, murder and other inhumane acts described above also constitute persecutory actions. These crimes were committed with a clear discriminatory intent as victims were targeted based on their actual or perceived political opinion and/or race. All prisoners were victims of political discrimination because the CPK viewed any opposition, whether real or perceived, as a major threat to its survival. This applied to former soldiers and officials of the Khmer Republic, former CPK cadres and other Cambodian prisoners at S-21 based on different justifications or perceived threats. Vietnamese soldiers and civilians were additionally discriminated against on racial grounds. The Accused's discriminatory intent should be inferred from the fact that he and his subordinates clearly knew about the CPK's policies of political and racial discrimination, and furthered and implemented them at S-21.

GRAVE BREACHES OF THE GENEVA CONVENTIONS [ART.6]

290. Article 6 of the ECCC Law authorises the ECCC to bring to trial individuals suspected of committing grave breaches of the Geneva Conventions ('grave breaches'). The specific offences listed in Article 6 include 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 the rights of fair and regular trial and unlawful confinement of a civilian. Similarly, the ICTY[560] and the ICC[561] have the power to prosecute the same crimes as provided in Article 6 namely the unlawful confinement of a civilian;[562] deprivation of a fair and regular trial;[563] wilfully causing great suffering or serious injury to body or health;[564] torture or

[558] Kvocka AJ : para 366
[559] Kvocka AJ : paras 364, 366
[560] ICTY Statute : Art. 2
[561] Rome Statute : Art. 8
[562] ICTY Statute : Art. 2(g); Rome Statute : Art. 2(a) (vii)
[563] ICTY Statute : Art. 2(f); Rome Statute : Art. 2(a) (vi)
[564] ICTY Statute : Art. 2(c); Rome Statute : Art. 2(a) (iii)

inhumane treatment;[565] and wilful killing.[566] The elements of these offences are discussed below.

291. For the commission of these offences to constitute grave breaches, certain jurisdictional elements must exist: (1) the specific offences must be committed in the context of and be associated with an international armed conflict; (2) the perpetrator was aware of the factual circumstances that established the existence of an armed conflict; (3) the acts were committed against person(s) or property that was protected under one or more of the Geneva Conventions of 1949; and (4) the perpetrator was aware of the factual circumstances that established this protected status.[567]

JURISDICTIONAL REQUIREMENTS

1. INTERNATIONAL ARMED CONFLICT

292. An international armed conflict must exist in fact. An armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between government authorities and organised armed groups or between such groups within a State."[568] The ICRC Commentary on the Geneva Conventions defines armed conflict as "any difference arising between States and leading to the intervention of the members of the armed forces."[569] An armed conflict assumes an international character when it involves two or more States, and "[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached."[570]

293. Additionally, there must be a nexus between the international armed conflict and the crimes alleged.[571] The nexus requirement does not require proof that the crimes were committed in the same area as the actual combat activities; it is met when it is shown that the alleged crimes were "closely related" to the hostilities.[572] To this effect "[t]he armed conflict need not have been causal to the commission of the crime, but

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[565] ICTY Statute : Art. 2(b); Rome Statute : Art. 2(a) (ii)
[566] ICTY Statute : Art. 2(a); Rome Statute : Art. 2(a) (i)
[567] Preparatory Commission for the International Criminal Court, PCNICC/2000/L.1/Rev.1/Add.2, (2000) Annex III; *see also* Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* : at 17
[568] Tadic AC Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction : para 70
[569] *Commentary on the Geneva Conventions of 12 August 1949,* Jean Pictet (ed.) Vol III, 23 (1952)
[570] Tadic AC Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction : para 70
[571] Halilovic TJ : para 29; Brdjanin TJ : para 128
[572] Vasiljevic TJ : para 25

the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed".[573]

294. The facts of this case amply meet these criteria. The crimes at S-21 were committed against Vietnamese soldiers and civilians who were detained because of the conflict, most of them having been captured during military operations or incursions. The armed conflict clearly played a substantial part in the manner and purpose in which the crimes were committed against these victims. The victims were tortured into making confessions relating to the armed conflict (including that Vietnam planned to invade Cambodia), which were broadcast and used for propaganda purposes also related to the conflict.

295. As illustrated in the ***Armed Conflict*** Section, the evidence before the Chamber establishes that an international armed conflict existed between the armed forces of DK and the armed forces of Vietnam from at least April 1975 and continuing until 6 January 1979. The conflict was between the regularly constituted armed forces of two sovereign States. The overall intensity of the conflict increased over time and armed border clashes, skirmishes and outright invasions occurred between the two States throughout this period, culminating in the full-scale invasion of Cambodia by Vietnamese forces and resulting in the collapse of the DK government.

2. PROTECTED PERSON

296. Geneva Convention IV extends "protected person" status to civilians from one of the belligerent states that are "in the hands of a party to the conflict or Occupying Power of which they are not nationals."[574] This protects civilians who find themselves on territory controlled by an enemy state.[575] Usually protected person status is determined by the citizenship of the person but it can also be determined by applying the "allegiance" test, which focuses on the allegiance of the person to a party to the armed conflict rather than their nationality.[576] Protected status may apply to

[573] Kunarac et al AJ : para 58
[574] Geneva Convention (IV) : Art. 4(1). The Convention starts by extending protection to all people "in the hands of a party to the conflict or Occupying Power of which they are not nationals." The Convention then excludes nationals from neutral or co-belligerent states, those who can claim protection under any of the other Geneva Conventions, and various other groups from protected status. Those who are not excluded have protected status. In practice the most common group entitled to protection is civilians of enemy states.
[575] Naletilic TJ : para 208
[576] Kordic AJ : paras 322-323, 328-330

individuals who have the same nationality as their captors because in modern conflicts victims may be "assimilated" to the external State involved in the conflict, despite the fact that they formally have the same nationality as their captors.[577] Geneva Convention III extends protection to "members of the armed forces of a Party to the conflict" who have "fallen into the power of the enemy."[578] This class of protected persons is usually referred to as "prisoners of war."

297. The evidence before the Chamber establishes that the Vietnamese prisoners of war and civilians, who were imprisoned, interrogated and executed at S-21, had the status of protected persons under international law. Between 150 and several hundred members of the regular Vietnamese military who were captured near the border with Cambodia became victims of S-21. Having fallen into the power of DK, these soldiers were entitled to prisoner of war status under the Third Geneva Convention.

298. At least 100 Vietnamese civilians were also imprisoned at S-21. Finding themselves in the hands of a party to the conflict of which they were not nationals, they enjoyed protected status under the Fourth Geneva Convention.

3. Awareness of Factual Circumstances

299. The perpetrator, in addition to having the requisite *mens rea* for the specific crimes, must: (1) be aware of the factual circumstances of the existence of an international armed conflict; and (2) be aware of the factual circumstances that established the protected status. Knowledge that a foreign State was involved in the armed conflict will satisfy the first element regarding the existence of an international armed conflict.[579] Knowledge that the victim belonged to an adverse party to the conflict will satisfy the second element regarding the status of the victim.[580]

300. The evidence before the Chamber establishes that the Accused was aware of the factual circumstances of the international armed conflict between DK and Vietnam and of the protected status of the captured Vietnamese soldiers and civilians. Speeches by the senior leaders of the CPK, Party magazines and other CPK propaganda constantly referred to Vietnam and Vietnamese as the enemy of DK. The

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[577] Blaskic AJ : para 174; Kordic AJ : paras 329-330; *see also* Tadic AJ : para 166
[578] Geneva Convention (III) : Art. 4
[579] Kordic AJ : para 311
[580] Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* : at 29

RAK and Zone forces fought regular battles with Vietnam throughout the international armed conflict. Vietnamese soldiers in uniform and Vietnamese civilians were captured in large numbers and sent to S-21. The Accused has admitted that he knew there was an armed conflict between Cambodia and Vietnam from early 1978. He has admitted that he knew that the Vietnamese captives were soldiers in the Vietnamese army who had been captured on the battlefield or Vietnamese civilians who were captured on Vietnamese territory by DK forces.

301. The Accused claims that he does not remember the details of the conflict prior to 1978 because of his concentration on his work at S-21, and because both states were keeping the conflict secret.[581] He does, however, recall Son Sen mentioning a border dispute between Vietnam and Cambodia at Mondulkiri, although he cannot recall whether this took place in August 1975 or in March 1976.[582] He has also acknowledged that Son Sen left Phnom Penh in August 1977 to assist in the war against the Vietnamese.[583]

302. Though the Accused is apparently unable to recall the moment at which he became aware of this armed conflict, his contemporaneous knowledge thereof can clearly be inferred from the arrests and detention of Vietnamese prisoners of war at S-21 from early 1976.[584] Nine prisoners were arrested in late February 1976 after being found in DK territory (either from Puolo Wai Island or Moeung Thom Village, Sector 25).[585] The Accused not only received these prisoners in April 1976, as evidenced by his signature, but also summarised their biographies and illicit activities related to the armed conflict between DK and Vietnam.[586] In summarising the confessions of two Vietnamese prisoners of war, the Accused describes the Vietnamese plan of moving border posts 600 meters into Cambodian territory.[587]

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[581] Accused : 9 June 09 : T.75
[582] Accused : 9 June 09 : T.81
[583] Accused : 10 June 09 : T.59
[584] Revised S-21 Prisoner List : para 31
[585] S-21 Document : E5/2.13: ERN 00336293-00336295
[586] S-21 Document : E5/2.13: ERN 00336293-00336295
[587] S-21 Document : E5/2.13: ERN 00336293-00336295

SPECIFIC OFFENCES

1. UNLAWFUL CONFINEMENT OF A CIVILIAN

303. The elements of unlawful confinement are identical to the elements of imprisonment as a crime against humanity.[588] The evidence before the Chamber establishes that at least 100 Vietnamese civilians were detained arbitrarily at S-21 because of their nationality. Their detention was deliberate and the result of orders issued and carried out by the Accused and his subordinates.

2. DEPRIVATION OF A FAIR AND REGULAR TRIAL

304. Depriving a protected person(s) of a fair and regular trial by denying judicial guarantees as defined, in particular, in the Third and Fourth Geneva Conventions of 1949 is a grave breach of those conventions. The following rights cannot be denied: (1) the right of the accused to be judged by an independent and impartial court;[589] (2) the right to be promptly informed of the offences with which the accused is charged;[590] (3) the protection against collective penalty;[591] (4) the right to protection under the principle of legality;[592] (5) the right not to be punished more than once for the same act or on the same charge (*ne bis in idem*);[593] (6) the right to be informed of rights of appeal;[594] and (7) the right not to be sentenced or executed without previous judgement pronounced by a regularly constituted court.[595]

305. The evidence before the Chamber confirms that the Vietnamese prisoners of war and civilians were deprived of their rights to a fair and regular trial. As indicated in relation to the crime of imprisonment above, there was no functioning legal system in Cambodia during the DK period. Thus there was no effective legal process through which Vietnamese military or civilian prisoners at S-21 could have challenged their imprisonment or status, and they were unable to exercise any of the rights they were entitled to under the Geneva Conventions. All Vietnamese prisoners at S-21, both civilian and military, were executed without trial.

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[588] Kordic TJ : paras 292, 301; Simic TJ : para 63
[589] Geneva Convention III : Art. 84(2)
[590] Geneva Convention III : Art. 104; Geneva Convention IV : Art. 71(2)
[591] Geneva Convention III : Art. 87; Geneva Convention IV : Art. 33
[592] Geneva Convention III : Art. 99(1); Geneva Convention IV Art. 67
[593] Geneva Convention III : Art. 86; Geneva Convention IV : Art. 117(3)
[594] Geneva Convention III : Art. 106; Geneva Convention IV : Art. 73
[595] Geneva Convention III : Art. 3; Geneva Convention IV : Art. 3

306. The Accused admitted that he knew at the time there were no judicial guarantees or due process for any prisoners at S-21. He was aware that Vietnamese prisoners of war and civilians alike were deprived of their right to challenge the legitimacy of their arrest, detention, classification or execution. The Accused nevertheless ordered, planned and participated in the arbitrary unlawful detention and execution of the Vietnamese prisoners. He further denied their rights under the Geneva Conventions by ordering and planning the forced taking of "confessions" and their recording for propaganda purposes.

3. WILFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY TO BODY OR HEALTH

307. This crime is defined as an intentional act or omission which causes serious mental or physical suffering or injury.[596] This category of crimes includes acts which do not fulfil the requirements of torture, although all acts of torture could fall within the scope of this offence.[597] Although the victim must be "seriously" harmed, there is no need to prove that the injury or injuries suffered are permanent or irremediable.[598] This crime is distinguished from that of inhumane treatment because it requires a showing of serious mental or physical injury. Injuries to an individual's human dignity are not included within this offence.[599]

308. The evidence before the Chamber establishes that the Accused and his subordinates wilfully caused serious mental and physical suffering to Vietnamese prisoners of war and civilians. The prisoners' physical suffering included, but was not limited to, the pain and discomfort caused by the inhumane conditions of detention within S-21, the lack of adequate food, medical care and sanitation, and the brutal methods of execution. The prisoners' mental suffering included, but was not limited to, being threatened and humiliated, witnessing the suffering of other prisoners, and living in constant fear of beatings, torture and execution. This suffering would have been particularly intense for the Vietnamese victims who found themselves in a foreign country with little or no knowledge of the local conditions and language.

309. The evidence of the Accused's and/or his subordinates' intent to cause great suffering or serious injury is clear. Under the Accused's authority, S-21

[596] Kordic and Cerkez TJ : para 245, Blaskic TJ : para 156; Mucic et al TJ : para 511
[597] Mucic et al TJ : para 511; Blaskic TJ : para 156
[598] Naletilic TJ : paras 340-342
[599] Kordic TJ : para 245

systematically imposed series of inhumane conditions of detention and cruel practices of interrogation, torture and execution. The physical and mental suffering of all prisoners was apparent to all staff at the prison, including the Accused himself. They nevertheless persisted in the commission of the criminal acts. The Accused regularly visited the main compound and other locations within the S-21 complex. He knew that the prisoners were being beaten and tortured under his orders.

4. TORTURE OR INHUMANE TREATMENT

Torture

310. The elements of torture as a grave breach of the Geneva Conventions are identical to the elements of torture as a crime against humanity.[600] Although there is no specific evidence that Vietnamese prisoners of war and civilians were tortured, it can be reasonably inferred that, as the vast majority, if not all, of S-21 prisoners were tortured, Vietnamese prisoners received the same treatment described in the above section discussing torture as a crime against humanity. The specific purpose of the torture was to extract "confessions" to be used as propaganda and broadcast on the radio. The Accused's actions in ordering and planning the interrogation and torture of the Vietnamese prisoners of war and civilians included assigning his subordinate Mam Nai to lead interrogations of these victims (which required the latter to learn the Vietnamese language).

Inhumane Treatment

311. Inhumane treatment is defined as an intentional act or omission which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity, committed against a protected person.[601] All acts found to constitute torture or wilfully causing great suffering or serious injury also constitute inhumane treatment. However, this third category of offence also extends to other acts which violate the basic principle of humane treatment, particularly the respect for human dignity. The question of whether any particular act constitutes inhumane treatment is a question of fact to be judged in light of all the circumstances.[602] The evidence

[600] Brdjanin TJ : para 482 (stating "[t]he definition of 'torture' remains the same regardless of the Article of the Statute under which the Accused has been charged")
[601] Kordic AJ : para 39; Blaskic AJ : para 665; Kordic TJ : para 256; Blaskic TJ : paras 154-155; Naletilic TJ : para 246
[602] Mucic et al TJ : para 544

supporting the wilful causing of great suffering and serious injury and torture of Vietnamese prisoners of war and civilians described above also demonstrates that they were inhumanely treated.

5. WILFUL KILLING

312. The definition of wilful killing as a grave breach of the Geneva Conventions is identical to the definition of the crime of murder as a crime against humanity (described above)[603] except that it must be proved the victim was a "protected person." The evidence before the Chamber establishes that the Accused and his subordinates detained and deliberately executed the Vietnamese prisoners of war and civilians at S-21. Witness testimony, photographs, information obtained from S-21 prisoner lists, and surviving "confessions" all prove the deliberate execution of these protected persons.

NATIONAL CRIMES [ART. 3]

313. The Accused is charged for acts of torture and premeditated homicide at S-21 under Article 3 (new) of the ECCC Law, which provides this Court jurisdiction over offences against Articles 500, 501 and 506 of the Cambodian Penal Code of 1956.

1. TORTURE

314. Torture is an offence pursuant to Article 500 of the 1956 Penal Code. Torture occurs when acts of torture are committed: (1) with the intent to obtain information useful for the commission of a felony or misdemeanour by causing pain; or (2) in a spirit of repression or barbarity.

315. The evidence before the Chamber and discussed above in relation to torture as a crime against humanity and a grave breach of the Geneva Conventions establishes that thousands of prisoners were tortured at S-21. The torture was committed with the intent to obtain "confessions," which resulted in the execution of those tortured and others implicated in these "confessions." The torture was committed as a tool of repression against those alleged to be "enemies," and involved barbaric acts of brutality.

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[603] Kordic AJ : para 38; *see also* Kordic TJ : para 229; Brdjanin TJ : paras 380, 381

316. The Accused is criminally responsible as a direct participant for the acts of torture pursuant to Article 500 of the Penal Code. Alternatively, he is criminally responsible as an accomplice for his role in inciting, instructing and aiding and abetting the acts of torture under Article 83 of the Code.

