

ECCE, Detention Sites in Cambodia

INTRODUCTORY TEXT: *The case is a part of the so-called Khmer Rouge Trials in front of the Extraordinary Chambers in the Courts of Cambodia. It deals with the acts committed in the alleged crime sites, as well as factual allegations against Nuon Chea and Khieu Samphan during the armed Conflict in Cambodia (1975-1979). At the focus of the case were several working sites and security centres such as S-21 Security Centre, in which, according to the Chamber, grave breaches of IHL have taken place inter alia against Vietnamese civilians and soldiers.*

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

ECCE, Trial Chamber, Case 002/02, Judgement

[**Source:** Extraordinary Chambers in the Courts of Cambodia, No. 002/19-09-2007/ECCC/TC, 27 March 2019, available at <https://www.eccc.gov.kh/en>, footnotes omitted]

[...]

4. GENERAL OVERVIEW: 17 APRIL 1975 – 6 JANUARY 1979

[...]

4.1 Factual Overview of the Temporal Scope of Case 002/02 (including the Nature of the Armed

Conflict)

281. The existence of an international armed conflict between DK [Democratic Kampuchea] and Vietnam [Socialist Republic of Vietnam] from May 1975 to at least 6 January 1979 is uncontested by the Parties.

282. Clashes between DK forces and Vietnamese forces around the islands, whose territory was in dispute between Cambodia and Vietnam, off the countries' coasts, as well as skirmishes in multiple areas of the border region, are reported to have occurred shortly after 17 April 1975. [...] While the Chamber is cautious as to the weight to be attached to both DK and Vietnamese public propaganda sources, it is satisfied that from the common elements of these conflicting narratives it follows that armed clashes commenced around the islands in the territorial waters of Cambodia and Vietnam as well as in various locations along the border in May 1975 at the earliest, and that Vietnamese troops occupied the Poulo Wai islands in early June 1975 at the latest. The latter is also supported by contemporaneous newspaper articles as well as the testimony of PAK Sok, who places the capture of the Poulo Wai islands by Vietnam sometime in June 1975.

283. [...] [C]lashes around the islands continued until at least early 1976.

284. On the mainland, border incidents occurred throughout the second half of 1975. [...] Despite there being some lulls in the fighting in 1976, border skirmishes continued to occur throughout that year and into 1977.

[...]

288. In any event, while discussions on the occurrence of these specific incursions may be relevant to understand the exact extent of the military operations in which both parties were engaged and how precisely the hostilities escalated, they are immaterial to any finding regarding the very existence of an armed conflict. [...]

289. In October and November 1977, the border war escalated when Vietnamese forces launched an extensive attack into Svay Rieng province. [...] This escalation of the conflict towards the end of 1977 led to DK cutting diplomatic ties with Vietnam on 31 December 1977. [...]

290. Vietnamese troops voluntarily withdrew on 6 January 1978, but border clashes, including incursions by both sides, continued throughout that month. [...]

[...]

293. On 2 December 1978, the Kampuchean National United Front for National Salvation ("KNUFNS"), of which HENG Samrin was the President and CHEA Sim the Vice-President, was founded in Ho Chi Minh City. The KNUFNS supported the Vietnamese army in the launch of a full-scale offensive against DK in late December 1978. By 7 January 1979, the RAK had been forced to retreat from Phnom Penh and Vietnamese

forces took effective control of the greater part of Cambodian territory.

294. The Chamber finds that the existence of an armed conflict with Vietnam is also evident from the presence of Vietnamese prisoners at the S-21 Security Centre as early as March 1976. S-21 was part of a nationwide network of security centres and execution sites, a vast system which the CPK [Communist Party of Kampuchea] had begun setting up prior to 17 April 1975 to identify and eliminate enemies of the Party, both outside and within its ranks. [...]

[...]

4.3 General Requirements for Grave Breaches of the Geneva Conventions of 1949 Listed in Article 6 of the ECCC Law

324. As relevant to Case 002/02, the Closing Order charges the Accused pursuant to Article 6 of the ECCC Law with the following grave breaches of the Geneva Conventions of 1949: (i) wilful killing; (ii) torture; (iii) inhumane treatment; (iv) wilfully causing great suffering or serious injury to body or health; (v) wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial; (vi) unlawful deportation of a civilian and (vii) unlawful confinement of a civilian.

4.3.1 Law

325. [...] All four Geneva Conventions prohibit “grave breaches” committed against “protected” persons or property within the context of an armed conflict of an international character, including wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health. Geneva Convention III and Geneva Convention IV further prohibit the grave breaches of wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial. Additionally, the unlawful deportation and unlawful confinement of a civilian are listed as grave breaches under Geneva Convention IV.

[...]

