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CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S APPEAL OF THE CASE 002/02 TRIAL JUDGMENT

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I. INTRODUCTION & STRUCTURE OF RESPONSE

A. INTRODUCTION[1]

1. The Co-Prosecutors hereby respond to **Khieu Samphan's** ("Appellant") appeal[2] of his convictions in the Case 002/02 Judgment issued on 16 November 2018.[3] In a properly pronounced decision[4] based on the totality of the evidence and the correct articulation of the law, with full respect for the principle of legality[5] and Appellant's fair trial rights,[6] the Trial Chamber ("TC") rightly convicted Appellant of committing through a joint criminal enterprise ("JCE"):[7] (i) crimes against humanity ("CAH"),[8] (ii) genocide of Vietnamese (by killing), and (iii) grave breaches of the Geneva Conventions ("GB").[9] The TC also found that he aided and abetted ("A&A"), murder with *dolus eventualis* at numerous locations.[10] For these crimes, each of which fell squarely within the *saisine* of Case 002/02,[11] Appellant, a senior leader of the Communist Party of Kampuchea ("CPK"), was appropriately sentenced to life imprisonment. On appeal, Appellant alleges, in essence, that during the Democratic Kampuchea ("DK") regime he knew nothing, saw nothing, heard nothing of the crimes, did nothing to implicate himself in the crimes of which he stands convicted, and that the TC viewed the evidence in the case through the pre-determined lens of conviction. A fair assessment of the evidence *in toto* and the TC's reasoned Judgment dispels this illusion, however. Applying the correct law to the totality of the evidence, the TC rightly found Appellant guilty based on his roles

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1 The Co-Prosecutors wish to recognise the outstanding contributions of the dedicated attorneys who drafted, reviewed and revised this Response: William S. Smith and Bunkheang Seng - Deputy Co-Prosecutors, Rattanak Srea, Vincent de Wilde d'Estmael, Ruth Mary Hackler, Sambath Pich, Nisha Patel, Helen Worsnop, Cóman Kenny, Ann Ellefsen-Tremblay, Melissa J. McKay, Evan Ritli, Holly Huxtable, and Isabelle Hayden, as well as the interns who provided invaluable assistance.

2 **F54** Appeal Brief, 27 Feb. 2020; **F54.1.1** Appeal Brief Annex A. *See also* Ground 250: **F54** Appeal Brief, *General Conclusions*, paras 2141-2143; **F54.1.1** Appeal Brief Annex A, p. 83 (EN), p. 77 (FR), p. 118 (KH).

3 **E465** Case 002/02 TJ.

4 *See* below in this Response the Co-Prosecutor's response to Appellant's Ground 1 as enumerated in Annex A to this filing ("*see* response to Ground 1").

5 *See* response to Ground 85.

6 *See* response to Grounds 4, 6-10, 14, 23.

7 **E465** Case 002/02 TJ, paras 4306-4307.

8 CAH – murder with direct intent, extermination, deportation, enslavement, imprisonment, torture, political and religious persecution, OIA - attacks against human dignity, enforced disappearances, forced transfer, forced marriage, and rape in the context of forced marriage.

9 GB – wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or a civilian of their rights under the GCs at S-21 Security Centre.

10 **E465** Case 002/02 TJ, para. 4318 (CAH murder with *dolus eventualis* at TK Cooperatives, 1JD Worksite, TTD Worksite, KCA Construction Site, S-21 Security Centre, KTC Security Centre and PK Security Centre).

11 *See* Section VI. *Saisine* & Scope of Trial.

and functions and his conduct. Appellant played a central role in these crimes, "as the face of DK".[12] Regarding his JCE liability, the achievement of the CPK's common purpose, to rapidly implement a socialist revolution through a 'great leap forward', involved the commission of significant crimes on a massive scale through the CPK's five destructive policies which were intrinsically linked to the common purpose.[13] Appellant was a senior leader in the Party, with the right to be heard through the principle of democratic centralism;[14] he shared a special relationship with other senior leaders, especially Pol Pot and Nuon Chea. His roles and functions included being: a candidate, then full-rights member, of the Central Committee ("CC"); a regular attendee of the highest-level policy-making body, the Standing Committee ("SC"); a member of Office 870, which oversaw implementation of SC decisions; and President of the State Presidium, by virtue of which position he served as the DK Head of State.[15]