2. MURDER

317. Homicide or premeditated murder is an offence pursuant to Articles 501 and 506 of the Penal Code of 1956. Homicide occurs when death results from acts committed or deliberately attempted with the intent to cause death. If the homicide results from acts accomplished or undertaken deliberately with the aim of causing injury but not death, the act is characterized as homicide without murderous intent pursuant to Articles 501 and 506 of the Penal Code.

318. The evidence before the Chamber, and discussed above in relation to murder as a crime against humanity and wilful killing as a grave breach of the Geneva Conventions, establishes that at least 12,273 individuals were unlawfully killed at S-21. The executions were deliberately carried out with the intent to cause death and therefore should be characterised as homicide with murderous intent. The deaths resulting from torture (where torture was not intended to cause death) or inhumane conditions at S-21 should be characterised as homicide without murderous intent, as the Accused was directly responsible for, and personally took steps to ensure, the torture and inhumane conditions to which the prisoners were subjected.

319. The Accused is therefore criminally responsible as a direct participant for acts of murder pursuant to Articles 501, 503 and 506 of the Penal Code. Alternatively, he is criminally responsible as an accomplice for his role in inciting, instructing and aiding and abetting the acts of murder pursuant to Article 83 of the Code.

INDIVIDUAL CRIMINAL RESPONSIBILITY [ART. 29]

ARTICLE 29

320. Article 29 of the ECCC Law on individual criminal liability states that suspects who "planned, instigated, ordered, aided and abetted, or committed" crimes within the jurisdiction of the ECCC shall bear individual criminal responsibility. Criminal responsibility is also attributed to superiors who fail to prevent or punish crimes committed or committed by their subordinates. The other international or

internationalized criminal tribunals such as the ICTY, ICTR, SCSL and the ICC have the power to convict individuals on the same modes of liability namely planning,[604] instigating,[605] ordering,[606] aiding and abetting[607] and committing[608] as well as failing to prevent or punish crimes as a superior.[609] The elements of these modes of liability and their applicability to the Accused in this case are discussed below.

1. COMMITTED

PHYSICAL COMMISSION

321. Whilst a crime is typically committed by a single person, several perpetrators can be guilty of committing a crime if "the conduct of each one of them fulfils the requisite elements" of the crime(s) charged.[610] The *actus reus* of commission is *fulfilled* when the accused "physically perpetrates the relevant criminal act or engenders a culpable omission."[611] As for the required *mens rea* for commission, the accused must have intended the act or omission and intended for the crime to occur.[612] Alternatively, an accused's knowledge or awareness of a "substantial likelihood" that a criminal act or omission would result from his or her conduct is sufficient.[613]

322. The evidence before the Chamber establishing the Accused's liability based on physical commission is limited to a small but significant number of acts. During the interrogation and torture process at S-21, the Accused personally mistreated and tortured prisoners by slapping, beating, kicking and electrocuting them. He also took gratification from ordering prisoners Bou Meng and Im Chan to fight each other. The circumstances surrounding the Accused's physical perpetration of ill-treatment and torture show that he intended these crimes to occur.

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[604] ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1)
[605] ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1)
[606] ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1); Rome Statute, Art. 25(3b)
[607] ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1); Rome Statute, Art. 25(3c)
[608] ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1); SCSL Statute, Art. 6(1); Rome Statute, Art. 25(3a)
[609] ICTY Statute, Art. 7(2); ICTR Statute, Art. 6(3); SCSL Statute, Art. 6(3); Rome Statute, Art. 28(b)
[610] Kajelijeli TJ : para 764; Kunarac TJ : para 390
[611] Kunarac TJ : para 390; Tadic AJ : para 188; Krstic TJ : para 601
[612] Limaj TJ : para 509; Simic TJ : para 137
[613] Kvocka TJ : para 251

VIA JOINT CRIMINAL ENTERPRISE

323. Committing an offence through a joint criminal enterprise ("JCE") has been recognised in the case law of the ICTY, ICTR and the SCSL.[614] As the ECCC Law was drafted after the creation of the ICTY and ICTR Statutes and contains very similar language on modes of liability, it is very likely that the language of Article 29 of the ECCC Law was also intended to encompass joint criminal enterprise.[615] It is a well-established principle of international law that when international law is incorporated into domestic law, "[d]omestic Courts must consider the parent norms of international law and their interpretation by international courts."[616] Likewise, the ECCC must take into account the norms on modes of liability contained in the ICTY and ICTR Statutes and their interpretation by those Tribunals.

324. JCE is a mode of liability that imposes criminal responsibility on individuals for actions perpetrated by a collectivity of persons in furtherance of a common criminal design.[617] While the technical term "JCE" is quite modern, the underlying legal concepts have existed in both national and international law since at least World War II. There were thousands of criminal trials that arose out of crimes committed during World War II, both national and international in character. For example, the ICTY Appeals Chamber demonstrated in *Tadic* that there were numerous World War II trials where people were held to be liable for their participation in a common criminal plan or purpose.[618]

325. While the concept of JCE first appeared in international law shortly after World War II, it was not a new idea at that time. Rather, the concept that multiple individuals

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[614] *See* Milutinovic et al Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, AJ : para 20. "The Appeals Chamber… regards joint criminal enterprise as a form of 'commission' pursuant to Article 7(1) of the Statute."; Gacumbitsi AJ : para 158 "The Appeals Chamber, following ICTY precedent, has recognized that an accused before this Tribunal may be found individually responsible for 'committing' a crime within the meaning of Article 6(1) of the Statute under one of three categories of 'joint criminal enterprise' ('JCE') liability."; Fofana and Kondewa TJ : para 208 "'committing' [as used in the Statute] is sufficiently protean in nature as to include participation in a joint criminal enterprise to commit the crime"

[615] This interpretation would also be consistent with the object and purpose of the ECCC Law. The primary purpose of the ECCC is to try "senior leaders of Democratic Kampuchea" and "those who were most responsible" for the crimes that occurred in DK, Law on the ECCC : Art. 1. To prosecute senior leaders and those most responsible, it is critical that the ECCC have jurisdiction over those who devised and planned the CPK's criminal policies, not just the physical perpetrators. Consequently, interpreting Article 29 to include joint criminal enterprise would be consistent with the object and purpose of the ECCC Law
See Tadic AJ : paras 189-190

[616] Todovic and Rasevic TJ: page 103

[617] Tadic AJ : paras 193, 187-226; *see also* Vasiljevic AJ : paras 95-96

[618] Tadic AJ : paras 195-220

can be equally liable for criminal acts resulting from participation in a common criminal plan or design had its origins in the domestic laws of various countries and exists in both common law and civil law jurisdictions.[619] A similar idea was also present in Cambodian law prior to the commission of the crimes described in this Submission. The 1956 Penal Code made any voluntary participant in a crime, whether a direct or indirect participant, equally liable with the principal author of the crime.[620] Consequently, the Accused could reasonably have foreseen that he would be directly liable for the acts of other S-21 staff if they were carried out pursuant to a common criminal plan or design.[621]

326. There are three different but interrelated forms of JCE. Basic: all accused participants act pursuant to a common criminal design, and all possess the same criminal intent when acting in fulfilment of the common criminal design.[622] Systemic: all accused participants act pursuant to a common criminal design, all possess the same criminal intent when acting in fulfilment of the common criminal design, and the charged crimes occurred in the context of a common criminal design *usually* carried out by members of a military or administrative unit.[623] Typically, this form of JCE is associated with concentration or extermination camps or any "organized system of ill-treatment."[624] The existence and/or membership in a military or administrative unit is not a formal requirement, but merely an indicator of an organized system of ill-treatment.[625] Extended: all accused participants act pursuant to a common criminal design, all possess the same criminal intent when acting in fulfilment of the common criminal design, and one *or more* of the

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[619] Tadic AJ : para 224 (discussing the origins of concepts similar to joint criminal enterprise in the jurisprudence of various States)

[620] Code Pénal et Lois Pénales : Art. 82 (1956). "Toute personne participant volontairement, soit directement, soit indirectement, à la perpétration d'un crime ou d'un délit, est passible des peines applicables à l'auteur principal."

[621] The Accused can be held liable for participation in a joint criminal enterprise if that liability was sufficiently foreseeable and the law of joint criminal enterprise was sufficiently accessible at the time the criminal acts were committed. The Statutes of the IMT and IMTFE, Control Council Law no. 10, as well as the large number of WWII Trials involving a common criminal purpose or design discussed above demonstrate that liability was foreseeable and that the basis for that liability was accessible. This conclusion is strengthened by the fact that the charged acts were also criminal under the 1956 Penal Code. Finally, the nature and scope of the crimes perpetrated at S-21 undercuts any argument that the participants did not realize their acts were criminal: see Milutinovic Decision on Joint Criminal Enteprise : paras 37-42

[622] Tadic AJ : para 196; Vasiljevic AJ : para 97; *see also* Krnojelac AJ : paras 83-84 (discussing the interplay between the basic form of JCE and the extended form of JCE)

[623] Tadic AJ : para 202

[624] Vasiljevic AJ : para 98

[625] Krnojelac AJ : para 89; Kvocka AJ : para 182

participants *carry* out an act that, despite being outside of the original criminal purpose, is nevertheless attributed to the other members because the act was a "natural and foreseeable consequence" of the criminal design.[626]

327. The *actus reus* of all types of JCE is comprised of three elements. First, a "plurality of persons" is required.[627] The group of people need not be organized in any formal or informal structure, such as a military, political, or administrative organization.[628] Second, a common criminal design or purpose must entail criminal activity prohibited under the statute of the tribunal with jurisdiction over the accused(s).[629] The common criminal purpose, design, or plan need not be previously arranged or formulated.[630] The perpetrator of the crime and the accused need not have an express understanding or agreement between them in regards to committing the crime(s).[631] Additionally, the common criminal plan or purpose may materialize extemporaneously and can be inferred from the facts.[632] Third, the Accused must participate in some capacity with the common criminal design.[633] The Accused's contribution need not be necessary *or substantial,*[634] *but must at least be significant to the crimes for which he / she is to be found responsible.*[635] The presence of the accused at the time when the crime is committed is not necessary.[636]

328. Whereas the three forms of JCE share these same elements of *actus reus*, they do not share the same *mens rea*. The "basic" JCE form requires that the Accused has the intent to perpetrate the charged crime(s) and all participants of the common criminal design share this intent.[637] The "systematic" form of JCE requires a similar level of criminal intent: the Accused must have personal knowledge of the system of ill-

[626] Tadic AJ : para 204. An example of this would be a common criminal purpose to ethnically cleanse a certain area by gunpoint, but with the common criminal intent only to deport unwanted people out of the area. During the operation, someone is shot and killed. While the common criminal purpose might be to ethnically cleanse the area, not commit murder, it is a predictable and foreseeable consequence that someone might be killed if the perpetrators of the ethnical cleansing campaign are armed with guns. Vasiljevic AJ : para 99
[627] Vasiljevic AJ : para 100; *see also* Stakic AJ : para 64
[628] Krnojelac AJ : para 31; Vasiljevic AJ : para 100
[629] Tadic AJ : para 227; Vasiljevic AJ : para 100
[630] Tadic AJ : para 227; Stakic AJ : para 64
[631] Tadic AJ : para 227; Vasiljevic AJ : para 100; Brdjanin AJ : para 418
[632] Tadic AJ : para 227; Krnojelac AJ : para 31
[633] Tadic AJ : para 227; Stakic AJ : para 64; Brdjanin AJ : para 418
[634] Kvocka AJ : para 98
[635] Brdjanin AJ : para 430
[636] Krnojelac AJ : para 81
[637] Tadic AJ : paras 220, 228

treatment and the intent to further that system.[638] Members of a JCE can be liable for crimes physically committed by outsiders to the JCE if these crime(s) form a part of the common criminal purpose and one member of the JCE uses the outside perpetrator(s) as a tool to carry out the common criminal purpose.[639]

329. As for the extended JCE form, the accused must have the intention to take part in and contribute to the common criminal purpose. Liability for those crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, requires two additional elements. The accused must know that such crimes might be perpetrated by a member of the group and willingly took that risk by joining or continuing to participate in the enterprise.[640] If an outside perpetrator commits a crime beyond the scope of the JCE, the Accused is responsible under extended JCE whenever:

(a) the Accused participated in the common criminal design with the requisite intent

(b) the commission of such crime by an outside perpetrator was a natural and foreseeable consequence of the common criminal purpose, and

(c) the Accused nevertheless willingly took this risk and decided to participate in the common criminal purpose.[641]

330. Jurisprudence specifically relating to prison camps has established that where prisoners have been unlawfully imprisoned, kept in inhumane conditions, beaten, tortured and executed, these crimes can be seen as manifestations of a JCE.[642] Accordingly, prison commanders or deputy commanders have been found to be co-perpetrators of JCEs within prison camps. At the ICTY the factors indicating such an enterprise have been identified as follows :

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[638] Krnojelac AJ : para 32; Vasiljevic AJ : paras 101, 105

[639] Brdjanin AJ : paras 410, 413, 418, 430. "When a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that this person (*the outsider*) knows of the existence of the JCE, i.e. of the common purpose, may be a factor taken into consideration when determining whether the crime forms part of the common criminal purpose." Mrksic TJ : para 547 (*explanatory note added*)

[640] Kvocka AJ : para 83; Tadic AJ : para 228; Mrksic TJ : para 546

[641] Brdjanin AJ : paras 411, 431

[642] Kvocka TJ : para 320; Krnojelac AJ : paras 110-111

(a) the fact that guards sought instructions from a commander and that he gave them orders that they then executed;[643]

(b) the significant contribution of the commander's presence during the early stage of the prison camp's existence, his participation in its formation, and his experience as a police officer;[644] and

(c) the key role of the commander in the everyday functioning and maintenance of the camp which contributed to the continued discriminatory criminal practices.[645]

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.

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. All of the charged crimes, if not physically perpetrated by the Accused or other JCE members, were perpetrated by prison guards, interrogators and other staff who were used by the Accused or other JCE members as tools to commit the crimes.

333. The Accused participated in the JCE as a co-perpetrator. He and the other members of the JCE acted according to the common purpose, and with the shared intent to bring about this common purpose (the "basic" form of JCE). Additionally, the Accused actively participated in the enforcement of the system of repression at S-21 through his positions first as Deputy Secretary and later as Secretary. The Accused

[643] Kvocka TJ : para 396
[644] Kvocka TJ : paras 398-399
[645] Kvocka TJ : paras 406-407

was fully aware of the nature of this system of repression at S-21. Together with the other members of the JCE, the Accused intended to further the system of repression at S-21 (the "systemic" form of JCE).

334. Alternatively, the crimes enumerated in this Submission were the natural and foreseeable consequences of the execution of the purpose of the JCE. The Accused was aware that such crimes were a possible consequence of the S-21 enterprise and with that awareness decided to participate in the enterprise (the "extended" form of JCE). He could foresee that potential outside perpetrators would commit barbarous crimes while fulfilling their tasks and nevertheless decided to participate in the criminal enterprise.

2. ORDERED

335. The act of ordering occurs when "a person in a position of authority us[es] that position to convince another to commit an offence."[646] The order is not required to be illegal on its face nor is it necessary that the order be given directly or personally by the accused to the perpetrator(s).[647] Reissuing an order by passing an illegal order down the chain of command similarly creates criminal liability.[648] The accused must have the authority to order for liability to arise, however the jurisprudence is unsettled whether a formal superior-subordinate relationship is necessary.[649] The order can either be explicit or implicit and be proved circumstantially.[650] As to intent, the accused must directly or indirectly have intended for the underlying crime(s) to be committed.[651] He or she must have the knowledge that the execution of the order would lead to the substantial likelihood that a crime will be committed.[652]

336. Jurisprudence specifically relating to prison camps has established that prison commanders can be held liable for ordering the mistreatment of prisoners during

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[646] Krstic TJ : para 601; Akayesu TJ : para 483; Bagilishema TJ : para 31; *see also* ECCC Law : Art. 29; ICTY Statute : Art. 7(1); ICTR Statute : Art. 6(1); SCSL Statute : Art. 6(1)
[647] Blaskic TJ : paras 281-282
[648] Kupreskic TJ : paras 613, 827
[649] Akayesu TJ : para 483; Blaskic TJ : paras 280-281; Kajelijeli TJ : para 763; Stakic TJ : para 444
[650] Stakic TJ : para 444; Kordic TJ : para 388
[651] Blaskic TJ : para 278; Bagilishema TJ : para 31
[652] Blaskic AJ : para 42; Kordic AJ : paras 29-30

interrogations,[653] as well as for ordering serious violence towards prisoners who were regularly beaten.[654]

337. The evidence before the Chamber establishes that the Accused ordered the commission of the crimes at S-21. His position, at the top of the chain of command inside S-21, enabled him to intervene in S-21's criminal activity at every level. The Accused exercised his complete authority by ordering his subordinates to commit specific crimes and by transmitting the orders he had received from his superiors to his subordinates. The Accused personally issued orders to carry out torture. The killing of almost all S-21 prisoners followed orders the Accused either issued directly or indirectly through his delegation of authority to Hor at S-21 and Huy Sre at S-24.