327. Offences listed in Article 6 of the ECCC Law constitute grave breaches only if the following chapeau requirements are established: (i) there is an armed conflict; (ii) the armed conflict is of an international character; (iii) there exists a nexus with the armed conflict; (iv) the victims have “protected persons” status under the Geneva Conventions; and (v) the requisite knowledge.

328. *Existence of an armed conflict* – Common Article 2 of the Geneva Conventions provides that the Conventions’ provisions (including the grave breaches provisions), apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” An “armed conflict” exists whenever there is a resort to armed

force between States (where the armed conflict is of an international nature) or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State (when it is of an internal nature).

329. *International character of an armed conflict* – Common Article 2 of the Geneva Conventions requires further that the armed conflict be of an international character. An armed conflict is of an international character if it takes place between two or more States. An official recognition of a state of war is not required for the grave breaches provisions of the Geneva Conventions to apply. Rather, *de facto* hostilities between States may be sufficient to satisfy the internationality requirement, where these hostilities are conducted through the States' respective armed forces. Once it is established that an international armed conflict existed at the place and time relevant to the charges against an accused, international humanitarian law will apply to the whole territory of the relevant States, whether or not actual combat takes place there, and will continue to apply beyond the cessation of hostilities until a general conclusion of peace is achieved.

330. *Nexus between the acts of the accused and the armed conflict* – A sufficient nexus must exist between the acts of the accused and the armed conflict giving rise to the applicability of international humanitarian law. To satisfy this nexus, the acts of the accused must have been “closely related” to the armed conflict as a whole. The crimes can be “temporally and geographically remote from the actual fighting” and it would be sufficient if the crimes are closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict. While the nexus need not be a causal link, the existence of an armed conflict must at a minimum have played a substantial part in the perpetrator's ability to commit the crime, their decision to commit it, the manner in which it was committed, or the purpose for which it was committed.

331. *Victims have a “protected persons” status* – “Protected persons” are defined according to Articles 4 of Geneva Convention III (as regards prisoners of war) and Geneva Convention IV (as regards civilian persons). Pursuant to Article 4 of Geneva Convention III, prisoners of war are persons, including “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces”, who have “fallen into the power of the enemy”. Article 4(1) of Geneva Convention IV (as regards civilian persons) defines protected persons as those who find themselves “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.

332. The Co-Prosecutors submit that the definition of protected persons encompasses ethnic Vietnamese who were Cambodian nationals but viewed as enemies allied with Vietnam by the DK authorities. No other Party makes any relevant arguments in this regard. The Chamber notes that the Closing Order expressly limits the categories of “protected persons” in Case 002 to “[m]embers of the armed forces of the Socialist Republic of Vietnam” and “[c]ivilians who were nationals of the Socialist Republic of Vietnam” who had fallen into the power of the forces of Democratic Kampuchea. Accordingly, there is no room to consider whether Vietnamese who were Cambodian nationals but owed allegiance to Vietnam could be considered protected persons. The Co-Prosecutors' submission is therefore moot.

333. The NUON Chea Defence submits that, pursuant to the First Additional Protocol to the Geneva Conventions, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy, thus falling outside the scope of protected persons. No other Party makes any relevant arguments in this regard. The Chamber notes that the First Additional Protocol entered into force on 7 December 1978 and that Cambodia only acceded to the protocol on 14 January 1998. Accordingly, the First Additional Protocol was not binding in Cambodia at the relevant time. Further, there is no indication that Article 46(1) of the First Additional Protocol reflected customary international law by 1975. However, given that the First Additional Protocol purports to afford greater protection to the Accused, pursuant to the principle of *lex mitior*, the Chamber will have regard to its provisions in this respect.

334. The Chamber finds that the NUON Chea Defence misconstrues the meaning and import of Article 46(1) of the First Additional Protocol. While this provision establishes that persons who are engaging in espionage lose the status of prisoner of war and “may be treated as a spy”, it does not exclude them from the protections of the Geneva Conventions. A person who loses his/her prisoner of war status would still enjoy the fundamental guarantees set out in Article 75 of the First Additional Protocol. The Commentary to the First Additional Protocol notes that the “deprivation of prisoner-of war status already constitutes a punishment in itself and can therefore only take place following the tribunal’s decision” and that the “presumption of prisoner-of war status should prevail, at any rate whenever the person concerned has not been charged on the basis of prima facie evidence”. The Chamber will assess on the evidence in this case whether there were any such proceedings which would deprive the individuals in question of their prisoner of war status.

335. *Knowledge* – An accused must have sufficient knowledge of the international character of the armed conflict and of the protected status of the victims under the Geneva Conventions. Awareness by the accused that a foreign state was involved in the armed conflict and that a victim belonged to an adverse party to that armed conflict will suffice to establish this knowledge. Furthermore[,] the Accused must know that his conduct had a nexus to an international armed conflict, or at least have “knowledge of the factual circumstances later bringing the Judges to the conclusion that the armed conflict was an international one”.