2. With requisite intent,[16] he contributed in a variety of ways to the JCE [17] by: supporting[18] and promoting[19] the common purpose; encouraging, inciting, and legitimising its implementation through its policies;[20] instructing on its implementation through its policies;[21] and enabling and controlling the implementation of the common purpose and its policies.[22] With requisite knowledge and awareness,[23] he also provided "encouragement",[24] "practical assistance",[25] and "moral support"[26] to CPK cadres across the country, generating horrifying results on a massive scale, resulting in his convictions through aiding and abetting.

3. Appellant's appeal must be read with caution. As discussed in detail in this Response, he assesses the Trial Judgment ("Judgment") and its underlying evidence in a selective and piecemeal fashion, misrepresents and misstates findings and evidence, disregards or

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12 **E465** Case 002/02 TJ, para. 4306.
13 *See* response to Grounds 175-178, 189, 224.
14 **E465** Case 002/02 TJ, paras 391-394, 399.
15 *See* response to Grounds 190-191, 194, 200-203, 205-207.
16 **E465** Case 002/02 TJ, Section 18.2.2. *Intent*, paras 4279-4305.
17 **E465** Case 002/02 TJ, Section 18.2.1. *Contribution to the Common Purpose*, paras 4257-4278.
18 **E465** Case 002/02 TJ, paras 4257-4261.
19 **E465** Case 002/02 TJ, paras 4262-4264.
20 **E465** Case 002/02 TJ, paras 4265-4270.
21 **E465** Case 002/02 TJ, paras 4271-4274.
22 **E465** Case 002/02 TJ, paras 4275-4278.
23 *See* response to Grounds 209, 245, 248-249.
24 **E465** Case 002/02 TJ, para. 4315 (as an aider and abettor at the cooperatives).
25 **E465** Case 002/02 TJ, para. 4317 (as an aider and abettor at the security centres and within the context of internal purges).
26 **E465** Case 002/02 TJ, paras 4315 (as an aider and abettor at the cooperatives), 4317 (as an aider and abettor at the security centres and within the context of internal purges).

misstates ECCC and international criminal jurisprudence, and provides citations that do not support his assertions.

4. Appellant's appeal should be dismissed as he has frequently failed to meet the applicable appellate review standards, including by failing to support his arguments with specific reference to the record, transcript, evidence, or Judgment and making obscure, contradictory, vague, or otherwise insufficient arguments. In addition, he has failed to: establish any legal error that invalidates the Judgment in whole or in part, show any error of fact which occasions an actual miscarriage of justice, and demonstrate any abuse of discretion forcing the conclusion that the TC failed to exercise its discretion judiciously. Finally, Appellant has also failed to establish actual bias or the reasonable apprehension of bias. In this regard, in challenging the Judges' impartiality, Appellant has often used intemperate language which goes beyond the acceptable bounds of robust advocacy.[27]

5. Appellant has established no errors warranting appellate intervention in this case; the convictions and sentence should be affirmed.

B. STRUCTURE OF RESPONSE

6. For ease of reference, the Co-Prosecutors have sequentially numbered Appellant's Grounds of Appeal as set out in Annex A of his Appeal Brief, the numbered Annex attached to this Response in all three languages.[28] Individual responses to these grounds will reference the corresponding number assigned in Annex A. The substantive Response is organised into the following sections: Standard of Review, Law, Fair Trial Rights, Approach to Evidence, *Saisine* and Scope of Trial, Crimes, Individual Criminal Responsibility, and Conviction and Sentencing. To assist the TC, the Response also collectively groups recurring themes raised in Appellant's brief.

II. STANDARD OF REVIEW

A. SPECIFIC STANDARDS

1. GENERAL STANDARD

7. The Supreme Court Chamber ("SCC") may "confirm, annul or amend decisions of the

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27 *See* e.g. **F54** Appeal Brief, paras 1417 (referring to the TC's "desire to implicate Khieu Samphan at all levels"), 1441 ("the manner in which the speeches from the CPK leaders were taken systematically out of context to be given a biased interpretation to make them say exactly what the Chamber needed to conclude for the criminal character of the CPK's policies"), 1600 (the TC decided to create criminal policies to make a conviction stick), 1601 ("the purpose of its biased examination of the CPK communications and administrative network was to lead to the 'knock-on effect' of implicating Khieu Samphan due to being unable to prove his contribution to a criminal aspect of the common purpose").