3. PLANNED

338. Planning a crime implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution stage.[655] The act of planning a crime must be sufficiently "substantial" to justify individual criminal liability, such as "formulating a criminal plan or endorsing a plan proposed by another."[656] Evidence of "planning a crime" may be circumstantial.[657] Additionally, the accused must have the criminal intent, directly or indirectly, that the planned crime be committed.[658]

339. The evidence before the Chamber establishes that the Accused planned the crimes at S-21, having been directly involved in the formulation of the plan for the establishment of the prison, and its implementation. He was fully aware of the intended functions of S-21 at the time of its creation, fully endorsed the plans suggested by his superiors, and actively developed its methods of operation. He also undertook specific planning actions to further the prison's mission by selecting and converting a new compound as well as the killing and burial grounds.

340. Specifically in relation to the arrests, the Accused also took part in the planning of certain arrests by supervising interrogations, compiling lists of traitors and

[653] Aleksovski TJ : para 89
[654] Aleksovski TJ : para 88
[655] Krstic TJ : para 601; Musema TJ : para 119
[656] Bagilishema TJ : para 30; Semanza TJ : para 380
[657] Blaskic TJ : para 279; Kajelijeli TJ : para 761
[658] Blaskic TJ : para 278; Bagilishema TJ : para 31

recommending additional arrests, participating in meetings with Son Sen and other senior cadre, corresponding with the chairmen of the units from which the arrests would take place, and by sending his own staff to facilitate and carry out the arrests. The Accused's conduct therefore contributed substantially to the commission of the crimes. He understood the purpose of the arrests and the ultimate fate of all those detained at S-21.

4. INSTIGATED

341. Instigating a crime means to "prompt another to commit an offence" and is synonymous with "provoke" and "incite."[659] The *actus reus* of instigation is "urging, encouraging, or prompting."[660] A causal connection between the instigation and the underlying crime(s) is necessary.[661] The instigation must have been a "clear contributing factor to the conduct of the person who actually committed the crime."[662] Instigation can be an act or an omission.[663] The mere presence of someone holding authority who fails to act has been held to be an act of instigation.[664] In terms of the *mens rea* element, the accused must have "intended to provoke or induce the commission of the crime." The awareness of the substantial likelihood that the crime(s) would be committed as a consequence of the accused's actions is sufficient.[665]

342. Jurisprudence specifically relating to prison camps has found camp staff liable for instigating mistreatment on prisoners during their interrogation and detention by bringing guards who beat the prisoners to their cells and by remaining silent when they could have opposed or repressed the abusive treatment.[666] Prison commanders have also been held liable for instigating persecutions, murder, torture, and beatings of prisoners by not taking action while in a position of authority and influence,[667] and by virtue of the commander's "approval, encouragement, acquiescence, and

[659] Krstic TJ : para 601; Blaskic TJ : para 280; Akayesu AJ : paras 474-483
[660] Semanza TJ : para 381
[661] Bagilishema TJ : para 30; Semanza TJ : para 381; Blaskic TJ : para 280
[662] Kvocka TJ : para 252; *see also* Ndindabahizi TJ : para 456
[663] Kordic TJ : para 387; Blaskic TJ : para 280
[664] Musema TJ : paras 865, 894
[665] Naletilic TJ : para 60; Blaskic TJ : para 278; Bagilishema TJ : para 31; Akayesu TJ : para 482
[666] Aleksovski TJ : para 88
[667] Kvocka TJ : paras 368, 393, 394

assistance in the development and continuation of the conditions in the camp and the ongoing commission of crimes" against the prisoners within the prison.[668]

343. The evidence discussed above in relation to the Accused's culpability for planning, ordering and committing the crimes at S-21 also establishes that he instigated the commission of those crimes. The Accused exercised his authority by, inter alia, training, directing and encouraging his subordinates to commit specific crimes, assigning guards, interrogators, executioners and other staff, and issuing and transmitting torture and execution orders. In addition to his orders and threats of punishment for disobedience, the Accused's leadership, presence and participation in every stage of S-21's operations clearly contributed to the crimes. The Accused's actions clearly show his intent to instigate or induce the commission of the crimes and his awareness of the substantial likelihood that the crimes would be committed as a consequence of his instigation.

5. AIDED AND ABETTED

344. Aiding and abetting a crime is otherwise known as accessory or accomplice liability. To aid and abet is to give "practical assistance, encouragement, or moral support" to the perpetrator that "substantially contributes" to the commission of the crime.[669] Substantial contribution means that the crime would most likely not have occurred in the same manner had it not been for the accused's participation.[670] However, the accused's role need not be indispensible.[671] The mere presence of the accused can be an act of aiding and abetting if the presence is shown to have significantly encouraged the perpetrator(s).[672] The aiding and abetting can occur before, during, or after the commission of the crime(s).[673] Whilst it needs to be established at trial that the underlying crime(s) was in fact committed,[674] this should not be conflated with a simultaneous prosecution or conviction of the direct perpetrator(s).

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[668] Kvocka TJ : para 26
[669] Aleksovski AJ : para 162; Blaskic AJ : para 46. However, a cause/effect relationship with the underlying crimes is not necessary, *see* Krnojelac TJ : para 88; Kunarac TJ : para 391; Blaskic TJ : para 285
[670] Tadic TJ : para 688
[671] Furundzija TJ : para 209, Bagilishema TJ : para 33
[672] Vasiljevic TJ : para 70; Aleksovski TJ : paras 64-65; Blaskic TJ : para 284
[673] Blaskic AJ : para 48; Aleksovski TJ : para 62
[674] Stakic TJ : para 561; Blagojevic TJ : para 638; Musema TJ : paras 171-172

345. As for the requisite criminal intent, the accused is not required to "share" the *mens rea* of the perpetrator(s),[675] nor to know the precise crime(s) that the perpetrator(s) intended to commit or actually did commit.[676] The accused, however, must: (1) be aware of or know that his or her acts will assist in the commission of a crime(s);[677] (2) be aware of the essential elements of the crime(s); and (3) know the intentions of the perpetrator(s).[678]

346. Jurisprudence specifically relating to prison camps has established that defendants are criminally liable who aided and abetted "recurring brutality" and violence in prisons.[679] In the circumstances of the *Aleksovski* case, the accused was found to have led the guards to the cells of the prisoners who were then beaten by the guards, in addition to being occasionally present during the frequent beatings or being nearby in his office. The presence of an accused during the systematic mistreatment of prisoners created an inference that he was aware that such tacit approval would be construed as a sign of support and encouragement.[680]

347. The Co-Prosecutors submit that the previously described modes of liability have been proven beyond reasonable doubt, and better capture the essence of the Accused's liability. For the sake of completeness, it is submitted that the evidence before the Chamber also establishes that the Accused is responsible for the crimes at S-21 as an aider and abettor. He participated at every stage of S-21's operations and contributed substantially to the crimes at S-21. He managed the prison ruthlessly and efficiently and created an environment in which the crimes were consistently committed with impunity. He provided practical assistance and support to the perpetrators. His mere presence must be considered an act of aiding and abetting, as it significantly encouraged the perpetrators to commit the crimes. The Accused knew that his presence would have this effect. He also knew that his acts would assist in the commission of the crimes. He was aware of the essential elements of those crimes and knew the intentions of the perpetrators, who were working under his orders and effective control.

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[675] Aleksovski AJ : para 162; Vasiljevic TJ : para 71; Semanza TJ : para 388; Kunarac TJ : para 392
[676] Blaskic TJ : para 287; Kvocka TJ : para 255
[677] Aleksovski AJ : para 162; Blaskic AJ : paras 46, 49-50; Tadic AJ : para 229; Vasiljevic TJ : para 71
[678] Aleksovski AJ : para 162; Kunarac TJ : para 392; Kvocka TJ : paras 255, 262; Krnojelac TJ : para 90
[679] Aleksovski TJ : para 88
[680] Aleksovski TJ : para 87

6. SUPERIOR RESPONSIBILITY

348. Superior or command responsibility is a form of criminal liability which is firmly entrenched in customary and conventional international law[681] and applies regardless of the nature of the underlying conflict, be it internal or international.[682] In order to establish criminal liability through superior responsibility, three elements must be satisfied:

(a) a superior-subordinate relationship;

(b) the superior knew or had reason to know that his or her subordinate had committed or was about to commit a crime;

(c) the superior failed to prevent the commission of the crime or to punish the perpetrators.[683]

349. As for the first element, a superior-subordinate relationship can exist either formally or informally, and either directly or indirectly between the accused and the alleged perpetrator(s) of the crime(s).[684] An accused must have either *de jure* or *de facto* authority over the perpetrator(s)[685] which may apply to civilian as well as military commanders as long as the civilian exercises control similar to that of a military commander.[686] A superior-subordinate relationship exists if the accused had "effective control" over the perpetrator(s), meaning that the accused could have prevented the crime(s) from being committed or could have punished the perpetrator(s) who committed the crime(s).[687] This must be more than simply substantial influence.[688] An accused may possess either permanent or temporary "effective control" over the perpetrator(s), but this must have existed at the time of the commission of the crime(s).[689]

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[681] Mucic et al AJ : para 195
[682] Hadzihasanovic et al AJ : paras 13, 31, 16
[683] Aleksovski AJ : paras 72, 76; Bagilishema AJ : paras 24-38; Mucic et al AJ : paras 189-198, 225-226, 238-39, 256, 263
[684] Mucic et al AJ : paras 251-52, 303; Krnojelac TJ : para 93; Kordic TJ : para 416
[685] Mucic et al AJ : para 193, 197; Niyitegeka TJ : para 472
[686] Bagilishema AJ : paras 51-55; Mucic et al AJ : para 196; Aleksovski AJ : para 76
[687] Blaskic AJ : para 375; Bagilishema AJ : paras 50, 56; Mucic et al AJ : para 256; Kayishema AJ : para 294; Aleksovski AJ : para 76; *see also* Blaskic AJ : paras 72, 417; Bagilishema TJ : para 47
[688] Mucic et al AJ : paras 257-266
[689] Kunarac TJ : para 399

350. An accused failed to prevent and punish when he failed to exercise "necessary and reasonable measures to prevent or punish the crimes of his subordinates."[690] An individual determination must be made of the measures legally required of each accused,[691] but there are a number of basic obligations every superior must follow. As a minimum requirement, an accused must "investigate the crimes to establish the facts and report them to the competent authorities, if (he) does not have the power to sanction himself."[692] A superior may be required to go beyond legal or structural formalities in an effort to prevent and/or punish the commission of crimes.[693] The failure to prevent or to punish must be the product of a deliberate, culpable, or wilful choice on the part of the accused to disregard his or her duty.[694] Mere negligence is not sufficient.[695]

351. For both military and civilian commanders, the mental element of superior responsibility requires the accused to have known or have had reason to know that his subordinates had been about to commit or had committed a crime.[696] "Knew" means actual knowledge, whereas "had reason to know" means that the accused "had in his possession information of a nature, which at the very least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates."[697] The accused must not deliberately refrain from fulfilling his duty as a superior by ignoring or disregarding evidence of criminal activity.[698] Knowledge[699] must correlate to the crimes for which the accused is prosecuted.[700]

352. Jurisprudence specifically relating to prison camps has established that an accused had reason to know that specific crimes inside a prison had been committed from

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[690] Mucic et al AJ : para 226
[691] Blaskic AJ : para 72; Brdjanin TJ : para 279
[692] Kordic TJ : para 446
[693] Kayishema AJ : para 302; Mucic et al TJ : para 395
[694] Bagilishema AJ : paras 35-36
[695] Blaskic AJ : paras 61-63; Bagilishema AJ : para 35; Mucic et al AJ : para 226
[696] Blaskic AJ : paras 54-64; Mucic et al AJ : paras 196-197, 239-241
[697] Mucic et al AJ : para 241; Baglishema AJ : paras 26-38, 42
[698] Blaskic AJ : para 406
[699] Knowledge can be proven with direct or circumstantial evidence.: *See* Blaskic TJ : para 308; Krnojelac TJ : para 94; Aleksovski TJ : para 80; For the relevant jurisprudence of factors for determining whether the Accused knew or had reason to know that crimes were committed or were going to be committed by his or her subordinates, *see* Kordic TJ : paras 427, 437
[700] Krnojelac AJ : paras 155-156

both the external context (namely the circumstances in which the prison was established) and the internal context (namely the operation of the prison, in particular the widespread nature of the beatings and the frequency of the interrogations).[701] Camp commanders have been found to have effective control because they had power to issue orders to their subordinates,[702] held an elevated status within the prison, and had the right to report offences by their subordinates to superior authorities.[703]

353. As stated in relation to the Accused's liability through aiding and abetting, the Co-Prosecutors submit that the previously described direct modes of liability have been fully proven, and better capture the essence of the Accused's liability. For the sake of completeness, it is submitted that the evidence before the Chamber also establishes that the Accused bears superior responsibility for crimes committed at S-21. In his capacities as Deputy Secretary and later Secretary of S-21, the Accused was the second highest and then the highest authority within the S-21 hierarchy. These positions gave him effective control over the physical perpetrators of the crimes. He exercised complete, effective and overall *de jure* and *de facto* command and control over all subordinate staff at S-21, which operated following military principles. All perpetrators were under an obligation to carry out every order given by the Accused. Even during Nat's tenure as Secretary of S-21, the Accused's position as Deputy Secretary enabled him to issue orders preventing or punishing any crimes committed by subordinates, or to report the crimes.

354. The Accused knew or had reason to know that the crimes were about to be, or had been, committed by his subordinates. He was involved in every aspect of S-21, coordinating arrests, receiving prisoners, interrogating them, extracting "confessions," and ordering executions.

355. The Accused was therefore directly aware of the vast majority of crimes prior to, and during, their commission through his supervision and issuance of orders relating to interrogation and executions. Those crimes he might not have actually been directly aware of as they took place were a direct consequence of the system he established and reported to him in due course.

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[701] Krnojelac AJ : para 171
[702] Aleksovski TJ : para 104
[703] Aleksovski TJ : para 105

356. The Accused failed to comply with his obligation to prevent or punish his subordinates who committed these crimes. He was under a duty under international criminal law to investigate and establish the facts of the crimes and to impose appropriate punitive measures. He made no efforts to initiate any legitimate investigation into the crimes committed by his subordinates. He in fact punished S-21 staff for failures to implement his criminal orders.

SENTENCING [ART. 39]

PRELIMINARY MATTERS

APPLICABLE SENTENCING LAW

357. Article 39 (1) of the Law on the ECCC prescribes a sentence range from five years to life imprisonment for each of the crimes the Accused is charged with. The Law on the ECCC also provides that an accused's rank or position does not mitigate punishment, and that superior orders are not a defence to criminal charges.[704]

358. The applicable legislation does not contain detailed rules for determining a sentence. Further, to the Co-Prosecutors' knowledge, there is no jurisprudence before Cambodian courts dealing with cases comparable to this one. Given the limited guidance in domestic law and jurisprudence, the Chamber should consider sentencing standards established at the international level – most notably at the ICTY, the ICTR, and the SCSL.[705] Further, the Kingdom of Cambodia is a State Party to the Statute of the ICC.[706] The Co-Prosecutors submit that the ICC sentencing rules are instructive, and accordingly, have structured this section of the Submission following the structure of the considerations set out in the ICC Statute and Rules of Procedure and Evidence (RPE).

PURPOSE OF SENTENCING

359. The two predominant justifications for sentencing in international criminal law are deterrence and retribution.[707] Deterrence takes two forms: individual and general.[708]

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[704] Law on the ECCC : Art. 29

[705] This would be consistent with Article 33 of the Law on the ECCC

[706] *Assembly of States Parties Cambodia*, http://www.icc-cpi.int/Menus/ASP/states+parties/Asian+States/Cambodia.htm

[707] Barayagwiza et al AJ: para 1057; Stakic AJ :para 402; Deronjic AJ : para 136-37; Mucic et al AJ : para 806

[708] Kordic and Cerkez AJ : para 1076

Individual deterrence is directed at "discouraging an accused from recidivism," while general deterrence attempts to deter all from committing international crimes.[709]

360. The concept of retribution is equated with a sense of "just desserts," as opposed to vengeance.[710] A penalty that "properly reflects the … culpability of the offender" [711] runs parallel with a Trial Chamber's overriding duty to tailor an appropriate sentence in light of the gravity of the crimes and the accused's circumstances and role therein. Furthermore, retribution correlates with moral admonition and with bringing integrity to the international criminal enforcement mechanism, as it "duly express[es] the outrage of the international community at these crimes."[712]

361. International tribunals have referred to other justifications for sentencing. These include: rehabilitation;[713] ending impunity while guaranteeing a fair trial for individual accused;[714] restoring and maintaining peace;[715] and ensuring affirmative prevention through enforcement of the international legal system.[716] Expert Richard Goldstone posits that an international tribunal must balance three distinct interests when issuing a sentence: first, the nature of the crimes; second, the interests of the victims; and third, the general interests of society.[717] He also recognised that these factors often come into conflict with each other and that "one has to find some proportionality between the three of them."[718]

GENERAL SENTENCING PRINCIPLES

INDIVIDUALISED SENTENCES

362. International criminal tribunals are not bound to follow any definitive sentencing regulations, and have a wide discretion to determine the appropriate sentence in light

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[709] Kordic and Cerkez AJ : para 1075
[710] Kordic and Cerkez AJ : para 1075
[711] Kordic and Cerkez AJ : para 1075 (citing R. v. M. (C.A.) [1996] 1 S.C.R. 500, para 80)
[712] Aleksovski AJ : para 185
[713] It should be noted that even though rehabilitation is a legitimate sentencing purpose, courts also emphasize
that it should not be given undue weight. *See* Kordic and Cerkez AJ : para 1079; Blagojevic and Jokic TJ : para 824; Bralo TJ: para 22
[714] Kordic and Cerkez AJ: para 1081; Deronjic TJ: para 137
[715] Dragan Nikolic TJ: para 4
[716] Kordic and Cerkez AJ : paras 1080-1082; Brdjanin, TJ : para 1091
[717] Richard Goldstone : 14 September 09 : T.10-11
[718] Richard Goldstone : 14 September 09 : T.11

of the particular gravity of the crimes and the circumstances of an accused.[719] To that end, a sentence must be tailored to the accused and reflect his/her guilt for the crimes.[720] It must reflect "the inherent gravity or totality of the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime."[721] The Court must not base the sentence upon the criminal conduct of others who may have acted in concert with the accused or committed interrelated crimes.[722]

SENTENCE COMPARISONS APPROPRIATE

363. While a sentence must be individualised, this does not preclude the Trial Chamber from seeking guidance from sentences imposed in other international criminal cases.[723] In particular, cases "where the offences are the same and committed in substantially similar circumstances" should be considered.[724] Consulting similar cases helps a Trial Chamber set a sentence that is consistent with international practice and not capricious or excessive.