4.3.2 Legal Findings

4.3.2.1 Existence of an international armed conflict

336. Based on the evidence detailed above, the Chamber finds that an armed conflict existed between DK and Vietnam from May 1975 through 6 January 1979. While the Closing Order finds that a state of armed conflict existed between DK and Vietnam throughout the entire DK period, thus from 17 April 1975 until 6 January 1979, the Chamber was unable to satisfy itself beyond reasonable doubt that an international armed conflict existed between DK and Vietnam at any time in April 1975 – i.e. before North Vietnam’s capture of Saigon on 30 April 1975. The first clashes between DK and Vietnam took place in May 1975 off the coast

involving the islands whose territory was in dispute between Cambodia and Vietnam. Continuous clashes, involving border skirmishes and incursions into both Cambodian and Vietnamese territory, occurred from May 1975 throughout the DK period. For this finding, it is irrelevant that DK and Vietnam did not recognise this state of war until diplomatic ties between the two states were severed on 31 December 1977.

4.3.2.2. Status as “protected persons under Geneva Conventions of 1949

337. For the crimes charged under Article 6 of the ECCC Law in relation to S-21 Security Centre and Au Kanseng Security Centre, the Chamber has examined the status of the alleged victims and made related findings where relevant in this Judgement. The Chamber notes in this regard that in relation to the crimes charged at Au Kanseng Security Centre, the Chamber was unable to satisfy itself beyond reasonable doubt that the Jarai were “protected persons” within the meaning of the Geneva Conventions. Conversely, in relation to the crimes charged at S-21 Security Centre, the Chamber is satisfied beyond reasonable doubt that the victims of the relevant charged crimes were Vietnamese civilians or prisoners of war and thus protected persons for the purposes of the Geneva Conventions. Thus, the Chamber will consider the remaining requirements only in relation to S-21 Security Centre.

4.3.2.3. Nexus between the Acts of the Accused and the armed conflict

338. The Chamber finds that the crimes committed against protected persons at S-21 Security Centre were closely related to the armed conflict between DK and Vietnam. In this regard, the Chamber has considered the following: Vietnamese detainees constituted the largest group of foreign detainees at S-21 and their numbers increased with the escalation of the conflict; surviving S-21 photographs depict prisoners in Vietnamese military uniforms; Vietnamese prisoners were made to read prepared confessions, in which they confessed that they had entered Kampuchean territory in order to spy and to invade Cambodia, for the purpose of broadcasting the confessions on the radio (the Phnom Penh Domestic Service); these confessions were also used in DK publications, like the abovementioned Black Paper, and government statements as evidence of Vietnamese aggression against Kampuchea, and included members of the Vietnamese armed forces such as commanders, colonels, lieutenants and soldiers; and finally, photographs and a movie depicting Vietnamese prisoners in the military uniforms they were arrested in were shown to S-21 staff at a study session to celebrate the 17 April anniversary.

4.3.2.4. Knowledge of the Accused

339. The Chamber finds that both Accused were aware of the armed conflict with Vietnam. [...]

340. The Chamber finds that NUON Chea was aware of the protected status of victims at S-21. [...] The Chamber finds that KHIEU Samphan, despite his limited involvement with respect to the oversight of security centres within the scope of Case 002/02, was also aware of the protected status of victims at S-21. [...]

[...]

9. APPLICABLE LAW: CRIMES

[...]

9.2. Grave Breaches of the Geneva Conventions 1949

9.2.1 *Wilful Killing*

756. As relevant to Case 002/02, the Closing Order charges the Accused with wilful killing at the S-21 Security Centre [...] as a grave breach of the Geneva Conventions.

[...]

9.2.2 *Torture*

758. As relevant to Case 002/02, the Closing Order charges the Accused with torture at the S-21 Security Centre as a grave breach of the Geneva Conventions.

[...]

9.2.3 *Wilfully Causing Great Suffering or Serious Injury to Body or Health*

760. As relevant to Case 002/02, the Closing Order charges the Accused with wilfully causing great suffering or serious injury to body or health at the S-21 Security Centre as a grave breach of the Geneva Conventions.

761. This grave breach consists of an intentional act or omission causing great suffering or serious injury to body or health, including mental health. While physical or mental injury are encompassed by both this grave breach and inhumane treatment, wilfully causing great suffering or serious injury to body or health focuses on the seriousness of the suffering or of the injury and does not include acts where the resultant harm relates solely to an individual's human dignity. The physical or mental harm caused to the victim need not be irredeemable or permanent, but must extend beyond temporary unhappiness, embarrassment or humiliation.

