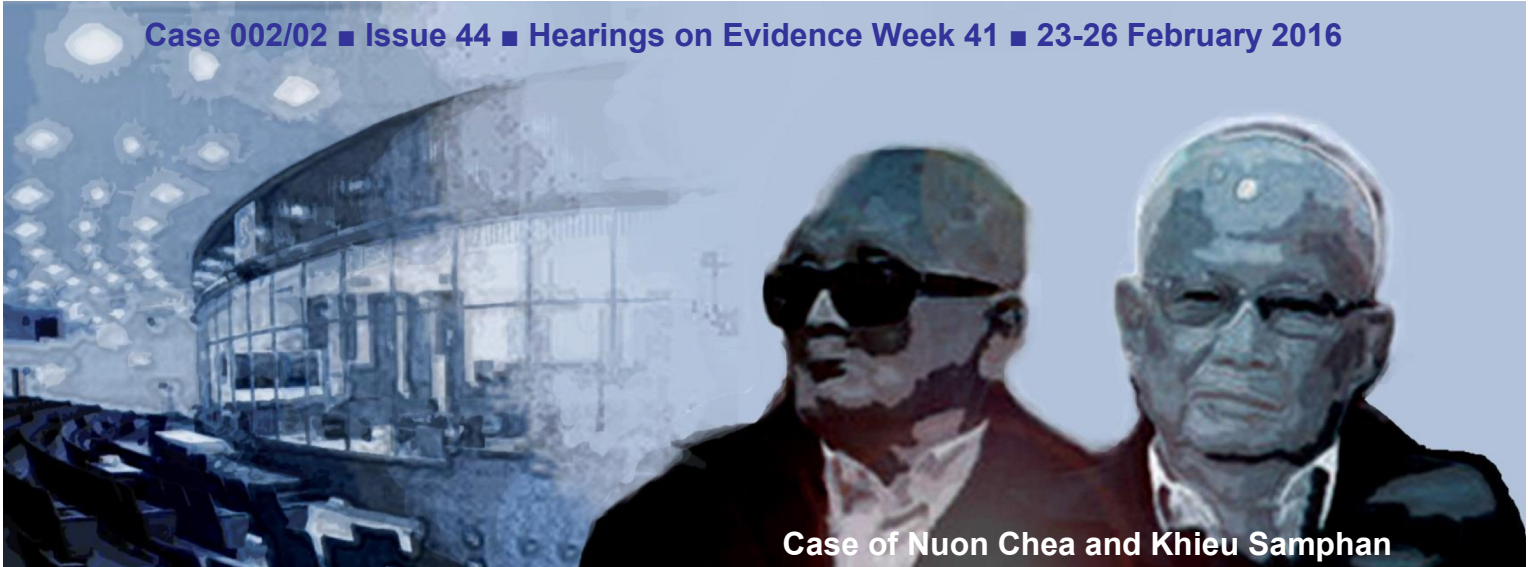


KRT TRIAL MONITOR

Case 002/02 ■ Issue 44 ■ Hearings on Evidence Week 41 ■ 23-26 February 2016



Case of Nuon Chea and Khieu Samphan

A project of East-West Center and the WSD HANDA Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center)

"There was no desire to eliminate the Cham because they were Cham as part of a national policy. Of course there was repression. Of course people were opposing the regime or considered to oppose the regime were repressed, but not because they were Cham."¹