28 *See* Response Annex C, D, E.

TC in whole or in part, as provided in Rule 110".[29] The grounds of appeal against a TC judgment must prove "an error on a question of law invalidating the judgment [...] or an error of fact which has occasioned a miscarriage of justice".[30] The SCC may change the legal characterisation of the crime adopted by the TC but may not introduce new constitutive elements not submitted to the TC.[31] The SCC corrects legal errors and also verifies whether the burden of proving the elements of the charges was met rather than substituting the trial findings with its own.[32]

2. ALLEGED ERRORS OF LAW

8. The SCC conducts a *de novo* review of alleged errors of law to determine if an error was committed on a substantive or procedural issue. The error of law must invalidate the judgment or decision to warrant SCC intervention to amend the decision or judgment.[33] "A judgement is invalidated by an error of law if, in the absence of the error, a different verdict, in whole or in part, would have been entered."[34] Where the SCC finds the TC has applied a wrong legal standard, the SCC applies the correct legal standard to the evidence of record, where necessary, and determines whether it is itself convinced as to the factual finding being challenged before confirming that fact.[35]

9. The party alleging the error of law "must identify the alleged error, present arguments in support of the allegation, and explain how the error invalidates the trial judgement".[36] Even if a party's arguments are insufficient, the SCC may find other reasons to conclude there was an error of law.[37] To determine the issue, the SCC will also review the TC's legal findings which are necessary predicates for the impugned decision.[38]

10. The TC's failure to mention or address crucial exculpatory evidence is an error of law. The key question is whether this error invalidates the relevant portion of the trial judgment.[39]

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29 IR 104(2).
30 **F36** Case 002/01 AJ, para. 84 *citing* IR 104(1).
31 IR 110(2).
32 **F36** Case 002/01 AJ, para. 94.
33 Case 001-**F28** *Duch* AJ, para. 16; **F36** Case 002/01 AJ, para. 86.
34 **F36** Case 002/01 AJ, para. 99 *citing Popović* AJ, para. 17, *Lubanga* AJ, para. 19.
35 **F36** Case 002/01 AJ, para. 86.
36 Case 001-**F28** *Duch* AJ, para. 15 *citing* IR 105(3); **F36** Case 002/01 AJ, para. 987.
37 Case 001-**F28** *Duch* AJ, para. 15 *citing Boškoski & Tarčulovski* AJ, para. 10, *Kambanda* AJ, para. 98.
38 Case 001-**F28** *Duch* AJ, para. 15.
39 **F36** Case 002/01 AJ, para. 354.

3. ALLEGED ERRORS OF FACT

11. The SCC applies a standard of reasonableness to alleged errors of fact; i.e., it determines whether the TC's finding of fact was one that no reasonable trier of fact could have reached,[40] based on a holistic assessment of the evidence.[41] An error of fact only occasions an actual miscarriage of justice if it was "critical to the verdict reached".[42] An appeal against a conviction must show that the TC's factual errors create a reasonable doubt as to an accused's guilt.[43] The party alleging the error must show how the alleged error of fact actually occasioned an actual miscarriage of justice.[44] Arguments which merely disagree with the conclusions of the TC based on unsubstantiated alternative interpretations of the same evidence do not warrant SCC intervention.[45]

12. The SCC "will not lightly disturb findings of fact by a Trial Chamber",[46] which personally observed witnesses and is in a better position to assess the reliability and credibility of evidence and decide which evidence it prefers.[47] The TC's findings of fact are given a degree of deference, "tempered by [its] duty to provide a reasoned opinion".[48] As a general rule, to determine if the TC's conclusion of fact was reasonable, more reasoning is required if the underlying evidence for the conclusion is weak than where there is a sound evidentiary basis.[49]