SENTENCE TO REFLECT TOTALITY OF CONDUCT

364. Where multiple convictions are applicable and permitted by law, a Trial Chamber may exercise its discretion as to whether to impose a single, concurrent or consecutive sentence, or a mixture of concurrent and consecutive sentences.[725] However, it must arrive at a sentence that reflects the totality of an accused's criminal conduct regardless of the form of sentence chosen.[726]

365. Individual sentencing factors can be evaluated in different parts of a judgment. For instance, the ICC RPE list certain factors as aggravating circumstances,[727] whereas the ICTY, ICTR, and SCSL have considered them either as illustrating the gravity of crimes or as aggravating factors.

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[719] Barayagwiza et al AJ : para 1037; Blagojevic and Jokic AJ : para 321; Blaskic AJ : para 680 ; Krstic AJ : para 242; Semanza TJ : para 560
[720] Kordic and Cerkez AJ : para 1087; Akayesu AJ : para 416
[721] Blaskic AJ : para 683; Kupreškić et al TJ : para 852. For a definition of 'gravity of the crime,' see Blagojevic and Jokic TJ : para 833
[722] Obrenovic TJ : paras 46, 152
[723] Mucic et al et al AJ : paras 756-757
[724] Blagojevic and Jokic AJ : para 333; Babic AJ : para 32; Jelisic AJ : para 101
[725] Blaskic AJ : paras 717-718 (adding that single sentences cannot be given out arbitrarily); Mucic et al AJ : paras 46, 428-30; Kambanda AJ : paras 101-103
[726] Mucic et al AJ : para 46
[727] ICC RPE Rule 145(2)(b)

CUMULATIVE CONVICTIONS AND CONCURRENT MODES OF CRIMINAL RESPONSIBILITY

366. Jurisprudence before the international tribunals establishes that cumulative convictions of an accused for the same act or omission are permissible where the conduct violates multiple provisions of the law, each of which contains a materially distinct element not contained in the other(s).[728] An element is "materially distinct" if it requires "proof of a fact not required by the other."[729] Where two offenses do not contain materially distinct elements, the Trial Chamber must select the more specific offence, or the offence that includes one or more additional elements.[730]

367. The possibility of multiple convictions based upon the same or overlapping underlying conduct may also raise issues of concurrent modes of individual criminal responsibility.[731] If an accused is found criminally responsible for planning, instigating, ordering, aiding and abetting, or committing a crime, he/she cannot be found guilty for the same crime pursuant to superior or command responsibility.[732] Yet if both forms of criminal liability are proved beyond a reasonable doubt, "the Trial Chamber . . . should consider the accused's superior position as an aggravating factor in sentencing."[733] These limitations do not preclude multiple convictions pursuant to different modes of criminal responsibility based upon distinct criminal acts.[734]

GRAVITY OF THE CRIMES

368. The gravity of the criminal offence of which an accused is found guilty is the primary consideration[735] and starting point[736] in determining the appropriate sentence. The culpability of the offender is therefore the "litmus test" for a Trial

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[728] Kordic and Cerkez AJ: para 1033; Simba AJ: para 277; Krstic AJ: para 218. Note that cumulative convictions are permitted for different episodes of criminal conduct: *see* Limaj et al TJ: para 720

[729] Kordic and Cerkez AJ: para 1033; Simba AJ: para 277; Krstic AJ: para 218

[730] Čelebići AJ : paras 412-413, followed in Kordic and Cerkez AJ : para 1032; Krstic AJ : para 218

[731] Kordic and Cerkez AJ : para 1030. Individual criminal responsibility is also referred to as, inter alia, forms of
criminal liability or modes of individual responsibility.

[732] Jokic AJ : paras 22-23; Blakic AJ : para 91; Kvocka et al AJ : para 104

[733] Jokic AJ : para 23; Čelebići AJ : para 745, followed in Blakic AJ : para 91 and Kvocka et al AJ : para 104;
Kordic and Cerkez AJ : paras 33-34

[734] Jokic AJ : para 25

[735] ICC Rome Statute Art. 78; ICC RPE Art. 145 (1)(a); ICTY Statute Art. 24; ICTR Statute Art. 23; SCSL Statute Art. 19; Mucic et al AJ : para 731; Nikolić AJ : para 18; Aleksovski AJ : para 182; Kupreškić et al TJ :
para 852; Gacumbitsi TJ : para 344; Richard Goldstone : 14 September 09 : T.10-11

[736]; Kayishema AJ : paras 335, 352, 363; Mucic et al AJ : paras 731; Bralo TJ : para 24

Chamber in its sentencing deliberations.[737]

369. The factors to be considered when determining the gravity of a crime depend on the particular circumstances of each case.[738] International criminal tribunals have considered a number of factors when assessing gravity of crimes in specific cases, some of which may overlap with other considerations examined below, such as the impact of the crime on victims. These factors include: the "inherently shocking nature" or "heinous character" of the crime;[739] the number of victims, scale of the crime or degree of magnitude;[740] the treatment of the victims or prisoners and the suffering they were subjected to;[741] the nature and conditions of detention;[742] the repetitious and ongoing quality of the crime;[743] the "heinous" methods and means of harming the victims, or the brutality of the offences;[744] the direct effect on victims, with particular regard to their long term mental and physical suffering;[745] the effect on the "broader targeted group;"[746] the effect on relatives;[747] the discriminatory nature or intent of the crime;[748] the "massive scope and extent of persecution;"[749] the role of the accused and her or his willingness to participate in the commission of the crime;[750] the vulnerability of victims;[751] the mental health of witnesses to the crimes and the fear that they will be "next;"[752] the use of forced labour;[753] the use of sexual violence,[754] and the fact that the accused acquired knowledge of killings after the fact, and that no lives were lost due to his/her omission.[755]

370. Evaluating the gravity of a crime for those in leadership positions requires an analysis of the subordinates' conduct, as well as the accused's own failure to prevent

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[737] Celebici AJ: para 731
[738] Nikolić AJ : para 18
[739] Hadžihasanović and Amir Kubura AJ : para 317; Gacumbitsi TJ : para 344; Bralo TJ : para 29
[740] Enver Hadžihasanović and Amir Kubura AJ : para 317; Kvočka et al TJ : para 701; Plavsic TJ : para 52; Krstić, TJ : para 701; Lukić et al, TJ : para 1050
[741] Kvočka et al TJ : para 701; Krstić TJ : para 701
[742] Mrkšić et al AJ : para 379; Blaškić AJ : para 684; Plavsic, TJ : para 52
[743] Kvočka et al TJ : para 702; Hadžihasanović and Kubura AJ : para 317
[744] Kvočka et al TJ : para 702; Lukić et al TJ : para 1050
[745] Krnojelac TJ: para 512; Blaškić AJ : para 683; Kvočka et al TJ : para 702; Krnojelac TJ : para 512
[746] Mucic et al TJ: para 758; Kvočka et al TJ : para 701
[747] Blaškić AJ : para 683; Krnojelac, AJ : para 260
[748] Blaškić AJ : para 683; Kvočka et al TJ : para 702; Rutaganda AJ : para 591
[749] Plavsic TJ : para 52
[750] Bralo AJ : para 33
[751] Blaškić AJ : para 683; Kvočka et al TJ : para 702; Kunarac et al AJ : para 352
[752] Kvočka et al TJ : para 702
[753] Blaškić AJ : para 684
[754] Kunarac et al AJ : para 352; Kvočka et al TJ : para 702
[755] Rugambara TJ : para 20

or punish the crime.[756] In this case, the Accused is criminally responsible for crimes which are particularly heinous and shocking. As part of a constant, persistent and unyielding operation he managed, S-21 detained, tortured and executed over 12,273 people. Victims who were not executed died as a result of various forms of torture, abuse and inhumane treatment. The detention conditions led to widespread disease, malnourishment and physical and psychological pain, as well as extreme fear. These conditions continued, essentially unchanged, for over three years – the duration of the Accused's role as Secretary and Deputy Secretary.

371. Armed guards, multiple fences and checkpoints were used to ensure that no one escaped from S-21. While awaiting torture and execution prisoners remained locked in their cells and in iron shackles. Talking and moving were not allowed. Permission was required even for urination and defecation, and physical punishment was meted out arbitrarily and frequently. Prisoners were subjected to the most extreme forms of psychological and physical torture and killed in a cruel and cold blooded manner. No mercy was shown towards any victim regardless of how young or old, and how defenceless. These crimes are almost unmatched in modern history due to the combined effect of their barbarity, scope, duration, and callousness.

EXTENT OF IMPACT ON THE VICTIMS

372. Sub-rule 145 (1) (c) of the ICC RPE states that "[i]n its determination of the sentence … the Court shall: … give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families." In international jurisprudence, the impact of a crime on the victim(s) has also been considered a significant sentencing factor.[757]

373. Not to be confused with the particular suffering of victims during the commission of the crime, the impact of a crime on victims deals with the continued distress after the fact. This includes long-term physical,[758] psychological and emotional effects[759] suffered by the victims as a direct result of the crime. The number of victims can also be relevant to this assessment in that it helps illustrate the totality of the

[756] Hadžihasanović and Kubura AJ : para 344; Mucic et al AJ : para 732
[757] Bralo AJ : paras 33-34; Babic TJ : para 47
[758] Milosevic TJ : para 990; Zelenovic TJ : para 40; Blaskic TJ : para 787 (where this aspect is discussed as aggravating factor)
[759] Zelenovic TJ : para 40; Deronjic TJ : paras 215-216; Jokic TJ : para 44; Blaskic TJ : para 787 (where this aspect is discussed as aggravating factor)

impact.[760] The lasting psychological trauma suffered by witnesses to crimes also falls within the ambit of impact on victims for the purpose of determining the gravity of a crime.[761] Finally, the impact on those "associated with the crime and nearest relations,"[762] "victims' relatives and friends"[763] and the wider community[764] will also be considered.

374. Tragically, only a few victims survived S-21. Over 30 years after the fact, they continue to suffer from physical pain or discomfort, emotional stress, nightmares, anxiety and mental anguish. The impact of the crimes at S-21 on their lives remains severe. S-21 staff members, many of whom were young, manipulated by the Accused and feared his punishment, still suffer from their experiences at S-21. These staff members include those who were forced to participate in horrific acts against the prisoners.

375. The crimes at S-21 did not just affect those that were tortured and killed but have had lifelong devastating effects on their family members.[765] The testimonies of victims' relatives clearly demonstrate this fact.[766] Civil Parties and witnesses from Cambodia and abroad have testified that the crimes against their loved ones at S-21 caused extreme emotional suffering that has devastated their lives and families, and even led to suicide. The exact number of those directly affected by the loss of a friend or family member at S-21 will never be known but would certainly reach into many thousands.

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[760] Zelenovic TJ : para 38; Babic TJ : para 47; Cesic TJ : para 32; Plavsic TJ : para 52; Kordic and Cerkic TJ : para 852; Erdemovic AJ : para 10; *see* Kambanda TJ : para 42. However, this jurisprudence is not consistent at the early stage of the ICTY. *See* Blaskic TJ : para 784 where this aspect is discussed under aggravating circumstances. More recent ICTR judgements seem to categorises it as an aggravating factor, *see* Rugambarara, TJ : para 23; Karera TJ : para 579; Simba TJ : para 440; *but see* Semanza AJ : para 337-338, which clarifies that the number of victims can be considered *either* as an element of the gravity of the offence *or* as an aggravating factor; it cannot be considered under both heads.

[761] Such witnesses are deemed to be indirect immediate victims. Their suffering is an element of the methodology of the attacks and will consequently be considered as an aggravating circumstance of the offence, *See* Deronjic TJ : para 218; *see also* Vasiljevic TJ : para 276; Nikolic TJ : paras 201-205 where this is discussed as aggravating factor.

[762] Mucic et al TJ : para 1226; *see* Milosevic TJ : para 990; Mrksic et al TJ : para 684; Mrjda, TJ : para 40; Jelisic TJ : para 132; Kayishema and Ruzindana TJ : para 16, where this aspect is discussed as aggravating factor.

[763] Cesic TJ : para 39; Krnojelac AJ : para 260

[764] Deronjic TJ : paras 219-220; Jokic TJ : para 44; Obrenovic TJ : para 68; *see* Kordic and Cerkez TJ : para 852; Blaskic TJ : para 787 (discussing this aspect is discussed as aggravating factor)

[765] Chhim Sotheara : 25 August 09 : T.37

[766] Hamill Robert, Toch Monin, Im Sunty, Seang Vandy, Phung Guth Sunthary, Phaok Khan, Ou, Savrith, So Saung, Chum Sirath, Ouk Neary, Lefeuvre Martine, Tioulong Antonya, Chum Neou, Chhin Navy, Neth Phally and Hav Sophea.

DEGREE OF PARTICIPATION/INTENT OF THE ACCUSED

376. International criminal tribunals consider the degree of participation of an accused an essential element in determining the length of a sentence.[767]

377. Similar events may result in different sentences depending on the level of the perpetrators' participation in the crime.[768] The jurisprudence of international tribunals indicates that those directly inflicting the pain and suffering deserve harsher punishment and that indirect participation may warrant a lighter sentence. For example, when a superior takes an active role in the crime, his/her participation becomes more culpable.[769] In *Aleksovski*, the ICTY Appeals Chamber increased the sentence of a prison warden because he "personally participated in physical violence against prisoners"[770] and because "his direct participation [. . .] provided additional encouragement to his subordinates to commit similar acts."[771] Therefore, the "active participation by a superior in the criminal acts of subordinates adds to the gravity of the superior's failure to prevent or punish those acts and may therefore aggravate the sentence."[772]

378. However, the mere fact that an accused did not actively participate is not a mitigating circumstance.[773] Further, those participating in the planning of a crime are not necessarily less culpable than those directly observing or participating in the crime.[774] The ICTR Trial Chamber in *Bisengimana* held that, in light of the accused's knowledge of an impending attack and moral support for its execution, his "form of participation in the [...] massacres [does not constitute] a mitigating circumstance."[775]

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[767] Aleksovski AJ : para 182; *see also* Blaškić AJ : para 683; Kupreškić et al TJ : para 852; Mucic et al AJ : para 731; Jelisić AJ : para 101

[768] Nikolić AJ : para 47 (Where the Appeals Chamber affirmed the differentiation of sentences for similar crimes with similar fact patterns on the basis of the Accused's "respective level[s] of participation in the \ commission of the crime...")

[769] Stakić TJ : para 914, ("The Trial Chamber regards the fact that Dr. Stakić has been found responsible for planning and ordering, in addition to committing, the crime of deportation as a second aggravating factor...")

[770] Aleksovski AJ : para 183

[771] Aleksovski AJ : para 183

[772] Mucic et al AJ : para 736; Blaškić, TJ : para 791 ("direct participation by the commander does constitute an aggravating circumstance...")

[773] Mucic et al AJ : para 737; *see also* Blaškić, TJ : para 791

[774] Nzabirinda TJ : para 84-7; *see also* Mpambara, TJ : paras 22-23

[775] Bisengimana TJ : paras 178-179

379. The ICTR has largely framed the question of active participation in the context of the defendant's intent and conduct in committing the crimes. For instance, in *Kayishema and Ruzidana*, the ICTR Appeals Chamber affirmed that "[t]he zeal with which a crime is committed may be viewed as an aggravating factor."[776] Similarly, ICTR Trial Chambers have taken into account as relevant considerations in sentencing the fact that a crime was committed voluntarily[777] or knowingly and with premeditation.[778]

380. Before the ICTY, the "willingness" of an accused to commit a crime is "likely to justify an additional aggravation."[779] Similarly, an accused's enthusiasm[780] or enthusiastic support for a crime serves as an aggravating factor in sentencing. And, as in the cases before the ICTR, an accused's "premeditation" can be considered relevant to sentencing by the ICTY.[781]

381. The Accused is a direct participant in, and perpetrator of, the crimes, in addition to being a commander who directed his subordinates to carry out thousands of individual criminal acts at S-21. As noted in the ***Accused's Criminal Role at S-21*** Section, his participation in the crimes at S-21 was so substantial and influential that many people would not have been illegally arrested, tortured and killed but for his active role in guiding interrogations, compiling lists of traitors and recommending arrests. In addition, he is directly responsible for the deaths of at least 155 S-21 staff whose arrests and detention he either personally ordered, approved or recommended to his superiors. The Accused therefore intended and furthered the commission of crimes that took place at S-21 with premeditation and full knowledge of their consequences.