- International Defense Counsel for Khieu Samphan,
Anta Guissé

I. OVERVIEW

As the segment on the treatment of targeted groups under the Democratic Kampuchea (DK) regime comes to a close, the Trial Chamber gave all Parties the opportunity to present key documents this week. These constituted the third round of key document hearings in Case 002/02 and covered the treatment of the Cham Muslim minority, ethnic Vietnamese, and former officials of the Khmer Republic.² The Defense Team for Nuon Chea declined to participate in hearings this week, following a walkout from the previous set of hearings in early September 2015. Other Parties participated actively in proceedings, presenting their key documents, which included book extracts, DK policy documents, telegrams, newspaper articles and copies of the Communist Party of Kampuchea (CPK) publication *Revolutionary Flag*. The OCP presented documents to support claims that there was a national policy to target former Lon Nol soldiers and destroy the Cham and Vietnamese ethnic minorities as such. The Defense for Khieu Samphan argued that these groups were only targeted because they posed threats to the regime and were not targeted for their ethnicity or religion. The Defense also argued that there was insufficient evidence that Khieu Samphan had played a role in the DK regime to influence decisions regarding these three groups. On Friday, Parties presented their responses to the documents presented by the opposing Parties, refuting their credibility variously based on the authorship, or on the context in which the document was created. Unlike in previous key document hearings, there were no significant legal issues raised that impeded the progress of proceedings, and in the absence of participation by the Nuon Chea team, hearings concluded ahead of schedule this week.

II. SUMMARY OF KEY DOCUMENT PRESENTATIONS

This week the Chamber heard the documentary presentations of the OCP, CPLCLs, and the Defense Team for Khieu Samphan. The Defense Team for Nuon Chea declined to

participate in proceedings. Parties presented their key documents on Tuesday and Wednesday this week, and the Chamber adjourned on Thursday to give Parties time to prepare their responses, which were then given on Friday.

A. Documents Presented by the OCP

The OCP were first to present their key documents, and used the opportunity to provide as much evidence as possible to support their claims that there was a national policy to target former Lon Nol soldiers, and to commit genocide against the ethnic Cham and Vietnamese minorities.

1. Targeting of the Cham

National Deputy Prosecutor Seng Bunkheang and International Assistant Prosecutor Dale Lysak began the OCP's presentation with 19 key documents, including excerpts from *The Pol Pot Regime*, by Australian scholar Ben Kiernan, whom the Prosecution presented as the foremost expert on the treatment of the Cham, along with Ysa Osman.³ The OCP also presented interviews conducted by Steve Heder, official DK documents, and OCIJ statements from witnesses, all of which, the Prosecutors argued, outlined the targeting and treatment of the Cham Muslim minority under the DK regime. Various documents made mention of the oppression of the Cham people; their traditions and culture, particularly with reference to the prohibition of religion, forced consumption of pork, as well as the killings and forced movement of the Cham people.⁴ Another piece of evidence came from an OCIJ statement in which a woman claimed she was given "made to choose between a bullet and eating pork."⁵

2. Targeting of the Vietnamese

International Deputy Co-Prosecutor William Smith continued the OCP's presentation by introducing 28 documents regarding the treatment of the ethnic Vietnamese during the DK period. These documents included interviews, excerpts from CPK magazine *Revolutionary Flag*, a speech given by Khieu Samphan, prisoner lists from S-21, records from Kraing Ta Chan Security Center, and other expert reports. Some included reference to orders and instructions given to Cambodian forces on how to deal with Vietnamese soldiers and civilians, and many documents demonstrated the way the Vietnamese, or 'Yvon,' were depicted as the "hereditary enemy" of the Khmer people.⁶ The documents also portrayed the arrest and execution of ethnic Vietnamese people and described official policies on the removal of mixed-race children. In order to support their argument that the Vietnamese were treated more harshly than the Khmer people under the DK regime, the OCP cited an undergraduate honors thesis written by Elizabeth Do from Stanford University, entitled, "Treatment of the Vietnamese Minority in Democratic Kampuchea from a Comparative Perspective."