4. ALLEGED PROCEDURAL ERRORS

13. Alleged procedural errors which constitute alleged errors of law or fact are brought under Internal Rule ("IR") 104(1).[50] Only procedural errors that resulted in a "grossly unfair outcome in judicial proceedings" warrant SCC intervention.[51] The TC's exercise of discretion is reviewed to determine if the TC correctly exercised its discretion, not whether the SCC agrees with the TC. The scope of appellate review of the TC's exercise of discretion is quite limited where there is no error of law or a clearly erroneous factual finding. A deferential approach is applied to this review. Appellate intervention is only

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40 Case 001-**F28** *Duch* AJ, para. 17.
41 **F36** Case 002/01 AJ, para. 418.
42 Case 001-**F28** *Duch* AJ, para. 19 *citing Kupreškić* AJ, para. 29.
43 Case 001-**F28** *Duch* AJ, para. 18; **F36** Case 002/01 AJ, para. 91.
44 Case 001-**F28** *Duch* AJ, para. 19.
45 **F36** Case 002/01 AJ, para. 90.
46 Case 001-**F28** *Duch* AJ, para. 17 *citing Furundžija* AJ, para. 37; **F36** Case 002/01 AJ, para. 88.
47 Case 001-**F28** *Duch* AJ, para. 17 *citing Kupreškić* AJ, paras 30, 32; **F36** Case 002/01 AJ, para. 89.
48 Case 001-**F28** *Duch* AJ, para. 17 *citing Kupreškić* AJ, para. 32; **F36** Case 002/01 AJ, para. 89.
49 **F36** Case 002/01 AJ, para. 90.
50 **F36** Case 002/01 AJ, para. 96.
51 **F36** Case 002/01 AJ, para. 99 *citing Furundžija* AJ, para. 37.

warranted where it is shown the TC's exercise of discretion was so unreasonable as to force the conclusion the TC failed to exercise its discretion judiciously.[52] The SCC will consider all phases of the proceedings, including measures that were taken during the appeals phase.[53]

5. PROOF BEYOND REASONABLE DOUBLE

14. Not every fact must be proved beyond reasonable doubt ("BRD"). All facts underlying the elements of the alleged crimes or forms of individual criminal responsibility must be proven to that standard, including those facts "indispensable for entering a conviction".[54] Other facts may require proving BRD due to "the way in which the case was pleaded".[55]
15. To uphold an overall finding of proof BRD of multiple instances of a crime, e.g. killings, specific instances must be proved BRD. If none of the specific instances have been established BRD, the overall finding has not been proven.[56] However, a murder conviction may be entered even where it is impossible to accurately establish the total number of deaths or identify the direct perpetrators and their victims.[57]
16. The BRD standard is to be applied based on the totality of the evidence, not in a piecemeal fashion, i.e., not to individual pieces of evidence in isolation. [58] That is, the SCC determines whether the standard is met "weighing of all the evidence taken together in relation to the fact at issue".[59] Similarly, a holistic approach is taken when considering whether there is sufficient indirect evidence to prove the main fact BRD from "predicate" facts.[60] If there is only indirect evidence, all links must be proven BRD.[61]
17. This holistic approach is considered primarily regarding the reliability of individual pieces of evidence and their corroborating evidence. Proof BRD may not, however, be established merely by sheer numbers of pieces of evidence regardless of their probative value.[62]

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52 *See S. Milošević* AC Defence Counsel Assignment Decision, paras 9-10.
53 **F36** Case 002/01 AJ, para. 100.
54 **F36** Case 002/01 AJ, para. 418 *citing Ntagerura* AJ, para. 174, *Mrkšić & Šljivančanin* AJ, para. 217.
55 **F36** Case 002/01 AJ, para. 418 *citing Halilović* AJ, para. 129.
56 **F36** Case 002/01 AJ, para. 420.
57 **F36** Case 002/01 AJ, para. 420 *citing Stakić* TJ, para. 201.
58 **F36** Case 002/01 AJ, para. 418 *citing Ntagerura* AJ, para. 174, *Mrkšić & Šljivančanin* AJ, para. 217.
59 **F36** Case 002/01 AJ, para. 418 *citing Lubanga* AJ, para. 22.
60 **F36** Case 002/01 AJ, para. 419 *citing Martić* AJ, para. 234.
61 **F36** Case 002/01 AJ, para. 418 *citing Ntagerura* AJ, para. 175.
62 **F36** Case 002/01 AJ, para. 419.