762. With respect to *mens rea* for the purposes of grave breaches of the Geneva Conventions, the Chamber observes that the ICRC Commentary notes that the "Geneva Conventions are silent as to the requisite degree of *mens rea* attached to most grave breaches [...] but leave it to States Parties to determine the requisite mental element attached to them, unless specifically defined in Article 50". The ICRC Commentary recognises that "for some grave breaches, the *mens rea* is specified in Article 50, when it lists 'wilful' killing, 'wilfully' causing great suffering, or extensive destruction carried out 'wantonly'". The ICRC Commentary

further suggests that the “use of the term ‘wilful’ indicates, at least for the crimes of killing and causing great suffering or serious injury to body or health, that either intentional or reckless conduct will engage the responsibility of the perpetrator”. The Chamber notes that jurisprudence of the ICTY has also held that the *mens rea* for violations of the grave breaches provisions can include both intent and recklessness.

763. The Chamber considers that the requisite *mens rea* varies depending on which grave breach is concerned. At the very least the Chamber finds that the *mens rea* for each grave breach includes intent to perform the act or omission. The Chamber will consider whether recklessness is sufficient if and when it arises on the facts of the case.

9.2.4 Inhumane Treatment

764. As relevant to Case 002/02, the Closing Order charges the Accused with inhumane treatment at the S-21 Security Centre as a grave breach of the Geneva Conventions.

765. The Chamber finds that “inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed ‘grave breaches’ in the Conventions fall”.

766. The *actus reus* of inhumane treatment as a grave breach consists of an intentional act or omission against a person protected under the Geneva Conventions, which causes serious mental harm or physical suffering or injury, or constitutes a serious attack on human dignity. In contrast to the crime of torture, conduct which amounts to inhumane treatment need not reach the threshold of causing severe mental or physical suffering, or be committed with a purpose prohibited by the Convention against Torture or with the involvement of any public official or any person acting in an official capacity.

767. Acts which constitute torture or wilfully causing great suffering or serious injury to body or health will simultaneously constitute inhumane treatment. The offence of inhumane treatment also encompasses other acts which violate the principle of humane treatment, in particular the respect for human dignity. The assessment of whether an act constitutes inhumane treatment is a question of fact to be judged in all the circumstances of the individual case. Examples of inhumane treatment include acts characterised in the Geneva Conventions and Commentaries to the Geneva Conventions as inhuman, and acts which are inconsistent with the principle of humanity.

768. The *mens rea* for this grave breach includes intent to perform the act or omission which causes serious mental harm or physical suffering or injury, or results in a serious attack on the human dignity of the victim.

9.2.5 Wilfully depriving a Prisoner of War or Civilian of the Rights of Fair and Regular Trial

769. As relevant to Case 002/02, the Closing Order charges the Accused with wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial at the S-21 and Au Kanseng Security Centres as a grave breach of the Geneva Conventions.

770. The *actus reus* of this crime consists of an act or omission which deprives a prisoner of war or a civilian of the right to a fair and regular trial by denying judicial guarantees as defined, in particular, in Geneva Conventions III and IV. Such judicial guarantees include: the right to be judged by an independent and impartial court; to be promptly informed of the charges; the protection against collective penalty; protection under the principle of legality; the right not to be punished more than once for the same act or on the same count; to be informed of the right to an appeal; and the right not to be sentenced or executed without a previous judgement pronounced by a regularly constituted court.

771. The *mens rea* for this grave breach includes intent to perform the act or omission.

772. The NUON Chea Defence submits that under international human rights law, states can in certain circumstances, derogate from some of their fair trial obligations in times of public emergency. [...] It will have regard to this guidance in assessing whether on the facts of the case any derogation with respect to the rights to fair and regular trial was lawful and consistent with obligations under international law during the relevant period.

773. The NUON Chea Defence contends that there is no evidence showing that “the physical perpetrators intended the victims to be arbitrarily detained or that their fair trial rights were violated, for there is no reasonable reason to believe that they were aware of the requisite fair trial standards”. The Chamber will assess the evidence with respect to each crime site to determine whether or not the physical perpetrators had the *mens rea*. In any event, if the evidence fails to establish the *mens rea* for the physical perpetrator, the Chamber will have regard to whether the Accused as alleged members of a joint criminal enterprise had the requisite intent and used the physical perpetrators as tools to achieve the common purpose.

9.2.6 *Unlawful Deportation of a Civilian*

774. As relevant to Case 002/02, the Closing Order charges the Accused with unlawful deportation of civilians from Vietnam to the S-21 Security Centre in Democratic Kampuchea as a grave breach of the Geneva Conventions.

775. The elements of the grave breach of deportation are, subject to the satisfaction of the chapeau requirements for grave breaches of the Geneva Conventions, largely the same as deportation as a crime against humanity, as set out above. The only distinction is that the provisions of Geneva Convention IV and specifically Article 49(1) refer to “deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country”.