3. Targeting of Lon Nol Soldiers and Officials

The Trial Chamber granted the OCP additional time to present their key documents on the targeting of former Khmer Republic soldiers and officials on Wednesday, 24 February. The OCP posited that the documents they cited amounted to evidence that Lon Nol soldiers were gathered and killed in a "deliberate and organized" fashion. Documents included extracts from Jon Swain's *River of Time*, Sydney Schanberg's diary, Henri Locard's *Prisoner of the Khmer Rouge*, and articles from the *Los Angeles Times* and *Washington Post*. The Prosecutor also presented documents that he argued demonstrated the policy of targeting former Khmer Republic soldiers was not limited to the immediate aftermath of the Khmer Rouge liberation in April 1975. As an example, the Prosecutor cited a list of 162 prisoners who died of either execution or illness at S-21 between 22 and 30 March 1976, all of whom were former Lon Nol soldiers.

B. Documents Presented by Civil Party Lawyers

The CPLCLs presented a number of Civil Party Applications (**CPAs**) concerning the treatment of the ethnic Cham and the ethnic Vietnamese. The Civil Party lawyers argued that these documents supported the position that the DK regime perpetrated genocides of the Cham and Vietnamese. The presentation of CPAs in key document hearings has previously caused contention before the Chamber, however, no Parties objected to their use this week.⁷

1. Targeting of the Cham

The Civil Party lawyers read extensive excerpts from 12 CPAs concerning the treatment of the Cham. The CPAs detailed firsthand experiences of various policies prohibiting language, culture, and religion, as well as descriptions of forced evacuations and the Cham rebellion in Svay Khleang. The Civil Party statements spoke at length about the suppression of religious practices, including the widespread experience of Cham people forced to eat gruel with pork up to three times a day.

2. Targeting of the Vietnamese

National CPLCL Pich Ang presented eight CPAs referencing forced confessions obtained through torture as well as the executions of ethnic Vietnamese people. Four further CPAs detailed the forced deportation of ethnic Vietnamese residents of Cambodia. The Civil Party statements discussed thorough searches for anyone with links to Vietnam, saying that many Vietnamese people were killed, even young children: “They killed them for fear they would pass on the blood line.”⁸ The Civil Party lawyers asserted that the number of similarities heard across the CPAs demonstrated the pervasive nature of this targeting of the Vietnamese. Their argument for the existence of a national policy rested on such claims of its frequency and diffusion.

C. Documents Presented by the Khieu Samphan Defense

Although the Defense Team for Nuon Chea declined to participate in the key document presentations, the Khieu Samphan Defense took part, with international Counsel Anta Guissé announcing that she would “also engage in this fastidious exercise.” Counsel prefaced her presentation by saying that it was difficult to select key documents when the final decision of the Chamber on calling Expert Witnesses for the segment had yet to be announced.⁹

1. Targeting of the Cham

The Khieu Samphan Defense only directly cited two documents regarding the treatment of the Cham. The first was a Democratic Kampuchea Radio broadcast from 23 October 1975. While acknowledging it was produced as propaganda, Counsel Guissé stated it was nonetheless important in demonstrating that the Cham people were viewed primarily as rebels and as an insurrectionist threat against the DK regime rather than a separate ethno-religious group. The other document she cited was an excerpt from the transcript in Case 002/01 during the expert testimony of Philip Short, when he told Nuon Chea’s Counsel, Victor Koppe, that, “I am convinced that there was no attempt to exterminate any ethnic group, regardless of what it was.” In the same comment, Philip Short drew distinction between the targeting of the Cham or Vietnamese and the genocides against the Tutsis in Rwanda and against the Jews in Nazi Germany.¹⁰

2. Targeting of the Vietnamese

Counsel Guissé spent a good deal more time presenting documents about the treatment of the Vietnamese. During her presentation, she cited a total of 13 documents, including excerpts

from expert Philip Short's book, *Pol Pot: Anatomy of a Nightmare*, and from Henri Locard, François Ponchaud, and Stephen Heder regarding the treatment of the ethnic Vietnamese.¹¹ These documents made mention of a pre-existing anti-Vietnamese sentiment in Cambodia prior to the DK period and suggested the Vietnamese were considered a political rather than racial enemy. The Defense used Stephen Heder's critique of Ben Kiernan to support this point, quoting his words that: "Political orientation was considered more important than biological or physical characteristics."¹² The Defense also worked to emphasize the lack of participation by Khieu Samphan in the development of any anti-Vietnamese policies and propaganda, claiming that a quote from Khieu Samphan claiming that border negotiations with Vietnam may require "hundreds of years" to resolve indicated his long-term commitment to negotiation rather than any malice. An overarching Defense argument was that the context of DK legitimately justified the treatment of the Vietnamese as a political enemy.