6. REASONED DECISION

18. IR 101(1) requires that a trial judgment set out the factual and legal reasons supporting the decision. IR 101(4) requires the judgment to respond to the written submissions of all parties.[63]

19. The TC, however, is not required to articulate every step of its reasoning in detail, and it is presumed to have properly evaluated all the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence.[64] Thus, that certain evidence is not referred to in the TC's assessment does not mean it was not taken into account.[65] However, this presumption may be rebutted where the TC did not address evidence that is clearly relevant to the challenged finding.[66] The TC has the discretion to accept some parts of a witness' testimony and reject others without articulating every step of its reasoning in making this assessment.[67]

20. "[N]ot every instance in which there is a paucity of reasoning in a judgment will lead to the conclusion that the trial proceedings were unfair".[68] For example, evidence not "tied to pivotal findings"[69] or concerning an issue that is not of "crucial importance" does not need to be addressed.[70] The TC is not required to work through every argument raised during trial; rather, the decision must clearly address the essential issues of the case.[71] The way in which the TC evaluated the evidence and reached its factual and legal conclusions must be understandable;[72] that is, the judgment must "indicate with sufficient clarity the grounds on [which the] decision [is based]".[73] "At a minimum, the [TC] must provide reasoning to support its findings regarding the substantive considerations relevant to its decision".[74]

21. Where, as here, the case is ongoing, the SCC may remedy any shortcomings in the TC's reasoning to avoid violations. If it finds that factual findings are based on insufficient

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63 IRs 101(1) ("The judgment shall be divided into two parts: (a) the findings, setting out the factual and legal reasons supporting the Chamber's decision;"), 101(4) ("The findings in the judgment shall respond to the written submissions filed by all of the parties.").

64 **F36** Case 002/01 AJ, para. 304 *citing Kalimanzira* AJ, para. 195, *Simba* AJ, para. 152, *Halilović* AJ, para. 121, *Kvočka* AJ, para. 23. *See also Ngirabatware* AJ para. 97, *Karera* AJ para. 21.

65 **F36** Case 002/01 AJ, para. 352.

66 **F36** Case 002/01 AJ, para. 352.

67 **F36** Case 002/01 AJ, para. 357.

68 **F36** Case 002/01 AJ, para. 349.

69 **F36** Case 002/01 AJ, para. 349.

70 **F36** Case 002/01 AJ, para. 352 *citing Zigiranyirazo* AJ, paras 45-46, *Ntabakuze* AJ, para. 171.

71 **F36** Case 002/01 AJ, para. 203 *citing Taxquet v. Belgium*, para. 91.

72 **F36** Case 002/01 AJ, para. 207.

73 **F36** Case 002/01 AJ, para. 203 *citing Hadjianastassiou v. Greece*, para. 33.

74 **F36** Case 002/01 AJ, para. 205 *citing Milutinović* AC Provisional Release Decision, para. 11.

reasoning, the SCC could consider that the impugned factual finding was not sufficiently reasoned and was therefore erroneous rather than conclude the trial was unfair.[75]

7. SUMMARY DISMISSAL

22. A party may not merely repeat arguments that were unsuccessful at trial, but must show the TC's rejection of those arguments is an error warranting intervention;[76] i.e., must substantiate why the decision or finding was made in error.[77] In addition, "[a]rguments […] which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed […] and need not be considered on the merits".[78]

23. The appealing party should provide precise transcript page or TC judgment paragraph references which it is challenging.[79] Submissions may be rejected if they are "obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[80] The SCC "has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing."[81] Arguments that are plainly unfounded may be dismissed without providing detailed reasoning.[82]

III. LAW

A. VALIDITY OF JUDGMENT

Ground 1: Judgment void for procedural defect because it was unlawfully announced[83]

24. **Ground 1 should be dismissed as Appellant fails to demonstrate that the TC erred in law by failing to apply compulsory procedures prescribed by the IRs.**[84]

25. There is no procedural requirement, in IRs 101, 102 and 107[85] or otherwise, which renders a judgment void where the TC does not provide written reasons on the same day as the judgment is pronounced. The plain meaning and purpose of IRs 101 and 102, when read together, are to set out the required form and content of the written judgment[86] and