776. The Geneva Conventions do not define “occupied territory”. Article 42 of the Hague Regulations relevantly provides that “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

777. While displacement from occupied territory has been referred to in ICTY jurisprudence, there has been limited discussion about what that term means in the context of establishing unlawful deportation. The Trial Chamber agrees with the approach taken by the Naletilić and Martinović Trial Chamber, which found that “the application of the law of occupation as it [a]ffects ‘individuals’ as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority”. Accordingly, when dealing with crimes that affect civilians, such conduct is “prohibited from the moment that they f[a]ll into the hands of the opposing power, regardless of the stage of the hostilities. There is no further need to establish that an actual state of occupation as defined under Article 42 of the Hague Regulations existed.” The Chamber concurs that this prevents civilians from having less protection during an intermediate period than that attached to them once occupation is established. This approach is consistent with a declaration of the UN General Assembly in 1974 that “forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal”.

[...]

9.2.7 *Unlawful Confinement of a Civilian*

[...]

781. The Chamber further notes that Article 42 of Geneva Convention IV provides that internment of a civilian may only be ordered if the security of the detaining power “makes it absolutely necessary”. This requires an assessment of whether there are reasonable grounds to believe that the security of the State is at risk. The Chamber agrees with the Co-Prosecutors’ submission that the mere fact that a person is a national, or aligned with the enemy cannot be considered as threatening the security of the country, nor can the fact that a person is of military age alone justify confinement of a civilian. No other parties made any relevant submissions in this regard. [...] As set out in the law on imprisonment as a crime against humanity, the Chamber must assess whether the deprivation of liberty had a legal basis or was arbitrary because it was carried out or perpetuated without due process of law.

[...]

12. SECURITY CENTRES, EXECUTION SITES AND INTERNAL PURGES

12.1 NUON Chea Defence regarding the Threat of Vietnam, Internal Factions and Justification of the

DK National Security Policy

12.1.1.1 Preliminary Issues

[...]

12.1.2.1 NUON Chea Defence submissions

1855. The NUON Chea Defence submits that Vietnam posed a formidable, existential threat to DK, endangering its national security, territorial integrity and sovereignty, and that owing to this threat, during the entire DK period, there existed a constant state of emergency. The Vietnamese threat was the paramount consideration in all CPK policy decisions, which the Defence submit were “logical, rational, proportionate, and lawful responses to the existential threat of treason from within and annihilation from without”. The NUON Chea Defence submits that it was therefore lawful for the CPK to identify, arrest, detain and, in most circumstances, execute internal and external enemies due to legitimate suspicions and convictions of unlawful activities such as treason, subversion, collaborating with the enemy and espionage. The NUON Chea Defence submits that “a significant proportion of [CPK’s] top leaders” were traitors to the CPK who sought to overthrow the DK government and install a new regime loyal to Vietnam.

[...]

12.1.2.2. Co-Prosecutors’ submissions

1860. The Co-Prosecutors submit that there is no credible evidence that thousands of victims detained, tortured and killed at DK security centres, many of whom were children, were planning a rebellion. Rather, they were detained and executed based only on the fact that they had been implicated in confessions obtained by torture. There was no possibility of due process because the DK abolished the courts. Contrary to what is argued by the NUON Chea Defence, there is no right to extrajudicial killings under international law. [...]

[...]

12.2. S-21 SECURITY CENTRE (S-21)

[...]

12.2.12 Conditions of Detention

[...]

2370. The NUON Chea Defence submits that “[e]ven if unfortunate, these conditions were not abnormal considering the general living standards in the country at the time and were certainly not worse than the conditions pre-1975 during the Khmer Republic regime or post-1979 under the PRK”. The NUON Chea Defence further submits that in any event, the conditions of detention “were not willingly and sadistically inflicted upon the detainees and [...] were certainly not implemented as punishment”.

2371. The Chamber finds that these submissions attempt to downplay the nature of the detention conditions at S-21 by reference to the prevailing situation in the country and by comparison to the conditions under other regimes. It finds that these submissions have no merit: the ultimate question is whether the legal elements for the crimes charged are established irrespective of whether these conditions were comparable to other conditions which may also have been inhumane. Similarly, the question of whether or not the conditions of detention were imposed sadistically or as a means of punishment has no bearing on the elements of the crimes charged. The NUON Chea Defence’s submissions are therefore rejected.

[...]

12.2.17 *Vietnamese Detainees*

[...]

2465. Some Vietnamese prisoners were brought to S-21 with their families after trying to flee the country. The Vietnamese soldiers who were arrested were labelled as spies and considered enemies. Duch also stated that Vietnamese civilians were forced to confess they were spies, and that all Vietnamese who entered Cambodian territory were considered spies and were arrested and brought to S-21. Vietnamese soldiers were only brought to S-21 after war broke out with Vietnam, whereas Vietnamese civilians were detained at different times.