3. Targeting of Lon Nol Soldiers

The Khieu Samphan Defense also briefly touched on the targeting of former Lon Nol soldiers during the DK regime. Counsel presented two articles to support the claim that Lon Nol soldiers were only targeted insofar as they represented a continued threat to the survival of the CPK. Ms. Guissé presented articles from the French newspaper *Liberation* from June 1976 and the *Bangkok Post* from October 1978 to show that former Khmer Republic officials were organizing and training armed groups, possibly in Thai territory, with the ultimate aim to retake parts of DK.

III. PARTIES' RESPONSES TO DOCUMENTARY PRESENTATIONS

After one day of preparation, Parties presented their responses to opposing Counsel's key documents on Friday, 26 February. The OCP argued that none of the Defense's documents challenged the allegations against the Accused. They also debated the extent of the research undertaken by the scholars cited by the Defense, saying that the research carried out by the OCIJ was far more extensive and therefore more reliable. In response, the Khieu Samphan Defense Team repeated an argument they have raised in the Chamber before that the Chamber relies too heavily on out of court testimony and the reiterated that there was insufficient evidence to support the argument that their client could be held responsible to crimes that had taken place during DK.

A. OCP Comments on Khieu Samphan Defense's Presentation

The OCP responded separately to the Defense's key documents concerning the Vietnamese, the Cham, and the former officials of the Khmer Republic. International Deputy Prosecutor William Smith argued that, although the views and opinions of authors and scholars such as Henri Locard, Philip Short, and Stephen Heder were valid, their work was written without the "benefit" of an investigation on the same scale as that conducted by the OCIJ in Case 002. Mr. Smith argued that their opinions therefore held limited probative value until such a time as these authors could corroborate their opinions with the voluminous material amassed by the Co-Investigating Judges. The Prosecutor went on to state that any legal determination on the occurrence of genocide was a matter for the Chamber to decide upon, and that conclusions should not be drawn from expert opinions.

Concerning Khieu Samphan's use of documents produced during the DK regime, the OCP conceded they were relevant to understanding the context of armed conflict and how that impacted policy, however, Mr. Smith pointed out the documents' limited value given their original purpose as propaganda. The OCP also contested that the longstanding border conflict with Vietnam could serve as an "excuse" for the elimination of the Vietnamese, asserting that pre-existing animosity did not diminish the crime of genocide. Mr. Smith pointed out that the Defense's documents were very general and did not relate to the specific allegations contained in the indictment.¹³ The OCP also refuted Defense Counsel's submission that references to "the

Vietnamese” in *Revolutionary Flag* referred only to the Vietnamese as a military enemy, rather than the civilian population. The Prosecutor argued there was no basis for such a claim.

Concerning the Defense’s arguments about the treatment of the Cham, international assistant prosecutor Dale Lysak began his response by addressing two documents from scholars Henri Locard and Philip Short. He argued that Ysa Osman’s research was much more valuable than that of either of these two scholars concerning the specific matter of the Cham experience under the DK regime. Mr. Lysak also urged a contextual reading of the Khieu Samphan Defense’s documents, arguing that any propaganda aimed at the Cham was intended to pacify the Cham in the months following the Krouch Chhmar rebellions in 1975. Mr. Lysak further argued that the Party’s supposed fear of future Cham insurrection did not mitigate the crime of genocide:

Contrary to what Locard, Short, and others appear to believe, genocide does not require that the perpetrators be racists or racially motivated. If you have the intent to eliminate an ethnic, religious, or racial group, that is genocide... So the quotes we heard from the Defense that Cham were not killed for racial reasons, but because they had rebelled, do not disprove genocide. To the contrary, if you decide to eliminate the Cham people because you were worried about them rebelling again some day, and you kill entire Cham communities – men, women, and children – that is genocide, period.¹⁴

With regard to the three documents presented concerning the treatment of former Khmer Republic officials and soldiers, the OCP argued that the alleged existence of pockets of resistance did not justify the rounding up and killing of soldiers and their families around the country. The OCP stated that attempts to use the resistance of a few to justify the killing of thousands, including women and children, was shameful and could not constitute a legal defense to the extrajudicial killing of so many Cambodians.

B. Khieu Samphan Defense Commentary on OCP Presentation

Defense Counsel Guissé made lengthy submissions as to the probative value of the OCP’s key documents. She began by reminding the Chamber of her team’s position regarding the admission of written statements in lieu of oral testimony and asked that the Chamber take this into account when reviewing the evidence. The Defense for Khieu Samphan argued that Ben Kiernan’s research was of low probative value considering that the Chamber had decided not to summon him for independent examination; Counsel likened him to a “historian” writing without a legal framework. Counsel also criticized a perceived over-reliance on Kiernan’s work, pointing out that the OCP had quoted his book, *The Pol Pot Regime*, 15 times over the course of the week. In regards to the undergraduate thesis, Anta Guissé deconstructed the OCP’s conclusions drawn from Elizabeth Do’s findings on the treatment of Vietnamese, claiming that the treatment of the Khmer was not manifestly different. Counsel also criticized Ms. Do’s methodology and the size of her case study, arguing the geographical spread was insufficient to prove the existence of a national policy against the Vietnamese. Counsel further objected to the use of Civil Party applications from any individuals not appearing before the Chamber for cross-examination on the grounds that reliance on such evidence would violate the rights of the Accused. In response to OCP documentary submissions regarding Lon Nol soldiers, Defense Counsel argued that there was sufficient evidence to demonstrate the Zones were autonomous enough to ignore orders from the Center not to harm Lon Nol soldiers. The Defense also argued that the OCP overly relied on WRIs to prove that a national policy existed to execute former Lon Nol soldiers. Counsel observed that many witnesses had testified that they could not recall such a policy.

IV. LEGAL AND PROCEDURAL ISSUES

This week, there were no significant legal or procedural issues raised outside of the procedural

documentary hearings themselves.

V. TRIAL MANAGEMENT

Over the course of this week, the Trial Chamber effectively managed three days of key documentary hearings in the segment on the treatment of targeted groups. Hearings were held on Tuesday, Wednesday, and Friday this week in order to give Parties one day mid-week to prepare responses. Due to the lack of participation by the Nuon Chea Defense team, hearings finished earlier than anticipated.

A. Attendance

Nuon Chea waived his right to be present in the courtroom and observed proceedings from the holding cell all week while Khieu Samphan was present in the courtroom during all sessions.

Judge Attendance: On 24 February, international reserve Judge Martin Karopkin was absent but did not need to be replaced, while, on 26 February, national Judge You Ottara was absent and was replaced by national reserve judge Thou Mony. All remaining judges were otherwise present throughout the week.

Civil Parties Attendance: Approximately ten Civil Parties observed proceedings from inside the courtroom during each hearing this week.

Parties: The international co-lawyer for Nuon Chea, Victor Koppe, was absent all week without providing a reason to the Court, however, his national counterpart, Son Arun, was present to represent their client. On 26 February, international CPLCL Marie Guiraud and Khieu Samphan's Defense Counsel, Kong Sam Onn, were absent for personal reasons.