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75 **F36** Case 002/01 AJ, para. 208.
76 **F36** Case 002/01 AJ, para. 101 *citing* Case 001-**F28** *Duch* AJ, para. 20. *See also Boškoski & Tarčulovski* AJ, para. 18; *Krajišnik* AJ, para. 24.
77 **F36** Case 002/01 AJ, paras 102, 304.
78 **F36** Case 002/01 AJ, para. 101 *citing* Case 001-**F28** *Duch* AJ, para. 20.
79 **F36** Case 002/01 AJ, para. 101 *citing* Case 001-**F28** *Duch* AJ, para. 20; IR 105(4).
80 Case 001-**F28** *Duch* AJ, para. 20 *citing Stakić* AJ, para. 12. *See also Martić* AJ, para. 14.
81 **F36** Case 002/01 AJ, para. 101 *citing* Case 001-**F28** *Duch* AJ, para. 20.
82 **F36** Case 002/01 AJ, para. 101 *citing* Case 001-**F28** *Duch* AJ, para. 20.
83 Ground 1: **F54** Appeal Brief, *Judgment void for procedural defect because it was unlawfully announced*, paras 30-79; **F54.1.1** Appeal Brief Annex A, p. 4 (EN), p. 4 (FR), p. 4 (KH).
84 **F36** Case 002/01 AJ, para. 100.
85 *Contra* **F54** Appeal Brief, para. 32, fn. 46.
86 IR 101.

to provide for its pronouncement,[87] including the oral delivery of a summary of the TC's findings and the disposition.[88] As already noted by the SCC, the TC "made it abundantly clear that '[t]he only authoritative account of the findings is contained in the full written Judgment which will be made available [in due course]'" and clarified that the time limit for filing a notice of appeal would commence following notification of the written Judgment,[89] as permitted under IR 107(4).[90] By doing so, the TC protected all the fundamental rights of the accused, including the right to a public trial without delay, a reasoned judgment, legal certainty and the right to appeal, as well as ensuring transparency of proceedings and public access to the judicial process.[91]

26. As Appellant notes,[92] all the ECCC Chambers have, at times, deferred issuing written reasons,[93] and the SCC has confirmed that a delay between the summary and disposition on the one hand, and written reasons on the other, does not in itself constitute a procedural breach.[94] Since Appellant's right to a written judgment and to appeal that judgment were manifestly not breached, the question of whether these previous decisions were appealable is of no consequence.[95] Appellant's attacks on the integrity of the decision-making process between the pronouncement of the Judgment and notification of written reasons are mere speculation;[96] IR 96(1) ensures that TC deliberations are confidential,[97] and there is no evidence whatsoever that the TC's reasoning changed in this period.

27. Appellant's claims that the TC did not "respect and apply the law" and that the Judgment "has no legal basis and therefore no legal validity" are thus without merit.[98] His arguments that the issuance of reasons at a later date cannot "cure the defect" and that the reasons are "invalid in and of themselves" are moot. When Appellant raised these

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87 IR 102.

88 IR 102(1).

89 **E463/1/3** SCC Summary Judgment Decision, para. 11 *citing* **E1/529.1** T. 16 Nov. 2018, 09:34:35-09:36:02, pp. 3, lines 13-16; 11:37:57-End, p. 57, lines 20-23.

90 Under IR 107(4), time limits for appeals begin running at "the date of pronouncement of the judgment *or its notification*, as appropriate" (emphasis added).

91 *Contra* **F54** Appeal Brief, para. 79.

92 **F54** Appeal Brief, para. 38.

93 *See e.g.* **SCC:** **E284/4/7** SCC Second Severance Appeal Decision Summary, *followed by* **E284/4/8** SCC Second Severance Appeal Decision; **PTC:** **D427/1/26** PTC First IS Closing Order Decision, *followed by* **D427/1/30** PTC Second IS Closing Order Decision; **TC:** **E367/7** TC Decision on Witness 2-TCE-95 Documents, *followed by* **E367/8** TC Written Reasons on Witness 2-TCE-95 Documents Decision.