[...]

2482. [...] Further, in regard to the reason for their arrests, the evidence described above and elsewhere in this Judgement clearly indicates that the Vietnamese were targeted as an enemy group and as a threat to the DK.

2483. [...] The NUON Chea Defence correctly submit that in a time of armed conflict, it would be legitimate for a party to the conflict to detain captured foreign troops with which it was at war. However, with respect to such soldiers the question is whether any of the alleged grave breaches of the Geneva Conventions were committed against them, even if they were lawfully detained. [...]

[...]

12.2.24 *Legal Findings*

[...]

12.2.24.2. *Grave breaches of the Geneva Conventions*

12.2.24.2.1. *Wilful killing*

2620. The Closing Order charges the Accused with wilful killing of Vietnamese prisoners of war and civilians as a grave breach of the Geneva Conventions at S-21, through both deliberate execution and deaths caused by methods of interrogation and general conditions of detention, inflicted with the reasonable knowledge that their death was likely.

[...]

2622. [...] [T]he Chamber finds that wilful killing as a grave breach of the Geneva Conventions is established at S-21 Security Centre.

12.2.24.2.2. *Torture*

2623. The Closing Order charges the Accused with torture as a grave breach of the Geneva Conventions at S-21 as a result of the alleged torture of Vietnamese prisoners of war and civilians, applied by S-21 cadres through interrogation methods inflicting severe physical or mental pain or suffering for the purpose of obtaining information or extracting confessions.

2624. [...] [T]he Chamber finds that torture as a grave breach of the Geneva Conventions is established at S-21 Security Centre.

12.2.24.2.3. *Inhumane Treatment*

2625. The Closing Order charges the Accused with inhumane treatment as a grave breach of the Geneva Conventions at S-21 as a result of the alleged inhumane treatment of Vietnamese prisoners of war and civilians by S-21 personnel through conditions imposed causing serious physical or mental pain, suffering or injury, or acts which amounted to serious attacks on human dignity, constituting inhumane treatment. The Closing Order charges that these conditions of detention included overcrowding, lack of sanitation, medicine, food or clothing, which collectively degraded detainees, leaving them in a permanent climate of fear.

2626. [...] [T]he Chamber finds that inhumane treatment as a grave breach of the Geneva Conventions was also committed at S-21.

12.2.24.2.4. *Wilfully causing great suffering or serious injury to body or health*

2627. The Closing Order charges the Accused with wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions at S-21 as a result of the alleged conditions imposed by acts or omissions aimed at Vietnamese prisoners of war and civilians, which caused great physical or mental suffering or serious injury to body or health. The general conditions of detention inflicted on the protected persons by S-21 staff included overcrowding and lack of adequate sanitation, medicine or food.

2628. [...] S-21 prisoners were held in deplorable conditions: they were forced to sit and sleep on the bare floor with their ankles constantly shackled, and were only taken out of their cells for interrogation or to work or for execution. The Chamber has found that hygienic conditions were very poor. Given these poor conditions, prisoners were infested with lice and also suffered from skin rashes. Prisoners were also not provided with sufficient food which had dire consequences for their health. The Chamber has found that while prisoners were sometimes provided with medical treatment, the medicines were not effective and given the conditions of detention the prisoners suffered from various diseases which placed some prisoners in a critical condition. There were inadequate medical supplies to treat injuries, including those inflicted on prisoners during interrogations. Many prisoners died as a result of these diseases while in detention. The Chamber has found above that the staff at S-21 intentionally inflicted these conditions on the prisoners. Based on the fact that the Vietnamese constituted a significant portion of the population of S-21, the Chamber finds that wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions is also established at S-21 Security Centre.

12.2.24.2.5. *Wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial*

2629. The Closing Order charges the Accused with wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial as a grave breach of the Geneva Conventions at S-21 as a result of the alleged wilful deprivation of the rights of a fair and regular trial to Vietnamese prisoners of war and civilians. S-21 cadres deprived the protected persons of the right to be judged by an independent and impartial court, the right to be informed of their charged offence, the rights and means of a defence, protection against collective punishment, the presumption of innocence, the right of appeal, and protection from a sentence without judgement pronounced by a competent court.

2630. The Chamber has found that the Vietnamese prisoners who entered S-21 were not provided any opportunity to defend themselves following their arrest, were deprived of any semblance of a fair trial and were forced to confess that they were spies before being killed. All Vietnamese soldiers and civilian who entered S-21 were labelled as spies and considered enemies. The fate of these prisoners was a foregone conclusion as they were all ultimately subject to execution. The Chamber recalls that prisoners were given no access to lawyers or judges throughout their detention as S-21 and were eventually executed without a trial. As found above, all Vietnamese who entered S-21 were killed in a deliberate and systematic manner

following their interrogation. The Chamber is therefore satisfied that both the *actus reus* and the *mens rea* of this offence are established. Accordingly, the Chamber finds that wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial as a grave breach of the Geneva Conventions is established at S-21 Security Centre.