Attendance by the public:

DATE	MORNING	AFTERNOON
Tuesday 23/02/2016	▪ Approximately 93 villagers from Kampot province	▪ Approximately 72 villagers from Kampot province
Wednesday 24/02/2016	▪ Approximately 400 students from Entrak Tevy High School and Royal University of Law and Economics (RULE), Phnom Penh ▪ Two foreign observers	▪ Approximately 100 students from Borey 100 Knong High School, Phnom Penh ▪ Two foreign observers
Friday 26/02/2016	▪ Approximately 70 students from Champuvoin High School, Phnom Penh ▪ One foreign observer	<i>No hearing</i>

B. Time Management

Since the Defense for Nuon Chea declined to participate in hearings this week, other Parties were able to use additional time to make their key document presentations without the overall schedule being negatively affected. All Parties requested some additional time to make their introductory presentations on 23 and 24 February. Court was not in session on Thursday, 25 February, in order to allow Parties time to prepare their responses to the documents presented. Friday's hearing adjourned early after Parties finished their responses ahead of schedule.

C. Courtroom Etiquette

All Parties conducted themselves professionally this week, and there were no breaches of courtroom etiquette.

D. Translation and Technical Issues

There were no significant technical or translation issues this week that impacted proceedings.

E. Time Table

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS
Tuesday 23/02/2016	9:08	10:13-10:30	11:31-13:31	14:35-14:56	16:00	4 hours 14 minutes
Wednesday 24/02/2016	9:06	10:12-10:30	11:31-13:30	-	13:58	2 hours 35 minutes
Friday 26/02/2016	9:01	10:12-10:31	-	-	11:24	2 hours 4 minutes
Average number of hours in session				2 hours and 57 minutes		
Total number of hours this week				8 hours and 54 minutes		
Total number of hours, day, weeks at trial				546 hours and 23 minutes		
150 TRIAL DAYS OVER 44 WEEKS						

*This report was authored by Borakmony Chea, Somaly Kum, Daniel Mattes, Caitlin McCaffrie, Elizabeth Orr, Thi Son, Lina Tay and Penelope van Tuyl as part of the KRT Trial Monitoring and Community Outreach Program. KRT Trial Monitor is a collaborative project between the East-West Center, in Honolulu, and the WSD HANDA Center for Human Rights and International Justice at Stanford University (previously known as the UC Berkeley War Crimes Studies Center). Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in Southeast Asia.



Unless specified otherwise,

- ☐ the documents cited in this report pertain to the *Case of Nuon Chea and Khieu Samphan* before the ECCC;
- ☐ the quotes are based on the personal notes of the trial monitors during the proceedings;
- ☐ the figures in the *Public Attendance* section of the report are only approximations made by AIJI staff; and
- ☐ photos are courtesy of the ECCC.

Glossary of Terms

Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (CaseNo.001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan</i> (CaseNo.002/19-09-2007-ECCC)
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”)
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ERN	Evidence Reference Number (the page number of each piece of documentary evidence in the Case File)
FUNK	National United Front of Kampuchea
GRUNK	Royal Government of National Union of Kampuchea
ICC	International Criminal Court
IR	Internal Rules of the ECCC Rev.8 (2011)
KR	Khmer Rouge
OCIJ	Office of the Co-Investigating Judges
OCP	Office of the Co-Prosecutors of the ECCC
VSS	Victims Support Section
WESU	Witness and Expert Support Unit

¹ Trial Chamber. “Transcript of Proceedings” (26 February 2016), E1/392.1, p.51, lines 3-7 [hereinafter, **26 FEBRUARY TRANSCRIPT**].

² For a summary of the first set of key document hearings in Case 002/02, on the Tram Kak District cooperatives and Kraing Ta Chan Security Center, see CASE 002/02 KRT TRIAL MONITOR, Issue 17, Hearings on Evidence Week 14 (27-30 April 2015). The next key document hearings were held at the end of the segment on three DK-era worksites; see CASE 002/02 KRT TRIAL MONITOR, Issue 28, Hearings on Evidence Week 25 (24-27 August 2015), and CASE 002/02 KRT TRIAL MONITOR, Issue 29, Hearings on Evidence Week 26 (1-3 September 2015).