382. The Accused made S-21 an efficient criminal enterprise, and expanded the degree of its criminality. His involvement in the crimes included: overall management of three separate sites covering large geographical areas and using over two thousand staff; making or contributing to crucial decisions, such as when and where individuals were interrogated, tortured and killed; training interrogators to torture and treat

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[776] Kayishema and Ruzidana AJ : para 351
[777] Kayishema and Ruzidana TJ : para 13
[778] Kambanda TJ : para 61(B)(vi)
[779] Blaškić TJ : para 792
[780] Blaškić TJ : para 792
[781] Blaškić TJ : para 793

prisoners inhumanely; and helping identify and arrest additional victims. The Accused both initiated the crimes, by selecting new victims and issuing torture and execution orders, and participated in them, by carrying out, supervising, attending and approving the interrogations. His participation was voluntary, driven by his motivation to contribute to the revolution, succeed at his job and please his superiors, and accompanied by discriminatory intent, as will be illustrated below.

AGE AND EDUCATION, SOCIAL AND ECONOMIC CIRCUMSTANCES OF THE ACCUSED

383. The ICC RPE stipulate that, in the determination of the range of the sentence, "the age, education, social and economic condition of the convicted person" shall be taken into account.[782] The statutes of other international criminal tribunals refer to these factors more generally when they state that "[i]n imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person."[783]

384. In international jurisprudence, the fact that an accused has enjoyed tertiary education is considered an aggravating circumstance in sentencing because it should have enabled him/her to appreciate "the dignity and value of human life and [be] aware of the need for peaceful co-existence between communities"[784] as well as to recognise "the import and consequences of his actions."[785] Accused who had been doctors,[786] priests[787] and teachers[788] have been considered to occupy positions of trust in society and hence seen as having betrayed, by their crimes, an ethical duty to the community.[789] Such individuals are described as having "abused the trust placed in them"[790] and their "moral authority."[791] Similarly, reduced maturity on the part of an

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[782] Rule 145(1)(c). In the RPE of the ICTR, ICTY and SCSL, this factor is not specifically mentioned.
[783] Article 23 (2) of the Statute of the ICTR, Article 24 (2) of the Statute of the ICTY, Article 19 (2) of the Statute of the SCSL
[784] Bisengimana TJ : para 120. *See also* Rukundo TJ : para 600; Nzabirinda TJ : para 62
[785] Brdjanin TJ : para 1114. *See also* Seromba TJ : para 385, where this factor is discussed under individual circumstances of the Accused. *But see* Blagojevic and Jokic TJ : para 846: the Trial Chamber "does not consider the educational background of the Accused to be a circumstance directly related to the commission of offence"
[786] Simic et al TJ : para 1084; Ntakirutimana TJ : para 910; Kayishema and Ruzindana TJ : para 26
[787] Rukundo TJ : para 599; Seromba TJ : para 385 (discussing this factor under individual circumstances of the accused); Ntakirutimana TJ : paras 900, 902
[788] Karera TJ : paras 21, 581; Simic et al TJ : para 1095
[789] Kayishema and Ruzindana TJ : para 26
[790] Ntakirutimana TJ : para 900
[791] Rukundo TJ : para 599

accused who was very young at the time of the commission of his/her crime has been regarded as a mitigating circumstance, albeit limited in significance.[792]

385. At the time the Accused committed the crimes at S-21, he was an intelligent, highly-educated man in his prime, with a professional and social background which enabled him to understand the full extent of the criminality of his acts. In 1975, at the age of 33, unlike many of the S-21 staff, he had the maturity, experience and education, which would have informed the decisions he made. He had undergone substantial schooling and was a competent, highly methodical and professional mathematics teacher. He was also a successful communist cadre, having held a position of significant power and authority as Secretary of M-13. Finally, having himself been a victim of imprisonment on political grounds, he understood the ethical and moral depravity of extra-judicial imprisonment, torture and executions of innocent individuals.

386. The Accused's circumstances and background make his crimes especially grave and demonstrate that he betrayed the trust bestowed in him by his community. As a teacher, he understood the power of education (particularly in influencing young people) and was in a position to observe and study human interactions. Experts at trial testified that the Accused "was trained in the pedagogical area and psychological area, and that made him understand the psychology of the children, the adolescents and the adults."[793] This is particularly relevant in the context of the Accused's indoctrination of children and young people into S-21 guards, interrogators, torturers and executioners – an exceptionally manipulative and predatory aspect of his conduct.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

387. The ICC RPE enumerate several aggravating and mitigating factors to be considered in sentencing[794] whereas a very limited list is provided in the rules of the other international tribunals.[795] Trial Chambers maintain considerable discretion in what

[792] Banovic TSJ : paras 74-76; Kordic and Cerkez TJ : paras 855-856; Jelsic TJ : para 124
[793] Françoise Syroni-Guilbard and Ka Sunbaunat : 31 August 09 : T.49
[794] ICC Rome Statute : Art 78; ICC RPE : Art. 145(2)
[795] ICTY Statute : Art. 24, ICTR Statute Art. 23, SCSL Statute Art. 19; ICTY RPE, ICTR RPE, SCSL RPE Rule 101

factors to consider and the weight to give them in light of the facts of the individual case and the guilt of the accused.[796]

AGGRAVATING CIRCUMSTANCES

388. Aggravating circumstances must be proven beyond reasonable doubt[797] and relate directly to the commission of the offence.[798] A circumstance which is an element of a crime, but which may otherwise have an aggravating effect, may not be used as an aggravating factor for the purposes of sentencing.[799] Moreover, the same fact cannot be used both to show gravity of the crime and to constitute an aggravating factor.[800]

ABUSE OF POWER / OFFICIAL CAPACITY

389. ICC Trial Chambers are required to take into account, as an aggravating circumstance, any "abuse of power or official capacity" on the part of the accused.[801] The concept of power or official capacity is also described as "seniority, position of authority, or high position of leadership."[802] The concept of abuse of power relates to "the manner in which the authority was exercised" by an accused.[803] While the actual position of the accused is not itself an aggravating factor, the abuse of that position or "breach…[of a] public duty" is.[804]

390. The rationale underpinning this principle is that "a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own"[805] – that is, the commission of crimes by an accused in a position of superior authority is an aggravating factor[806] because he/she is in a position to prevent or punish the crimes, but chooses not to do so. For example, in *Aleksovski* the ICTY Appeals Chamber concluded that the accused's "superior responsibility as a warden

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[796] Blaskic AJ : para 685; Krstic AJ : para 242; Jelisic AJ : para 100
[797] Naletilic and Martinovic AJ : para 592
[798] Limaj et al TJ : para 729
[799] Kordic and Cerkez AJ : para 1089; Blagojevic and Jokic TJ : para 843
[800] Deronjic ASJ : paras 106-107
[801] ICC RPE, Rule 145(2)(b)(ii)
[802] *See e..g.* Blagojevic and Jokic AJ : para 324
[803] Blagojevic and Jokic AJ : para 324
[804] Galic AJ : para 412; *see* Stakic AJ : para 411
[805] Brdjanin TJ : para 1099
[806] Aleksovski AJ : para 183; Blaskic, AJ : para 90. *See also* Kvocka et al AJ : para 104; Kordic and Cerkez AJ : paras 33-34

seriously aggravated the [accused's] offences. Instead of preventing it, he involved himself in violence against those whom he should have been protecting."[807]

391. From the beginning of S-21, as its Deputy Secretary until the day he fled S-21 as its Secretary, the Accused consciously and flagrantly abused his *de jure* and *de facto* authority. As the official head of S-21, he was responsible for ensuring that the basic legal and humanitarian protections of those detained under his supervision were respected, regardless of whether they were Cambodians, prisoners of war or other foreigners. The Accused clearly failed to exercise his authority to prevent the abuses of the prisoners' fundamental human rights, and to punish abuses committed by his subordinates.

392. Instead, the Accused used his power to help establish and manage one of the most terrifying, violent and brutal detention centres in modern history. In every possible manner, he used his power against the prisoners rather than for their protection. He used that power to train interrogators to torture and abuse the prisoners, to identify more targets for arrest, and to ensure executions were committed in an efficient and secret manner. The evidence of the deliberate, unquestioning manner in which he abused the powers inherent to his authority at S-21 is overwhelming.

CRUELTY OF THE CRIMES

393. Since the ICTY, the ICTR and the SCSL RPEs do not specifically enumerate aggravating circumstances, these Tribunals have exercised considerable discretion in treating cruelty either as an aggravating circumstance or as an element pointing to the gravity of a crime.[808] The ICC RPE specifically provide that the "[c]ommission of the crime with particular cruelty [...]" is an aggravating circumstance.

394. Cruelty of a crime can be summarised as being the unusual pain and suffering caused by the manner in which the offensive act was committed, which goes beyond the normal commission of the crime. Cruel acts are described as being those which are "particularly violent in nature,"[809] "cold-blooded,"[810] "ruthless and savage,"[811] or

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[807] Aleksovski AJ : para 183
[808] *See* Bagosora et al TJ : para 2266; Rajic TSJ : para 86; Kordic and Cerkez TJ : para 852
[809] Rajic TSJ : para 86
[810] Vasiljevic TJ : para 279; Jelisic TJ : para 130
[811] Kordic and Cerkez TJ : para 852

"repugnant, bestial and sadistic."[812] For example, an offence was deemed "heinous" because the victims "were systematically murdered and sometimes burnt alive."[813] Beatings are brutal when exercised with "weapons such as iron bars, axe handles, rifle butts, metal 'knuckles,' truncheons, rubber tubing with lead inside, lengths of wood and wooden bats."[814]

395. Cruelty can also be psychological, and can arise from circumstances such as a victim being aware of family members witnessing the crime, or others being forcibly turned into spectators.[815] Of applicability to the present case is the fact that several courts found particular cruelty where victims were lead to killing pits where dead bodies lay, and where the wounded were made to witness mass executions.[816]

396. No mercy was shown to prisoners at S-21, including children, the most defenceless victims. As the evidence at trial illustrated, the prison was essentially an enormous torture and execution processing centre which operated with unrelenting brutality and horrific efficiency. Numerous methods of torture were systematically employed. Most of these involved the infliction of extensive physical injuries and/or pain, as well as extreme psychological shock, humiliation and fear. As has already been noted, torture resulted in death on a number of occasions.

397. Most of those arrested and taken to S-21 probably knew little about where they were going and exactly why they were being arrested. However, during their confinement, mistreatment and torture, the vast majority of victims would have come to realise the fate that awaited them before they were actually taken to be executed. Those prisoners whose family members were also arrested would have realised that the same fate awaited their loved ones. The psychological trauma and pain which these realisations would have caused, in addition to the physical pain resulting from the inhumane conditions and torture, are particularly aggravating circumstances.

398. The Accused organised, perpetrated, observed and permitted this cruelty to continue at every step of the processing of prisoners through S-21 over a period of more than three years.

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[812] Jelisic TJ : para 130; *see also* Blaskic TJ : para 783
[813] Blaskic TJ : para 783
[814] Dragan Nikolic TSJ : para 189
[815] Bagosora et al TJ : para 2266; Dragan Nikolic TSJ : paras 208-209
[816] Mrda TSJ : para 55; Obrenovic TSJ : para 73; *see also* Dragan Nikolic TSJ : paras 208-209

DEFENCELESSNESS OF THE VICTIMS

399. While the ICC RPE list defencelessness of victims as an aggravating circumstance,[817] the other international tribunals may take it into account either when assessing the gravity of crimes[818] or as an aggravating factor.[819] Certain groups of victims have been classified as particularly vulnerable and defenceless in international jurisprudence.

400. A number of considerations can be relevant to determining the particular defencelessness of victims, and these include:

(a) Victims' status: for example, civilian prisoners,[820] hospital patients and disabled persons, people held in confinement,[821] women, children[822] and the elderly, as well as wounded and captured men;[823] and

(b) The treatment of victims, and the conditions in which they are held, for example where:

(i) victims are in a position of helplessness and subject to cruel treatment at the hands of their captors.[824]

(ii) victims are powerless prisoners who could not avoid daily humiliation, degradation or physical and mental abuse[825] and suffered brutal beatings[826]

(iii) prisoners are placed in illegal detention without any contact with outsiders,[827] are guarded by soldiers or armed men,[828] and "treated rather as slaves than as inmates."[829]

Aggravating circumstances were also found to exist where victims were "systematically disarmed only to be attacked, killed, beaten, tortured, raped, mistreated and forcibly displaced."[830]

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[817] ICC RPE : Rule 145 (2) (b) (iii)
[818] Lukic and Lukic TJ : para 1050
[819] Deronjic AJ : paras 124-125; Jokic, Miodrag TSJ : paras 64-65
[820] Cesic TSJ : paras 49, 108
[821] Jokic, Miodrag TSJ : paras 64-65
[822] Dragan Nikolic TSJ : paras 184-185
[823] Kordic and Cerkez AJ : para 1088; Blagojevic and Jokic TJ : para 844
[824] Blagojevic and Jokic TJ : para 844; *see also* Krstic TJ : para 703
[825] Dragan Nikolic TSJ : para 185
[826] Simic et al. TJ : para 1083
[827] Dragan Nikolic TSJ : paras 184-185
[828] Dragan Nikolic TSJ : para 184
[829] Dragan Nikolic TSJ : para 213

401. An accused's failure to show compassion for the suffering of the victims is considered an aggravating circumstance, as is the fact that he/she was neither dissuaded by the fear or suffering of his/her victims nor deterred by the prospect of being identified in carrying out his/her acts.[831]

402. By any standard, S-21 prisoners were particularly defenceless and vulnerable. They were held at the complete mercy of their captors and denied their most basic human rights. They were humiliated, tortured, malnourished, and kept in disease-ridden environments. Spouses, children and other family members of prisoners were routinely arrested, imprisoned and executed. All were held in confinement under constant armed guard, in conditions which were inhumane and abhorrent.

403. Fully aware of the entire cycle of inhumane detention conditions, constant fear, repeated torture and executions, the Accused showed no compassion, took no steps to ease the victims' suffering and remained persistent in the commission of the crimes.

DISCRIMINATORY INTENT

404. The fact that a crime is committed with a discriminatory intent is an aggravating circumstance in sentencing if such intent is not an element of the offence.[832] A discriminatory intent is an aggravating factor because the perpetrator commits the underlying crime by targeting the victim for his/her actual or perceived membership of a group. Therefore, it elevates a crime from being an ordinary crime directed against an individual to a crime against the targeted group. The criminal intent of the perpetrator is thus not just to harm the victim but to harm him/her in the name of his/her membership of a group, which as a whole is the target of the perpetrator's hatred.

405. Under the customary international law definition of crimes against humanity, the existence of a discriminatory intent is a required element only for the crime of persecution.[833] With respect to all other underlying crimes discriminatory intent can be considered as an aggravating factor if it is found to exist in addition to the intent to commit the criminal act. Such intent can be inferred from the circumstances of the

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[830] Brdjanin TJ : para 1106
[831] Lukic and Lukic TJ : para 1068
[832] Vasiljevic TJ : paras 277-278; Todorovic TSJ : para 57
[833] Akayesu AJ : paras 447-469; Semanza TJ : para 332

crime where the accused knowingly participated in a system or enterprise that discriminated on political, racial or religious grounds[834] and where an accused wilfully or knowingly participated in a campaign of systematic abuse against a specific ethnic, religious, or political group.[835]

406. Article 5 of the Law on the ECCC requires that the widespread or systematic attack in cases of crimes against humanity be directed against a civilian population on "national, political, ethnical, racial or religious grounds." The same statutory requirement exists in Article 3 of the ICTR Statute, but is not otherwise part of customary international law which, as noted above, presupposes discriminatory intent only in the case of persecution as a crime against humanity.[836] The ICTR has held that this requirement is a jurisdictional limitation and not part of an accused's *mens rea* – that is, an accused need not act with discriminatory intent (other than in the case of persecution), but must know that his/her act is part of the widespread or systematic attack.[837]

407. When applied to the Law on the ECCC, this means that a) while the attack must be committed on one of the enumerated grounds, and b) an accused must be aware of the attack, c) the accused is not required to possess discriminatory intent for any crime against humanity other than persecution. In proceedings before the ECCC, discriminatory intent on the part of an accused therefore constitutes an aggravating factor in cases of crimes against humanity, other than persecution. This interpretation is supported by the fact that, under Article 5 of the Law, only persecution as a crime against humanity requires the additional discriminatory intent on the part of an accused.