12.2.24.2.6. *Unlawful deportation of a civilian*

2631. The Closing Order charges the Accused with unlawful deportation of civilians as a grave breach of the Geneva Conventions at S-21 as a result of the alleged unlawful deportation of Vietnamese civilians captured by CPK forces during military incursions into Vietnam, which was followed by detention, interrogation and execution at S-21. According to the Closing Order, these acts were carried out pursuant to well-defined CPK policies regarding the transfer of Vietnamese civilians to S-21 as opposed to security or military reasons.

2632. The Chamber recalls that while it has excluded from the scope of Case 002/02 the facts contained in paragraphs 832 to 840 of the Closing Order regarding deportation, it may consider evidence of crimes committed by the RAK, including incursions in Vietnam for other purposes, including but not limited to the grave breaches charges related to civilians or soldiers hors de combat who were arrested during such fights on Vietnamese territory and who were sent to S-21 thereafter.

2633. The Chamber has nevertheless found that there is insufficient evidence to conclude that Vietnamese prisoners at S-21 were originally captured in Vietnam. Accordingly, the Chamber finds that unlawful deportation of civilians as a grave breach of the Geneva Conventions is not established at S-21 Security Centre.

12.2.24.2.7. *Unlawful confinement of a civilian*

2634. The Closing Order charges the Accused with the unlawful confinement of civilians as a grave breach of the Geneva Conventions at S-21 as a result of the alleged arbitrary detention of Vietnamese civilians in the absence of reasonable or legal grounds for detention and without procedural and substantive protections afforded by Geneva Convention IV.

2635. The Chamber has already found that individuals, including Vietnamese individuals, were arbitrarily deprived of liberty and detained at S-21 without due process of law and without a warrant or any document emanating from an investigative or judicial authority and this amounted to the crime against humanity of imprisonment. The Chamber has found that some of the Vietnamese prisoners were civilians who were brought to S-21 after trying to flee the country. Those detained included Vietnamese children and women. There is no evidence to suggest that the civilians were detained as a matter of absolute necessity for reasons of state security. On the contrary, the Chamber has found that Vietnamese civilians were arrested and detained at S-21 by virtue of their identity and without due process of law. The Chamber therefore finds that both the *actus reus* and the *mens rea* of unlawful confinement of civilians is established. Accordingly, the

Chamber is satisfied that unlawful confinement of civilians as a grave breach of the Geneva Conventions is established at S-21 Security Centre.

[...]

DISCUSSION

I. Classification of the situation in Cambodia and applicability of IHL

1. (*Paras 281-294, 328, 336*) How would you classify the situation in Cambodia? Which degree of violence does an international armed conflict have to meet? According to the Chamber? (GC I-IV, Art. 2)

2. (*Paras 293, 329*)

a. What is the geographical scope of application of IHL?

b. When does the application of IHL end? With the general conclusion of peace? (GC III, Art. 5 (1); GV IV, Art. 6)

c. Was Vietnam occupying Cambodia? Even if the KNUFNS requested the Vietnamese invasion? If Cambodia had been occupied by Vietnam in 1978/1979, when did the law of occupation stop to apply in Cambodia? (GC IV, Arts 6, 47; Hague Regulations 1907, Art. 42)

3. (*Para. 288*) Is it relevant under IHL who started a war and for which reasons?

4. (*Paras 330, 338*) What is required to establish the nexus to an armed conflict? Which law would apply to the detention sites if the nexus could not be proven? How was the nexus established in the case?

II. Qualification of persons

5. (*Paras 331-332, 337*)

a. Who is considered a POW and a protected person under the Geneva Conventions III and IV respectively? (GC III, Art. 4, 5; GC IV, Art. 4)

b. Who is a protected person in the Cambodian detention camps? According to the Chamber? According to the Co-Prosecutors? What might be the advantages or disadvantages of the criterion adopted by the Co-Prosecutors? (GC IV, Art. 4)