94 **E50/1/1/4** SCC Decision on NC & IT Release Applications, paras 31, 38; **E50/3/1/4** SCC Decision on KS Release Application, para. 22.

95 *Contra* **F54** Appeal Brief, para. 38.

96 **F54** Appeal Brief, paras 71-77.

97 IR 96(1).

98 **F54** Appeal Brief, paras 41-56.

same arguments as an urgent appeal following the pronouncement in November 2018,[99] this Chamber concluded that there were no "compelling circumstances that would bar the Chamber from issuing a fully reasoned, final written judgement on the merits".[100] If the TC was not "established by law"[101] or was acting *functus officio,* or if the written Judgment was in any way *ultra vires,* the SCC would not have made this finding.

28. In any case, Appellant has not demonstrated that the alleged error resulted in a "grossly unfair outcome in judicial proceedings", taking into account all phases of proceedings, including this appeal.[102] As demonstrated, all of Appellant's fundamental fair trial rights have been respected. That Appellant has not been deprived of his right to appeal, to be heard, or to an effective defence, is self-evident from this very appeal; the only significant consequence is that Appellant has been provided with *more* time to prepare his appeal. As this Chamber already concluded, the TC did not "deprive the Accused of his right to have examined the merits of the conviction and sentence",[103] "the alleged violation of the Accused's procedural rights remains purely hypothetical",[104] and the SCC did not need to intervene "to safeguard the fairness of the proceedings".[105] The TC's publication of its written reasons and Appellant's appeal of those reasons have proven this correct.

B. PRINCIPLE OF LEGALITY

Ground 85: Errors pertaining to the principle of legality[106]

29. **Ground 85 should be dismissed as Appellant fails to establish that the TC erred in law in its articulation of the requirements of accessibility and foreseeability.**

30. Appellant shows no error in the TC's articulation of the requirements of the principle of legality,[107] *every aspect of which* accords with the prior jurisprudence of the SCC, the PTC, and the *ad hoc* tribunals, as well as post-WWII jurisprudence *and* the jurisprudence of the ECtHR from which Appellant alleges deviation.

31. Appellant does not contest that the TC correctly held – consistent with the practice of the

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99 **E463/1** Khieu Samphan's Urgent Appeal against the Judgement Pronounced on 16 November 2018.
100 **E463/1/3** SCC Summary Judgment Decision, para. 15.
101 **F54** Appeal Brief, para. 79.
102 *See* Standard of Review (Procedural errors).
103 **E463/1/3** SCC Summary Judgment Decision, para. 14.
104 **E463/1/3** SCC Summary Judgment Decision, para. 18.
105 **E463/1/3** SCC Summary Judgment Decision, para. 18.
106 Ground 85: **F54** Appeal Brief, *Errors pertaining to the principle of legality*, paras 550-574; **F54.1.1** Appeal Brief Annex A, p. 34 (EN), p. 31 (FR), pp. 47-48 (KH).
107 **F54** Appeal Brief, paras 550-574.

SCC,[108] PTC,[109] International Criminal Tribunal for Former Yugoslavia ("ICTY"),[110] and the ECtHR[111] – that the crimes or modes of liability must have (i) existed under national or international law, and (ii) been accessible and foreseeable to the accused at the time of the alleged criminal conduct.[112] He draws the erroneous conclusion, however, that the TC was required to apply the accessibility and foreseeability requirements to the "technical definition"[113] of the crimes and modes of responsibility, and was not permitted to rely on (i) the existence of the crime or mode in CIL during the DK period, (ii) the gravity of the crime, and (iii) Appellant's position in Cambodia's governing authority to establish the accessibility and foreseeability limbs.[114]

Accessibility

32. Just like the TC,[115] the SCC already held that "as to the accessibility requirement, in addition to treaties, 'laws based on custom or general principles can be relied on as sufficiently available to the accused'",[116] a holding repeated in both ICTY[117] and ECtHR[118] jurisprudence. The SCC has confirmed, moreover, that the position of an accused may additionally be relevant, *but not necessary*, in determining accessibility.[119] The same considerations are found at the ECtHR[120] and in post-WWII jurisprudence.[121]

33. Thus, Appellant's contention that he should not be held accountable for his actions because he could not access post-WWII case law in a language he understands[122] is irrelevant. In any case, the TC's findings demonstrate that Appellant was in an excellent position to access all the relevant law. Not only was he a leading government official

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108 **F36** Case 002/01 AJ, paras 761-762; Case 001-**F28** *Duch* AJ, paras 91, 96-97.