408. In this case, the Accused committed his crimes with a specific discriminatory intent based on the victims' political opinion (i.e. prisoners who were perceived as having opposing political views to those of the regime) and ethnicity/nationality (i.e. Vietnamese prisoners). The victims were targeted specifically on these grounds. The Accused's training and education of interrogators and staff as well as his annotations on confessions clearly demonstrate his disdain for these "enemies." He instructed his

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[834] Simic et al. TJ : para 51
[835] Jelisic TJ : para 73
[836] Akayesu AJ : paras 447-469
[837] Akayesu AJ : paras 447-469; *see also* Niyitegeka TJ : para 442; Bagilishema TJ : para 81

subordinates to view the prisoners as animals because of who they were or what they represented - this played a crucial role in hardening the young interrogators and encouraging them to employ extreme torture against the prisoners. This discriminatory intent on the part of the Accused should therefore be considered an aggravating factor in sentencing for his crimes, except for persecution as a crime against humanity.

MITIGATING CIRCUMSTANCES

409. The international tribunals have held that the required standard of proof for establishing the existence of mitigating factors in favour of an accused is on the balance of probabilities.[838] A finding of mitigating circumstances relates to an assessment of the sentence and in no way derogates from the gravity of the crime[839] - i.e. it mitigates the punishment, not the crime.[840] Further, any consideration of mitigation must be secondary to considerations of seriousness of the crimes and interests of the victims.[841] Mitigating circumstances may include those not directly related to the offence, such as true expression of remorse.[842] The absence of a potential mitigating factor cannot be treated as an aggravating factor.[843]

SUPERIOR ORDERS

410. The Law on the ECCC specifically stipulates that acting under superior orders shall not relieve a suspect of individual criminal responsibility.[844] The ICC Statute allows superior orders to constitute a defence where an accused was under a legal obligation to obey orders of the government or the superior in question, and did not know that the order was unlawful, provided that the order was not manifestly unlawful.[845] The Statute specifically deems "manifestly unlawful" any order to commit genocide or

[838] Babic JSA : para 43; Blaskic AJ : para 697; Dragan Nikolic TSJ : para 145
[839] Kambanda TJ : para 56
[840] Brdjanin TJ : para 1117
[841] Richard Goldstone : 14 September 09 : T.23-24
[842] Brdjanin TJ : para 1117; Stakic TJ : para 920
[843] Blaskic AJ : para 714; Vuckovic, AJ : at 27
[844] Law on the ECCC : Art 29
[845] Rome Statute : Art. 33. Two of these requirements are factual (the legal obligation to obey orders, and the order being manifestly unlawful) and are therefore to be measured by objective standards, whereas the remaining one (not knowing that the order was unlawful) is subjective or "mental."

crimes against humanity,[846] because they are contrary to fundamental moral norms.[847]

411. Turning to the impact of superior orders as a mitigating factor in sentencing, while the ICC Statute does not specifically label the existence of superior orders as a mitigating factor in sentencing, the Court presumably has the discretion to apply them as such.[848] Statutes of the *ad hoc* Tribunals specifically permit superior orders to be used as mitigating circumstances in determining an accused's sentence.[849]

412. Importantly, 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."[850] Evidence that there were negative consequences for disobedience on the part of the accused helps establish mitigation.[851] In order for superior orders to operate in mitigation, however, the criminal acts of the accused must lack cruelty or relentlessness.[852] Further, superior orders are not a mitigating circumstance where the accused "voluntarily reiterated criminal orders previously issued by his superior."[853]

413. While in the present case the Accused may argue that the existence of superior orders should be used in mitigation of his sentence, the facts do not support such a conclusion. The Accused was prepared to perpetrate the crimes at S-21 as he did at M-13. His relationship with his superiors must be viewed in light of the facts that: a) he was a willing and professional prison warden who sought and accepted his superiors' orders; b) most orders in fact resulted from the Accused's recommendations, analyses and reports, and should thus be viewed as permissions facilitating his work as opposed to orders which caused him to act a certain way; c) the Accused did nothing to contravene the criminal orders or indicate his lack of

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[846] Rome Statute : Art. 33(2); *see* Geert-Jan A. Knoops, *Defenses in Contemporary International Criminal Law* (2001) at 46
[847] Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 McGill L.J. 1
[848] ICC RPE : Rule 145(2)(a)(i)
[849] ICTY Statute : Art 7(4); ICTR Statute : Art 6(4); SCSL Statute Art 6(4)
[850] Erdemović TSJ (1996) : para 53
[851] Bralo TSJ : para 55
[852] Jelisic TJ : para 126
[853] Brima et al TSJ : para 122

willingness to comply; and d) the Accused did contravene orders which may have led to evidence of the crimes being discovered (as described in the ***Accused's Criminal Role at S-21*** Section).

414. The Accused followed criminal orders from the CPK without hesitation prior to, during and following the period covered by the Closing Order. He was a willing participant who, in 1975, after years of managing an imprisonment, torture and execution camp, spent months in Phnom Penh waiting for a new assignment. As indicated in the ***Accused's Cruelty and Lack of Mercy*** and ***Alleged Fear Versus Choices and Protected Status*** Sections, although choices were available to the Accused to minimise the suffering of some of his victims, or even to escape from S-21, he never took them. Instead, he was instrumental in supplying the basis for the superior orders which he implemented with consistency, professional zeal and enthusiasm.

DURESS

415. Pleas in mitigation based on superior orders or duress often arise out of the same or overlapping facts.[854] Superior orders and duress may be pleaded independently.[855] Duress is defined as the "use or threatened use of unlawful force — usu[ally] that a reasonable person cannot resist — to compel someone to commit an unlawful act.[856]

416. Duress is a complete defence at the ICC, in a situation where a person's conduct was caused by duress resulting from a threat of imminent death (or of continuing or imminent serious bodily harm) against him/her or another person, and the person acted necessarily and reasonably to avoid this threat, while not intending to cause harm greater than the one sought to be avoided. [857]

417. The Accused has not pleaded duress as a *full defence* to the charges, and clearly such a defence would not have been available to him.

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[854] Bralo ASJ : para 22
[855] Mrda TSJ : para 65
[856] Black's Law Dictionary (8th ed. 2004)
[857] Rome Statute, Art 31, ICC RPE, Rule 145. See also Erdemovic, AJ Separate and Dissenting Opinion of Judge Cassese : para 16 "The following strict conditions must be met for duress "(i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb; (ii) there was no adequate means of averting such evil; (iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils; (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced."

418. The presence of duress in the commission of a crime can be a mitigating factor in sentencing.[858] However, the mere presence of superior orders[859] or even the fact that an accused had several superiors does not mitigate his/her sentence on duress grounds.[860]

419. In applying duress in mitigation, a broad-range of circumstances can be considered, such as the imminence and severity of the threat the accused is placed under, the characteristics of the conflict he/she is involved in, the rank of the accused, and his/her lack of knowledge or criminal intent.[861]

420. Duress cannot aid an accused if he/she exhibited "volition to commit the crimes,"[862] did not perform his/her orders "with reluctance,"[863] or if he/she showed "enthusiasm and willingness to implement such orders [and/or a] desire to humiliate his victims."[864]

421. The evidence before the Chamber in this case does not support a conclusion that the Accused was under any form of duress. In fact, as stated above, the evidence illustrates that the Accused was a willing and highly effective participant in the crimes. Further, he was a loyal cadre with access to the highest echelon of CPK, whom he sought to please and with whom he coordinated his activities. The Accused placed himself at the regime's disposal, having performed similar duties at M-13. His claims that he sought re-assignment to another post and asked that another individual be named as Secretary of S-21 are contradicted by consistent documentary and testimonial evidence of his active and voluntary participation in the crimes.

422. While putting forward vague allegations of being in danger based on his conversations with Son Sen and Nuon Chea, the Accused has never offered any specific or tangible evidence of an immediate and severe threat to his life, or to the lives of those close to him. More importantly, his enthusiasm and willingness to be a part of the entire criminal enterprise and his unequivocal volition to commit and

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[858] Martic TJ : para 501; Erdemovic Second TJ : para 17
[859] Mrda TJ : paras 66-67
[860] Brima et al TJ : para 116
[861] *See e.g.*, Erdemovic TJ : para 17
[862] Serushago AJ : para 27
[863] Mucic et al TJ : para 1281
[864] Bralo ASJ : para 22

further the crimes without reluctance have been clearly established. These circumstances clearly negate the availability of duress as a mitigating factor.

COOPERATION

423. The RPEs of international criminal tribunals state that an accused's substantial cooperation with the Prosecutor before or after conviction is a mitigating factor in sentencing.[865] Specific requirements which must be fulfilled for a successful plea in mitigation based on cooperation with the authorities include the quality and quantity of the information provided,[866] voluntariness,[867] and selflessness of the accused's cooperation, which must be lent without asking for anything in return.[868] Nevertheless, the fact that an accused may benefit from his cooperation does not *per se* preclude it being considered as a mitigating factor.[869]

424. For cooperation to be deemed substantial, it must provoke a greater efficiency in the trial.[870] Consequently, early cooperation will be granted greater value.[871] Nevertheless, willingness to provide cooperation after sentencing, such as by testifying against an accused in a subsequent trial, is also considered to be a mitigating factor.[872] Information provided by an accused has to strengthen the facts already known to the prosecutor and therefore save resources during trial and/or investigation.[873] In contrast, giving only limited information[874] or evidence not wholly true[875] is insufficient for mitigation.

425. In the present case, the Accused has cooperated with the authorities from an early

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[865] ICTR Rules of Procedure and Evidence Rule 101 (B) (ii); ICTY Rules of Procedure and Evidence Rule 101 (B) (ii); SCSL Rules of Procedure and Evidence Rule 101 (B) (ii)
[866] Todorovic TSJ : para 86; *see* Kambanda TJ : para 47; Erdemovic First TSJ : paras 99-101
[867] Kvocka et al TJ : para 743; Erdemovic First TSJ : para 99
[868] Blaskic TJ : para 774; Mucic et al TJ : para 1279: "Trial Chamber does not consider any attempt at plea bargaining to be a mitigating factor in the matter of sentencing"; Erdemovic Second TSJ : para 16
[869] *See* Deronjic TSJ : paras 249-250; Banovic-Predrag TSJ : para 61; Todorovic TSJ : para 86
[870] Simic TJ : para 111: "The Trial Chamber finds that Milan Simic was cooperative throughout the proceedings, and notes specifically his agreement to follow the proceedings via video-link from the Detention Unit, resulting in greater efficiency in the trial."; Kvocka et al TJ : para 743; Musema TJ : para 1007
[871] Deronjic TSJ : paras 245-246
[872] Banovic-Predrag TSJ : para 61; Ruggiu TJ : para 58; Serushago TSJ : para 33; Kambanda First Trial Sentencing Judgment TJ : paras 47; 61; *see also* Kupreskic et al AJ : para 463. Here the Appeals Chamber takes it even a step further when it considers that "in appropriate cases, cooperation between conviction and appeal could be a factor that the Appeals Chamber too may consider in order to reduce sentence. This will, of course, depend on the circumstances of each case and the degree of cooperation rendered."
[873] Babic TSJ : para 73; Deronjic TSJ : para 246; *see* Ruggiu TJ : para 57
[874] Haradinaj et al TJ : para 495
[875] Krstic TJ : paras 716, 722

stage, showing a general willingness to testify, comment on the available evidence and otherwise participate in the investigation and the trial. However, this cooperation has been limited. While he accepts the base crimes at S-21 and his overall responsibility, he has contested numerous allegations relating to his direct involvement, and, as illustrated in the ***Accused's Criminal Role at S-21*** Section, has sought to portray his role at S-21 in a light that is wholly inconsistent with the available evidence. On numerous occasions during the trial, when confronted with questions on the issue of his power to order, his willingness, intent and level of participation in the crimes the Accused has given incomplete, evasive and misleading testimony.

426. Moreover, throughout the investigation and trial, the Accused has: a) refused to divulge the whole truth of the events at and surrounding S-21, b) sought to minimise his role and personal participation in the crimes and c) claimed failure to recollect or refused to answer questions on issues which are clearly within his knowledge. Through his counsel he has a) objected to the allegation that he was a senior or most responsible individual responsible for crimes in DK, b) objected to his liability for committing crimes via joint criminal enterprise, c) objected to his liability for national crimes, d) objected to the Co-Prosecutors' request for a reserve trial witness list, e) objected to the admission of relevant and probative documentary evidence, f) objected to a request for the admission of witness statement summaries to assist the Chamber, g) objected extensively without substantial foundation throughout the questioning of a key expert, Craig Etcheson and h) sought to aggravate trial witnesses' fear of prosecution in national courts thereby reducing the probative value of their testimony at trial.

427. The Accused's cooperation has therefore facilitated the economy of the trial only to a limited extent. The information he has provided has had a limited impact on achieving a greater understanding of S-21 crimes or his role therein. All of these facts must minimise the effect of mitigation to which the Accused is entitled as a result of his cooperation. The Accused cannot, on the one hand, seek to present himself as fully cooperative and expect a significant level of mitigation of his sentence on that basis, while at the same time refusing to cooperate and in fact seeking to fight significant aspects of the case against him.

GUILTY PLEA

428. Although the criminal procedure before the ECCC does not incorporate a plea by an accused as to his/her guilt, given the Accused's partial acceptance of responsibility, the Chamber should consider international principles relating to reduction of sentence on the basis of acceptance of guilt. RPEs of international criminal tribunals require that guilty pleas be voluntary, informed and unequivocal.[876] While a guilty plea that includes an expression of honesty[877] and unreserved acceptance of individual criminal responsibility[878] has substantial mitigating value, the weight to be attached to it clearly lies within the discretion of the Trial Chamber.[879]

429. The Court should evaluate acceptance of guilt by examining a) the time at which it is expressed,[880] b) the risk of prosecution at that time,[881] c) its "exceptional" quality,[882] and d) its significance[883] (i.e. if a guilty plea leads to the indicting of new suspects).[884] At international tribunals, guilty pleas have been found beneficial because they spare witnesses from travelling to the tribunal to give evidence[885] and reliving their traumatic experiences.[886] Guilty pleas also bring closure to victims[887] and save the tribunal's time and resources.[888]

430. Guilty pleas can promote reconciliation, restoration and maintenance of peace as well as combat revisionism and denials of crimes.[889] In addition, they can assist in establishing the truth[890] and aid the fulfilment of an international criminal tribunal's mandate.[891] The mitigating effect of a guilty plea can be given "considerable weight" by the Trial Chamber if the accused is the first to accept responsibility in relation to crimes that occurred in a particular region,[892] and/or held a high position of

[876] Rome Statue : Art. 65, ICTY RPE : Rule 62(bis), ICTR RPE : Rule 62; SCSL : Rule 62
[877] Dragan Nikolic TSJ : paras 235-237
[878] Obrenovic TJ : para 116
[879] Bralo ASJ : para 42; Nikolic-Momir ASJ : para 82; Jelisic AJ : para 121
[880] Bralo TSJ : para 64; Cesic TSJ : paras 59-60
[881] *See* Babic TSJ : para 70
[882] Babic ASJ : para 68
[883] Bralo AJ : para 44
[884] Bralo AJ : para 43-44
[885] Todorovic TSJ : para 80
[886] Bralo TJ : para 64
[887] Obrenovic TSJ : para 111
[888] Bralo AJ : para 47
[889] Nikolic ASJ : para 84; Obrenovic TSJ : para 111
[890] Todorovic TSJ : para 81, Deronjic TJ : para 236
[891] Obrenovic TSJ : para 111; *see* Plavsic TSJ : paras 78-79
[892] Zelenovic, AJ : para 18

authority.[893] However, any benefit that an accused can expect from his/her admission of guilt must be proportionate to the genuineness and specificity of that admission.[894]

431. As is obvious from the preceding discussion, certain aspects of international jurisprudence on guilty pleas are not directly applicable to the criminal procedure at the ECCC. Whereas a guilty plea at the international criminal tribunals would largely bypass a trial, a trial at the ECCC is required irrespective of the acceptance by an accused of criminal responsibility. Nevertheless, the principle of admitting guilt is the same.

432. As indicated above, the Accused's acceptance of guilt has , to a limited extent, assisted the shortening of the trial. It has also helped the ascertainment of the truth, and the process of informing the victims' families and the wider community about the crimes.

433. However, as indicated above, the Accused's admissions did not amount to a full and unequivocal acceptance of his responsibility. He admits that he is responsible for the crimes at S-21. Yet he simultaneously claims that he was unable to counter the wishes of his superiors and simply acted under their orders. His efforts to minimise his active role in, and importance to, the commission of the crimes contradict both physical and testimonial evidence that proves otherwise. He therefore does not give an unreserved acceptance of individual criminal responsibility, and only admits guilt on qualified terms. As a result of the position the Accused has adopted on this issue, significant disagreements remain between the Co-Prosecutors and the Defence.

434. The timing and circumstances of the Accused's acceptance of guilt are also relevant. After the DK regime was toppled, the Accused spent 20 years on the run, at certain times concealing his identity. When he was finally tracked down and discovered by an international reporter, the Accused testified that "everything was compromised,"[895] specifically in regards to his then current plans to be educational administrator for Samlaut.