³ Ysa Osman has published two books on the Cham in the DK period: *Oukoubah* and *The Cham Rebellions*. He appeared before the Trial Chamber as an Expert Witness on the treatment of the Cham from 9 to 10 February; for a summary of his testimony, see CASE 002/02 KRT TRIAL MONITOR, Issue 43, Hearings on Evidence Week 40 (9-10 February 2016).

⁴ Farina So’s Undergraduate Thesis; ‘An Oral History of Cham Muslim Women in Cambodia Under the Khmer Rouge’, submitted as part of her Master of Arts in the Center for International Studies, Ohio University was also cited: “Many mosques and monasteries were profaned or turned into pigsties, storages, stables and torture chambers... Religious rituals and religious books like the Buddha Dharma doctrine and the Koran were collected to be burned or used as toilet paper. The Khmer Rouge intended to assimilate all ethnic minorities into one ethnicity, the Khmer.”

⁵ The OCIJ statement in question was given the number E3/9672. Among other evidence used by the OCP about the forced consumption of pork the OCP cited a report from Sector 5 Committee in 25 May 1977 referring to a protest of Cham people who were refusing to eat pork, and subsequent orders to “sweep clean” the protest movement.

⁶ The term “*Yuan*” is a derogatory Khmer term for people of Vietnamese ethnicity.

⁷ The use of CPAs as key documents has been cause for discussion in the past. The Defense Teams object to their use if coming from Parties who will never appear in Court in person, thereby precluding any chance for cross-examination.

⁸ This quote comes from a civil party interview of Ms. Khun Samit, given the number E3/7586

⁹ Although Ysa Osman (2-TCE-95) has appeared before the Chamber as an Expert Witness on the treatment of the Cham, the Chamber is yet to announce whether any more experts will be called in the segments on the treatment of the Cham, Vietnamese, or Lon Nol soldiers. Defense Counsel Anta Guissé specifically questioned whether 2-TCE-92, 2-TCE-97, and 2-TCE-99 would appear.

¹⁰ Mr. Philip Short testified before the Trial Chamber as an Expert Witness in Case 002/01 from 6-10 May 2013. For a summary of his testimony see our report: CASE 002/01 KRT TRIAL MONITOR, Issue 59, Hearings on Evidence Week 54 (6-10 May 2013).

¹¹ The article by Francois Ponchaud was dated 10 January 1976, and documents interviews he held with Cambodian refugees at the Thai border. Two articles by Henri Locard were cited by the Defense; one entitled 'Scope of KRT Case 002/02 Contains Fundamental Shortcomings' was published in English in the *Cambodia Daily* on 15 April 2014 and another titled Near-sighted Vision of Cambodia, published in *Le Monde Daily* on 28 April 1998. Philip Short's book *Pol Pot: Anatomy of a Nightmare* (New York: Henry Holt, 5 September 2004) was referred to in relation both to the context of ongoing conflict between Cambodia and Vietnam, and also of alleged instances of repatriation of Vietnamese people living in Cambodia between 1974 and 1976.

¹² The article cited by the Defense is: "Racism, Marxism, labelling and genocide in Ben Kiernan's 'The Pol Pot Regime'" *South East Asia Research*, (1997) vol. 5, no. 2, pp. 101-153.

¹³ Specifically, the deportation of the Vietnamese in 1975, mistreatment of Vietnamese civilians in Svay Rieng and Prey Veng, cruel treatment and torture of Vietnamese civilians and combatants taken to Kraing Ta Chan, Au Kanseng, S-21 and Tram Kak cooperatives.

¹⁴ 26 FEBRUARY TRANSCRIPT, p.19, lines 4-16.