- c. Which law is applicable to those who are not protected persons?
6. (*Paras 333-334, 2465, 2630*)
- a. How would you define a spy? Is espionage a violation of IHL? Do spies lose protection under IHL and, if so, under what circumstances? When is espionage permissible under IHL? Does it depend on whether civilians or combatants engage in espionage? Does it depend on their clothes at the time they are captured or arrested? (Hague Regulations 1907, Art. 24, 29; GC III, Art. 5; GC IV, Art. 5; P I, Art. 46)
- b. Is Article 46 of Additional Protocol I concerning spies applicable in this case? What is Nuon Chea's Defence's argument? What does the Chamber say about the argument that spies fall outside the scope of the protection of IHL? In which circumstances does a person forfeit the right to be a POW under IHL? What rules protect such a person? (GC IV, Arts 4, 5; P I, Arts 46, 75)
- c. In case of doubt regarding the status of a person having committed a belligerent act, does such a person have a right to fair trial? Which requirements would a tribunal have to meet in such a case? (Hague Regulations 1907, Art. 30; GC III, Art. 5, 84; P I, Arts 44 (4), 45; CIHL, Rule 107)
- d. What would be the protective regime applicable to a spy after they lose the POW status? Do they still receive the treatment similar to the one accorded to POWs? If not, they consequently protected persons as per Geneva Convention IV? 'Unlawful combatants'? (Hague Regulations 1907, Art. 29-31; GC IV, Art. 5; P I, Art. 44 (4), 45(3), 46, 75; CIHL, Rules 87, 107)
- e. If the internees in S-21 Security Centre would all have been spies, which rules would have been applicable to them? (Hague Regulations 1907, Art. 29-31; GC IV, Art. 5; CIHL, Rules 87, 107)

III. Detention of Protected Persons

7. (*Para. 2482*) When is a soldier of the opposing army lawfully detained? Is there a right to detain in IACs? (GC III, Art. 21)
8. (*Paras 769-770, 2629, 2630*)
- a. What are the judicial guarantees for a fair and regular trial under GC III? When must a POW be brought to trial? (GC III, Art. 5, 84, 105)
- b. POWs may be deprived of their liberty without trial or any other procedure. Why was it nevertheless correct to convict the accused for having deprived POWs of the rights of fair and regular trial even if no trial at all was conducted?

c. May a POW be deprived of POW status in conformity with Art. 46 of P I only after having been tried for espionage? (P I, Art. 46)

9. (Paras 772,781)

a. Is IHRL applicable in times of armed conflict? Is IHL or IHRL *lex specialis* in cases concerning fair trial for POWs? For civilian internees?

b. Would a derogation declared by a state in conformity with IHRL automatically reduce IHL judicial guarantees accordingly? For POWs? For protected civilians? (International Covenant on Civil and Political Rights, Art. 4(1); GC IV, Art. 5)

c. In which circumstances is a derogation from obligations under GC IV possible? (GC IV, Art. 5, 10, 27, 143)

10. (Para. 781)

a. Under which circumstances could civilians be detained during an international armed conflict? What is the rationale behind the internment of civilians as opposed to the internment of POWs? (GC IV, Art. 42, 43)

b. When can a civilian be detained for security reasons? How would you interpret the relevant provision? How did the Chamber interpret it? (GC IV, Art. 42)

c. Could POWs and civilians be detained together? (GC IV, Art. 84)

11. (Paras 1860 and 2635)

a. What are the judicial guarantees for a fair and regular trial under GC IV? (GC IV, Art. 43, 78)

b. Does the confinement of civilians without due process of law necessarily violate IHL? What kind of due process is required as a minimum? (GC IV, Arts 42, 43)

c. Since Cambodia abolished courts, would an administrative body be sufficient? Which criteria would this body have to fulfil?

12. (Paras 2370-2371, 2627-2628) Would the standard prison conditions in a country be qualified as sufficient for civilian internees and POWs? Is it relevant for the obligation to ensure humane detention conditions that a state might not be able to do so? According to the Chamber? (GC III, Art. 13; GC IV, Art. 5, 27; CIHL, Rule 87)

IV. Grave Breaches

13. (*Para. 325*) What are grave breaches under the Geneva Conventions III and IV? What are the consequences of the commission of a grave breach? Are grave breaches defined in the same way under the relevant Conventions III and IV? (GC III, Art. 130; GC IV, Art. 147)

14. (*Paras 2620-2635*) What are the rules of the GCs prohibiting the grave breaches the Chamber deals with? (GC III, Arts 13, 14, 84, 130; GC IV, Arts 27, 31, 32, 147; CIHL, Rules 87, 89, 90, 91, 99, 100, 118)

15. (*Paras 762-763*) How is 'wilfully' interpreted by the ICTY and the ICRC? What does the Chamber think of their interpretation of the term? Did the Chamber take a stance on that issue?

16. (*Paras 1855, 1860*)

a. Can the defences put forward by Nuon Chea's Defence Team justify the violations found by the Chamber? Threat to Cambodia's national security, territorial integrity and sovereignty by Vietnam? Treason, subversion, collaborating with the enemy or espionage?

b. Does the treatment of POWs and civilian internees in the Cambodian detention sites amount to collective punishment? (GC III, Art. 87 (3); GC IV, Art. 33; CIHL, Rule 103)