435. The Co-Prosecutors acknowledge that the Accused's acceptance of guilt has been beneficial in terms of corroborating the existing evidence of the crimes and limiting

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[893] Plavsic TSJ : para 80
[894] Richard Goldstone : 14 September 09 : T.22
[895] Accused : 2 September 09 : T.55-56

the length of the trial. Yet the acceptance of guilt is qualified and its benefits limited. Its potentially mitigating impact on the sentence must therefore be proportionately reduced.

NATIONAL RECONCILIATION

436. The benefits for the process of national reconciliation arising from the Accused's participation in this trial are relevant to the determination of an appropriate sentence. National reconciliation is recognised in the preamble of the Agreement on the ECCC as a legitimate concern of the ECCC.[896] Other international tribunals also consider national reconciliation as a factor in determining appropriate sentences.[897]

437. In this context, an accused's post-conflict conduct may lead to a mitigation of the sentence in exceptional cases.[898] This would be the case where, for example, an accused has demonstrated "considerable support"[899] for or substantial involvement[900] in the peace process. Activities such as working with affected communities to recover human remains,[901] discussing events with survivors and relatives,[902] and working to rebuild communities other than those directly affected by the crimes have also been considered relevant in the context of sentencing.[903] A Trial Chamber may also decide to consider an accused's post-conflict conduct as evidence of remorse, rather than as the distinct mitigating circumstance of aiding national reconciliation.[904]

438. National reconciliation may also be considered a mitigating factor in sentencing in conjunction with other factors. For instance, Chambers have credited an accused where there is a guilty plea along with "acknowledgement and full disclosure."[905] Further, national reconciliation is promoted where an accused's guilty plea prompts

[896] ECCC Agreement : para 2
[897] Erdemovic First TSJ : para 58; Kamuhanda TJ : para 754
[898] Sesay et al TSJ : para 225
[899] Plavšić TSJ : para 85
[900] Delić TJ : para 584; Kristic TJ : para 724; Fofana and Kondewa TJ : para 67
[901] Nikolić-Dragan TSJ : para 247-248; Bralo TSJ : para 69
[902] Nikolić-Dragan TSJ : para 251; *see* Bralo TSJ : para 69
[903] Nikolić-Dragan TSJ : para 251
[904] Jokić AJ : para 54
[905] Plavšić TSJ : para 80; *see* Češić TSJ : para 58

others to recognise their responsibility.[906] Mitigation for national reconciliation may also be given where an accused assists families and victims from the dock.[907]

439. It is acknowledged that the Accused's public recognition of his responsibility and the criminality of the DK regime, and his apologies to victims and their families have been beneficial to the process of national reconciliation in Cambodia and abroad. The Accused's admission of guilt inevitably assists the process of healing and encourages public discussion of a very painful chapter in Cambodia's history. However, the Co-Prosecutors submit that the Chamber should assess the Accused's contribution to the process of national reconciliation in light of the significant qualifications on his acceptance of responsibility and cooperation with authorities, as discussed above.

440. It is also relevant to note that the Accused's cooperation was not forthcoming for some 20 years after the fall of the DK regime, that is, until his discovery. He in fact continued to be a part of, and provide support to, the Khmer Rouge for a number of years after the fall of the regime. Even after apparently becoming disillusioned with the Khmer Rouge, he did not come forward to assist authorities in the investigation of the crimes at S-21, but rather decided to stay in hiding. At different stages of the trial, usually when confronted with evidence or questions relating to his own involvement he has been evasive and often non-responsive to direct questions. On these issues, he has also disingenuously claimed inability to recollect significant events (despite his excellent memory of matters which are beneficial to him) or given implausible accounts which are inconsistent with the evidence before the Court.

441. Experts heard at trial testified that the greatest influence a criminal trial can have on national reconciliation is the establishment of a "single history of what happened."[908] Stephane Hessel stated that "reconciliation can only go hand in hand with the concept of truth."[909] If full disclosure and unqualified acceptance of responsibility for serious crimes are necessary pre-conditions for reconciliation, as they must be,

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[906] Nzabirinda TJ : para 68, Bisengimana TJ : para 201; Erdemovic Second TSJ : para 16; Ruggiu TJ : para 55

[907] Nikolić-Dragan TSJ : paras 247, 252

[908] Richard Goldstone : 14 September 09 : T.26; Chhim Sotheara : 25 August 09 : T.33-34 (testifying that to find "justice" and national reconciliation, the "evidence" must be "well-presented")

[909] Stephane Hessel : 15 September 09 : T.63, 69

then the Accused's efforts to minimise the amount of trial evidence and his attempts to challenge the Prosecution's case logically minimise the value of his contribution.

442. Chhim Sotheara testified that criminal trials are in any event limited in the effect they can have on national reconciliation, because they can only give "symbolic justice" and not "psychological heal[ing]."[910] It is relevant to note that the victims heard by this Court, [911] are still unwilling to forgive the Accused, and this is indicative of the feelings of at least a significant part of the Cambodian community .

REMORSE

443. Expressions of remorse have been held to be a mitigating factor in sentencing before the international tribunals.[912] To have an effect in terms of reduction of sentence expressions of remorse must be real and sincere[913] at the time they are given.[914] Experts at this trial have agreed with this view.[915]

444. Generally, although an accused can express sincere regrets without admitting his/her participation in a crime,[916] "[r]emorse nonetheless requires acceptance of some measure of moral blameworthiness for personal wrongdoing, falling short of the admission of criminal responsibility or guilt."[917] Remorse can be inferred from the fact that the accused has pleaded guilty and cooperated with the Prosecution.[918] However, "remorse is not the only reasonable inference that can be drawn from a guilty plea."[919]

445. In determining whether there is genuine remorse, indicators which can be taken into account in addition to the sincerity of the accused's statements[920] include: a) the

[910] Chhim Sotheara : 25 August 09 : T.50
[911] Hamill Robert, Toch Monin, Im Sunty, Seang Vandy, Phung Guth Sunthary, Phaok Khan, Ou, Savrith, So Saung, Chum Sirath, Ouk Neary, Lefeuvre Martine, Tioulong Antonya, Chum Neou, Chhin Navy, Neth Phally and Hav Sophea.
[912] *E.g.* Blaskic AJ : para 705; Todorovic TSJ : paras 89-92; Erdemovic First TSJ : paras 44, 55, 111; Erdemovic Second TSJ : para 16 (iii); Jokic TSJ : para 89, Dragan Nikolic TSJ : para 241; Serushago TSJ : para 39-42; Ruggiu TJ : paras 69-72; Plavsic TSJ : paras 66-81; *but see* Jelisic TJ : para 127 (Jelisic's sincerity of remorse not accepted)
[913] Blaskic AJ : para 705; Todorovic TSJ : para 89; *see* Obrenovic TJ : para 121
[914] Zelenovic TSJ : para 51
[915] Richard Goldstone : 14 September 09 : T.11; Chhim Sotheara : 25 August 09 : T.52
[916] Vasiljevic AJ : para 177
[917] Strugar AJ : para 365 n.900 (citing the the Oxford English Dictionary definition of remorse as "a feeling of compunction, or of deep regret and repentance, for a sin or wrong committed.")
[918] Todorovic TSJ : para 92; Jokic Miodrag TSJ : para 92
[919] Kambanda TJ : para 52
[920] Vasiljevic AJ : para 177

accused's behaviour, such as voluntary surrender or guilty plea;[921] b) contributions to reconciliation;[922] c) public apologies;[923] and d) the accused's demeanour.[924] An expression of remorse given from the first day of an accused's testimony, combined with evidence of profound regret, adds to the mitigating weight of remorse on sentencing.[925]

446. On the other hand, lack of a sincere remorse has been found in international cases where there has been: a) a failure to surrender to authorities, despite expressions of remorse to expert psychiatrists;[926] b) a failure to limit the consequences of crimes;[927] c) a written statement given at the end of a trial apparently only for the purpose of obtaining a reduction in sentence;[928] d) a written letter of remorse by an accused addressed to a third person in light of the circumstances of the case, the role of the accused in the crimes and his failure to investigate and punish perpetrators;[929] e) a failure to investigate and punish perpetrators of the crimes;[930] f) an expression of remorse which covers only a fraction of the convicted crimes;[931] and g) disrespectful behaviour in the courtroom.[932]

447. In this case, the Accused has made public apologies and statements of remorse when given the opportunity. There is no doubt that he feels a degree of remorse for his actions, and for this he deserves credit. Nevertheless, there are doubts about the extent of that remorse which clearly arise from his attempts to limit the degree of his direct responsibility and involvement in the crimes, and his hostility during the proceedings towards some of the witnesses, experts and participants in the proceedings.

448. The Trial Chamber directly addressed the Accused's conduct on a number of occasions. It has reproached him for laughing, gesturing and for his "attitude"[933]

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[921] Blaškic TJ : para 775
[922] Todorovic TSJ : para 91
[923] Mrda TSJ : para 87
[924] Mrda TSJ : para 87
[925] Blaškic TJ : para 775
[926] Jelisic TJ : para 127
[927] Blaškic TJ : para 775
[928] Mucic et al TJ : para 1279
[929] Strugar AJ : para 377
[930] Strugar AJ : para 377
[931] Kvocka et al AJ : para 715
[932] Kunarac et al TJ : para 854
[933] Accused : 29 April 09 : T.76

during questioning.[934] The Chamber also censured the Accused for using inappropriate language.[935] As has already been noted, on a number of occasions, the Accused refused to answer[936] or was unresponsive to questions,[937] including those from the Chamber.[938]

449. Psychological and psychiatric experts have testified that the Accused, for most of his adult life, has been unable to process empathy, compassion, or emotions concerning the suffering or the pain of others.[939] While the Accused may be in a gradual process of cultivating these emotions, his history and his conduct at trial suggest that his remorse is restricted and not yet complete.

450. The experts have testified that the Accused "is willing to accept what is proven, and what cannot be proven, well, he does not accept it."[940] The trial transcript contains numerous examples supporting this conclusion.[941] A notable illustration is the Accused's challenge to the evidence given by Norng Chanphal. The Accused initially did not "recognise" that Norng Chanphal was ever at S-21,[942] but once confronted with documentary and video evidence to the contrary, he recanted, stating that "at that time I did not have the document and I would not accept it, but now I would accept it entirely."[943]

451. An accused who denies culpability or guilt is certainly entitled to put the Prosecution to proof on each element of the crime and each aspect of his/her personal responsibility. However, an accused who seeks to plead remorse and acceptance of guilt in mitigation of his sentence should be expected to give genuine cooperation rather than seeking to scrutinise every piece of evidence, refusing to answer questions on issues which are within his knowledge, and minimising his responsibility despite clear evidence to the contrary. The two approaches are mutually exclusive, or at the very least, a qualified willingness to cooperate must lead to a reduced mitigation of sentence.

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[934] Accused : 29 April 09 : T.58, 65
[935] Accused : 8 June 09: T.83
[936] Accused : 20 April 09 : T.23; Accused : 29 April 09 : T.60, 81; Accused : 8 June 09 : T.59; Accused : 9 June 09 : T.27
[937] Accused : 9 June 09 : T.61-62; Accused : 27 May 09 : T.3-5
[938] Accused : 7 April 09 : T. 107-108; Accused : 21 April 09 : T.16; Accused: 27 May 09 : T.24
[939] Françoise Syroni-Guilbard and Ka Sunbaunat : 31 Aug 09 : T.33, 43, 66-67
[940] Françoise Syroni-Guilbard and Ka Sunbaunat : 31 Aug 09 : T.93
[941] *See e..g.*, Accused : 13 July 09 : T.56-57; 27 July 09: T.48-50; 24 Aug 09 : T.85
[942] Accused : 2 July 09 : T.83, 85
[943] Accused : 8 July 09 : T.4-5

452. The Accused's predilection to admit guilt for crimes committed at S-21 generally while simultaneously rejecting a significant number of facts which illustrate his direct involvement, raises legitimate doubt as to the completeness of his admission of remorse and his desire to assist the ascertainment of the truth. Rather, it suggests that, to a certain extent, the Accused admits guilt not out of a true sense of empathy for the victims, but out of self-interest in easing the burden of punishment he is facing.

SIMILAR CASES

453. Although sentencing must be individualised and decided on a case by case basis, guidance should be sought from other international criminal tribunals that have dealt with cases of similar gravity and circumstances. For the benefit of the Trial Chamber, the Co-Prosecutors provide an analysis of sentencing in comparable cases, focusing on convictions of accused who held a significant degree of authority, were responsible for a large number of deaths (100 or more) and committed their crimes over an extended period of time.

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

454. Since 2000, there have been 76 accused convicted and sentenced at the ICTY at either the trial or appellate level. Of those, 40 held significant positions of authority[944] and of the 40, 21 were responsible for the deaths of over 100 people.[945] On average these accused received 25.6 years of imprisonment. More specifically, of these 21 cases, where the crimes were committed over a period one month or more, the average sentence received was 26 years. If the duration of time is extended to over a year, as in this case, the average sentence is **44** years.

[944] Jokic AJ; Deronjic AJ; Babic AJ; Kvocka AJ; Dragan Nikolic AJ; Kordic TJ; Blaskic AJ; Krstic AJ; Obrenovic TJ; Krnojelac AJ; Mucic AJ; Delic AJ; Plavsic TJ; Kunarac AJ; Sikirica TJ; Todorovic TJ; Jelisic AJ; Aleksovski AJ; Lukic-Milan TJ; Sainovic TJ; Ordanic TJ; Pavkovic TJ; Lazarevic TJ; Lukic-Sreten TJ; Mrksic AJ; Krajisnik AJ; Martic AJ; Delic TJ; Brahimaj TJ; Strugar AJ; Hadzihasanovic TJ; Milosevic TJ; Blagojevic AJ; Brdanin AJ; Galic AJ; Simic AJ; Rajic TJ; Naletilic AJ; Stakic AJ; Nikolic-Momir AJ

[945] Babic AJ; Kordic TJ; Blaskic AJ; Krstic AJ; Obrenovic TJ; Lukic-Milan TJ Sainovic TJ; Ordanic TJ; Pavkovic TJ; Lazarevic TJ; Lukic-Sreten TJ; Mrksic AJ; Krajisnik AJ; Martic AJ; Milosevic TJ; Blagojevic AJ; Brdanin AJ; Galic AJ; Naletilic AJ; Stakic AJ; Nikolic-Momir AJ

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

455. Since 1998, there have been 39 accused convicted and sentenced at the ICTR at either the trial or appellate level.[946] Of those, 22 held significant positions of authority,[947] and of those, 20 were responsible for the deaths of over 100 people.[948] On average these Accused received 37.85 years of imprisonment. More specifically, of these cases, where the crimes were committed over a period of one month or more, the average sentence received was **45.42** years.

SPECIAL COURT FOR SIERRA LEONE

456. Since 2000, eight accused have been convicted and sentenced at the SCSL at either the trial or appellate level.[949] All accused held positions of significant authority and all were responsible for the deaths of more than 100 people. The average sentence was **37** years of imprisonment. All accused were convicted for crimes that were committed over a period of one month or more Unlike the present case, none of these accused committed their crimes over an extended period of time.

PRE-TRIAL AND ILLEGAL DETENTION

CREDIT FOR TIME SERVED

457. The Accused has been held in detention continuously since 10 May 1999[950] when he was taken into custody pursuant to orders of the Cambodian Military Court. He was transferred to the ECCC Detention Facility pursuant to orders of the Co-Investigating Judges of the ECCC on 31 July 2007, following which he has been held in detention pursuant to the orders of the Co-Investigating Judges, Pre-Trial Chamber and Trial Chamber. At the close of the trial, the Accused's period of detention has exceeded 10 years. On 15 June 2009, the Trial Chamber held that the

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[946] Renzaho TJ; Nshogoza TJ; Kalimanzira TJ; Rukunkdo TJ; Kerera AJ; Bagosora TJ; Ntabakuze TJ; Nsengiyumva TJ; Zigiranyirazo TJ; Nchaminhigo TJ; Bikindi TJ; Seromba AJ; Serushago AJ; Ruggiu TJ; Kambanda AJ; Akayesu AJ; Kayishema AJ; Ruzindana AJ; Musema AJ; Rutaganda AJ; Niyitegeka AJ; Ntakirutimana AJ; Bisengimana TJ; Serugendo TJ; Seromba TJ; Nzabirinda TJ; Rugambarara TJ; Gacumbsti AJ; Imanishimwe AJ; Muhimana AJ; Nahimana AJ; Ndindabahizi AJ; Ngeze AJ; Simba AJ; Barayagwiza AJ; Kajelijeli AJ; Kamuhanda AJ; Rutanganira TJ; Semanza TJ

[947] Renzaho TJ; Kalimanzira TJ; Karera AJ; Bagosora TJ; Ntabakuze TJ; Nsengiyumva TJ; Serushago AJ; Kambanda AJ; Akayesu AJ; Kayishema AJ; Niyitegeka AJ; Bisengimana TJ; Rugambarara TJ; Gacumbsti AJ; Imanishimwe AJ; Muhimana AJ; Ndindabahizi AJ; Simba AJ; Kajelijeli AJ; Kamuhanda AJ; Rutaganira TJ; Semanza TJ

[948] Renzaho TJ; Kalimanzira TJ; Karera AJ; Bagosora TJ; Ntabakuze TJ; Nsengiyumva TJ; Serushago AJ; Kambanda AJ; Akayesu AJ; Kayishema AJ; Niyitegeka AJ; Bisengimana TJ; Rugambarara TJ; Gacumbsti AJ; Muhimana AJ; Ndindabahizi AJ; Simba AJ; Kajelijeli AJ; Rutaganira TJ; Semanza TJ

[949] Fofana and Kondewa AJ; Brima et al AJ; Sesay et al TJ

[950] *Decision on Request for Release*, TJ Chamber (15 June 09) : para 29

Accused is entitled to a reduction of his sentence equal to the entire period of the pre-trial and trial detention, including the detention pursuant to orders of the Cambodian Military Court.[951]

458. This places the Accused in the same position as persons standing trial before the international tribunals where the rules of procedure and evidence provide that an Accused who is convicted must be given credit for the amount of time already spent in detention pending surrender to the Tribunal or pending trial or appeal.[952]

REDUCTION FOR ILLEGAL DETENTION

459. The Chamber has also held that the Accused's detention by the Cambodian Military Court (which lasted for over eight years) was unlawful and constituted a breach of his fundamental right to a trial within a reasonable time, which entitles him to an effective remedy in addition to full credit for the time spent in detention.[953] The Trial Chamber's ruling is clearly consistent with international jurisprudence.[954] An express and quantifiable reduction of the Accused's sentence for the violation of his rights is both appropriate and necessary.

460. A formula that would facilitate the quantification of the reduction in sentence has not been developed at the international level. The Co-Prosecutors submit that, in considering the appropriate period of reduction, the Chamber should take into account the totality of the circumstances of the case, including: the nature of the right that has been violated[955] and the seriousness of the violation;[956] the length of the delay in commencing an investigation and presenting charges against the Accused; factors causing the delay; prejudice to the Accused that has resulted from the unlawful detention; and the underlying facts of the case, including the gravity of the crimes the Accused has been charged with.[957] To be effective, the remedy should be proportionate to the breach but also determined in light of the broader circumstances of the case.

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[951] *Decision on Request for Release*, Trial Chamber (15 June 09) : paras 27-29
[952] ICTY and ICTR RPE : Rule 101(C)
[953] *Decision on Request for Release*, Trial Chamber (15 June 09), paras 21-22; 35-37
[954] Kajelijeli AJ : para 322
[955] Rwamakuba TC Decision on Appropriate Remedy : para 68
[956] Semanza AJ : para 324
[957] *See generally* Semanza TJ : paras 579-584; Barayagwiza et al TJ : paras 1095-1110

461. Should the Accused be acquitted of the charges, an appropriate remedy may be pecuniary and/or non-pecuniary compensation.[958] In case of acquittal, the Co-Prosecutors respectfully request that opportunity be given to the parties to file separate submissions and be heard on the issue.

INTERNATIONAL TRIBUNAL JURISPRUDENCE

462. There are only a handful of international cases with violations of the rights of accused similar to the present case. In the three most notable cases before the ICTR, all of the accused were convicted of genocide and crimes against humanity.[959]

463. In *Barayagwiza*, the accused was detained and not informed of the charges against him for a period of 18 days,[960] and went through 20 days without an initial appearance at the ICTR.[961] At judgment the Trial Chamber, implementing a decision of the Appeals Chamber which found that the Accused's rights had been violated, reduced the Accused's sentence of life imprisonment to a term of 35 years.[962] The Appeals Chamber later modified this sentence to 32 years, although an unspecified part of the further reduction was attributed to certain convictions being set aside on appeal.[963] In *Semanza*, the Appeals Chamber found that a reduction of 6 months in the Accused's 25 year sentence was appropriate where the Accused was illegally detained for a total of 36 days without being informed of the charges against him.[964]

464. Finally, in *Kajelijeli* the Accused's rights were violated during his detention when he a) was not informed of the reasons for his arrest at the time of the arrest, b) was arbitrarily detained for 85 days without an arrest warrant or a reasonably requested extradition petition, and without being properly informed of the charges against him; and c) was detained for 95 days without being brought before a competent judicial authority.[965] Additionally, the Accused's right to an expeditious trial was also violated for a total of 211 days while in the Tribunal's custody.[966] The Appeals Chamber concluded that the seriousness of the violations necessitated that the

[958] Rwamakuba TC Decision on Appropriate Remedy : para 68
[959] Kajelijeli AJ : para 321; Barayagwiza et al TJ : para 1096; Semanza TJ : paras 585-89
[960] Barayagwiza et al AJ : paras 1075-1079
[961] Barayagwiza et al, AC Decision on Prosecutor's Request for Review or Reconsideration : para 62
[962] Barayagwiza et al TJ : paras 1106-1107
[963] Barayagwiza et al AJ : para 1097
[964] Semanza AJ : paras 323-329
[965] Kajelijeli AJ : paras 251-255
[966] Kajelijeli AJ : para 323

Accused's two life imprisonment sentences and one sentence of 15 years be reduced to one fixed term of 45 years.[967]

OTHER JURISDICTIONS

465. In determining whether a state has provided a sufficient remedy for illegal detention through a reduction of sentence,[968] the European Court of Human Rights (ECHR) has required that the reduction be "express and measurable."[969] For instance, it found the remedy provided by the state to be sufficient in *Beck v. Norway*, a case in which four years and six months had elapsed between the commencement of the criminal investigation and the initiation of proceedings.[970] The Norwegian court had expressly acknowledged that the proceedings had exceeded a reasonable time and had provided a measurable remedy because the sentence handed down was at the lower end of the scale of possible punishment and appreciably less than in comparable cases.[971]

466. In other cases, the ECHR applied the "express and measurable" requirement more strictly, requiring that a state clearly indicate the amount of time by which it reduced a sentence and the proportion of the reduction which was given on account of the violation. In *Chraidi v. Germany*, the ECHR found that the German court had not provided an express and measurable remedy for excessive pre-trial detention since it only acknowledged that detention was "unusually long" and "failed to specify to what extent the applicant's sentence had been reduced on account of the length of his detention."[972] Similarly, the ECHR found in *Dzelili v. Germany* that while the German court had expressly found a violation of the right to a hearing within a reasonable time, it did not provide a measurable remedy.[973] Even though it reduced the sentence from 9 to 6.5 years of imprisonment, its decision did not "specify to

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[967] Kajelijeli AJ : para 324

[968] Murray Hunt, *State Obligations Following from a Judgment of the European Court of Human Rights, in* 2005 European Court of Human Rights: Remedies and Execution of Judgments 25 (Theodora Christou and Juan Pablo Raymond, eds.) (explaining that, under the European Convention, "it is for the Contracting States, in the first instance, to decide how best to secure the substance of the Convention rights in their domestic legal system, and also to choose the means by which they comply with judgments of the Court"). Due to this subsidiary role, the ECHR will consider the remedy, if any, provided by the state, determine if the remedy corrected the violation of the Convention, and if it failed to do so, order the state to provide compensation to the victim.

[969] *Beck v. Norway* : para 27

[970] *Beck v. Norway* : para 23

[971] *Beck v. Norway* : para 28

[972] *Chraidi v. Germany* : para 25

[973] *Dzelili v. Germany* : para 85

what extent [the finding of a violation] had entailed a measurable reduction of the applicant's sentence."[974]

467. The United States has rejected sentence reduction as a remedy for a violation of the right to a speedy trial.[975] Instead, a defendant must satisfy a four-part test to determine whether there was a violation, and if a violation is found, the only remedy is dismissal with prejudice.[976] The four factors are: the length of the delay, the reason for the delay, the defendant's assertion of this right, and whether the delay caused any prejudice to the defendant.[977] This last prong can include actual impairment, such as lost evidence or fading witness memories, but it can also include anxiety caused by incarceration.[978]

468. While the United States' approach seems to depart from the approach of the international criminal tribunals and that of most European countries, the Co-Prosecutors submit that the four factors used in the United States to determine whether a violation exists are among the factors which would be appropriate for consideration by the Trial Chamber when calculating a reduction in sentence.

APPLICATION

469. As noted above, the relevant jurisprudence does not present clear guidance as to the quantification of a remedy in a case such as this one, although it is clear that a remedy must be both measurable and express. Reduction by way of conversion of a sentence of life imprisonment to a specific sentence of long term imprisonment is possible. Clearly, the unlawful detention of the Accused for a period of over eight years is a major breach of his fundamental human right to a trial without delay and warrants a significant reduction of his sentence. It is relevant to consider that the Accused apparently had not attempted to flee once identified by an international journalist, had agreed to be interviewed, and was otherwise cooperative when arrested by the Cambodian authorities. His pre-trial detention was excessive and often not justified by reasoned decisions. The Military Court failed to undertake substantial investigations, and the Accused remained in custody without the prospect of a trial within a reasonable time.

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[974] *Dzelili v. Germany* : para 85
[975] *Strunk v. United States* : 412 U.S. 434, 440 (1973)
[976] *Barker v. Wingo* : 407 U.S. 514, 530 (1972)
[977] *Barker v. Wingo* : 407 U.S. 514, 530 (1972)
[978] *Barker v. Wingo* : 407 U.S. 514, 532 (1972)

470. However, it must also be noted that the circumstances of this case are unique in many respects. The crimes the Accused was suspected of at the time of his arrest and during his detention are extremely grave. The local authorities lacked the technical and institutional capacities to investigate and prosecute the case, and the Court which now has jurisdiction over it was not in existence for most of the period of the illegal detention. The ECCC therefore could not have prevented or rectified the breach as it was occurring. The Accused was taken into the custody of the ECCC and informed of the allegations made against him within days of the adoption of the ECCC Internal Rules.

471. While the above facts do not diminish the seriousness of the breaches of the Accused's rights, they do illustrate that those breaches were not contributed to by the organs of the ECCC, and that the ECCC ensured that the unlawful detention was terminated at the earliest possible opportunity. As such, these facts are relevant to an assessment of the totality of the circumstances surrounding the Accused's unlawful detention.

472. Taking into account the serious violations of his rights, the circumstances surrounding his illegal detention, and the underlying facts of the case, the Co-Prosecutors submit that, if the Accused is convicted, an express and measurable reduction is appropriate. In the absence of clear guidance at the national and international jurisprudence, the Co-Prosecutors defer to the wisdom of the Chamber on the issue of the quantum of the reduction.

CONCLUSION

473. The sheer extent and brutality of crimes which took place at S-21, Prey Sar and Choeng Ek have shocked the conscience of humankind to its core. The planned and systematic, wide-scale use of torture, and the methodical, cold-blooded executions of thousands of innocent victims, including hundreds of children, over a period of more than three years, defy comprehension. The evidence of the facts of S-21 is overwhelming, and the truth inescapable. In their gravity, these crimes belong to the most extreme category of evil human beings are capable of inflicting upon one another. They terrify and remind humankind of the darkest chapters of its history.

474. Although the exact number of victims of execution may never be known, as this Submission has indicated, a conservative estimate would put that figure at a minimum of 13,000 persons. The majority of these victims were subjected to torture and almost all were detained in inhumane conditions for weeks or months, treated with utmost contempt and denied their most basic human rights. Contemporary society can barely contemplate the fear and utter despair these victims must have felt, aware of the fate that awaited them. Those prisoners whose families were also arrested knew that their loved ones were being subjected to the same ordeal. They would also have realised that those whom they were forced to implicate would likely become victims.

475. The repercussions of these heinous crimes extend far past the period in which the crimes were perpetrated. Tens of thousands of families in Cambodia and around the world have been directly affected by the carnage that occurred at S-21. The Court has heard accounts of destroyed lives and broken families of those whose loved ones were tortured and killed. The civil parties have described the emotional and psychological pain endured by the victims' close family members. In some cases, the inability to cope with the loss of loved ones has led victims' relatives to commit suicide.

476. The Accused's crimes are exacerbated by numerous aggravating factors, including:

(a) The Accused's abuse of authority and his discriminatory intent against perceived opponents of the Party and Vietnamese prisoners of war and civilians

(b) The particular cruelty of the crimes, exemplified by the systematic use of physical and psychological torture, humiliation, inhumane treatment and cold-blooded killings

(c) The defencelessness and vulnerability of the victims, which included children and babies who were held at the complete mercy of the Accused and his subordinates, and

(d) The denial of every sense of victims' dignity or humanity, and their reduction to the status of animals in order to make it easier for the interrogators and guards to torture and execute them.

477. It took an extraordinary individual to run S-21 and make it the efficient killing machine it became. The Accused possessed all the qualities that made him ideal for that role. He was, first and foremost, a proud and committed revolutionary and a firm believer who accepted and promoted CPK's extremist policies. His relationship with the CPK defined the greater part of his life – his commitment to the Party spans a period of approximately 30 years. Even after leaving S-21, he was devoted to the leaders of the CPK, including Son Sen who he says ordered him to carry out his crimes at S-21. He stayed close to the senior leaders and continued to follow their orders for several years after the fall of the DK regime.

478. Secondly, he was a meticulous administrator, and an effective manager who ran every aspect of the prison with utmost efficiency. And finally, he was both ruthless and indifferent to the immense human suffering which he was instrumental in causing, and which surrounded him on a daily basis for over three years.

479. The Accused abused his power and his official capacity. For the greater part of his tenure at S-21 he was the most senior person with the ability to prevent abuses of human rights or to punish those who committed them. He also had the authority and ability to ease the suffering of the victims. Not only did he fail to prevent the crimes, punish the perpetrators or help the victims, he actively used his power to plan, organise, commit, direct and encourage the crimes.

480. The Accused had entered this criminal enterprise ready, willing and able, seemingly encouraged by the crimes he had committed and supervised at M-13. He then performed his work with persistent zeal and diligence throughout his tenure, knowing that it led to the arrests, torture and execution of innocent victims. At the same time he got married and enjoyed a comfortable family life, completely unaffected by the fact that he was taking part in the killing of 13,000 persons. Until his discovery by a journalist, he continued to live in hiding, under an assumed name, actively concealing his identity, and taking steps to avoid being found.

481. The Accused has sought to characterise his role in these crimes as essentially that of an unwilling participant who was compelled to follow orders in fear for his own life, and who turned a blind eye to the suffering he was causing. The evidence, however, leads to a very different conclusion: events undisputed or confirmed by the Accused, contemporaneous documents, testimonies of survivors and participants in the crimes,

and opinions of expert witnesses coalesce to paint a picture of a committed revolutionary who performed his duties with zeal, enthusiasm and meticulous attention to detail – an individual whose diligent work significantly expanded the scope of the crimes. The only conclusion to be derived from the totality of the evidence is that the Accused was an enthusiastic participant in the crimes he has been charged with.

482. The Accused's claims that he was ordered what to do on a daily basis by a small group of senior officials who were effectively in charge of the entire country simply cannot be accepted – these claims are clearly untrue. His actions, both during the DK regime and up until late 1990s, clearly show that he did not participate in the crimes at S-21 in obedience of orders or in fear, but instead, due to a deep and passionate belief in a cause to which he was devoted for a significant part of his life. Indifferent to the human suffering he was causing, the Accused oversaw torture and murders of members of his friends, relatives, staff, his pre-revolutionary teachers and his revolutionary mentors and superiors. Blinded by his commitment to DK's revolution and the drive to purge its enemies, he apparently abandoned all moral concepts of right and wrong. He was instrumental in the denial of mercy and dignity which became an essential part of S-21's daily operation.

483. While acknowledging the base crimes and accepting his responsibility as commander of S-21, the Accused has consistently sought to minimise his role in the crimes and has not fully cooperated in the process of ascertaining the truth. His general statements of remorse must therefore be viewed in light of both his selective memory and his conduct during the trial. He has disingenuously claimed failure to recollect key facts, or avoided answering questions relating to his role in ordering executions, assisting in the purges and managing S-21. The Defence has objected to the admission of relevant evidence and raised numerous procedural challenges, seeking to limit the amount of evidence to be put before the Chamber, all in the interests of supposedly helping a speedy trial. All of these factors must be taken into account when assessing the mitigating effect of the Accused's general acceptance of responsibility and his statements of remorse.

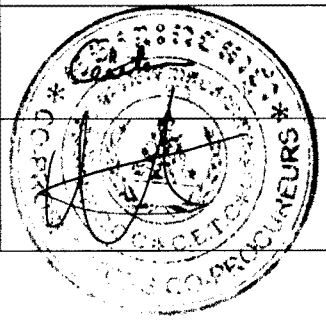
484. This Court has the ability to give back to the victims and their families some of the dignity and humanity which the Accused and his accomplices denied them. It has the

duty to express the strongest condemnation, on behalf of all humanity, of the monstrous crimes which can only be viewed as crimes against all human beings.

485. The sentence imposed on the Accused must reflect the horror and outrage with which all human beings view these crimes, and which in every sense are crimes against all humanity. The Co-Prosecutors submit that a sentence of life imprisonment would be the only appropriate penalty for the Accused's role in these crimes

486. A conversion of this life sentence to imprisonment for 45 years would provide an appropriate remedy for the Accused's unlawful detention. A further reduction of five years should be granted for his general co-operation, limited acceptance of responsibility, remorse, and the potential impact these factors may have on national reconciliation. The sentence to be imposed by the Trial Chamber should therefore be 40 years imprisonment.

Respectfully submitted,

Date	**Name**	**Place**	**Signature**
11 November 2009	YET Chakriya **Deputy Co-Prosecutor**	Phnom Penh	
	William SMITH **Co-Prosecutor**	Phnom Penh	