109 *See e.g.* **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, paras 105-106; **D427/1/30** PTC Second IS Closing Order Decision, paras 210-229; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 43.

110 *Hadžihasanović* Command Responsibility Decision, paras 33-35; *Ojdanić* AC Jurisdiction Decision, paras 21, 37; *Blagojević & Jokić* TJ, fn. 2145; *Stakić* TJ, para. 431.

111 *See e.g. Kononov v. Latvia*, para. 187; *Streletz v. Germany*, para. 51; *K.-H. W. v. Germany*, para. 46; *Kafkaris v. Cyprus,* paras 138, 140; *Vasiliauskas v. Lithuania*, para. 154.

112 **E465** Case 002/02 TJ, paras 21-32.

113 **F54** Appeal Brief, paras 552, 557, 559, 561, 563.

114 **F54** Appeal Brief, para. 550.

115 **E465** Case 002/02 TJ, para. 31.

116 **F36** Case 002/01 AJ, para. 762; Case 001-**F28** *Duch* AJ, para. 96.

117 *Hadžihasanović* Command Responsibility Decision, para. 34; *Ojdanić* AC Jurisdiction Decision, para. 40.

118 *Kononov v. Latvia*, paras 213, 227, 236-237.

119 **F36** Case 002/01 AJ, para. 761; Case 001-**F28** *Duch* AJ, para. 280.

120 *See e.g. Kononov v. Latvia*, para. 238.

121 IMT Judgment, p. 219 ("Occupying the positions they did in the Government of Germany, the defendants […] must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.").

122 **F54** Appeal Brief, para. 572.

before[123] and during the DK regime, but he studied law in France in the 1950s,[124] shortly after the Nuremberg trials took place, and several fundamental human rights treaties had been signed.[125] In 1959, he presented a French-language doctoral thesis in Paris,[126] containing detailed discussion on international trade law,[127] and was fully conversant in international law during the DK period.[128] Appellant is also fluent in English.[129]

Foreseeability

34. The TC's holdings that, for a crime or mode of responsibility to be foreseeable, an accused "must be able to appreciate that the conduct is criminal in the sense generally understood without reference to any specific provision",[130] and that the gravity of the crime may be relevant to that assessment,[131] similarly accord with consistent SCC jurisprudence.[132] The PTC,[133] ICTY[134] ECtHR,[135] and post-WWII jurisprudence[136] have

123 **E465** Case 002/02 TJ, paras 570-571.
124 **E465** Case 002/02 TJ, paras 564-565.
125 Including the 1948 UDHR, 1948 Genocide Convention, 1949 GCs, and 1950 ECHR.
126 **E465** Case 002/02 TJ, para. 567.
127 **E3/123** Thesis by Khieu S.: *L'Economie du Cambodge et ses Problemes d'Industrialisation* (The Economy of Cambodia and its Problems of Industrialisation), EN 00750610, 00750654.
128 *See* **E3/8304** FBIS, *Khieu Samphan Statement*, 3 Jan. 1978, EN 00166068 ("in the same way Hitler invaded Czechoslovak territory in 1939, showing no consideration for any international law"); **E3/549** *Speech of the President of the State of Democratic Kampuchea at the Fifth Summit Conference of Non-Aligned Countries,* Aug. 1976, EN 00644940, 42-44 ("[DK] scrupulously abides by the principles that every country is sovereign and has the right to dispose and decide by itself its internal affairs without foreign interference" adding that he supports Palestine in its recovery of self-determination rights.). *See also* **E3/203** Interview of Khieu Samphan by Stephen Heder, 4 Aug. 1980, EN 00424006 ("[DK] is a sovereign state recognized by the world by the United Nations and the Yuon invasion of [DK] is a violation of international law and the Charter of the United Nations").
129 *See* **E3/4058R** Nuon Chea and Khieu Samphan Press Conference, 1998, EN V00172408-V00172408 (During a press conference, Appellant read a political statement in fluent English. An English-speaking journalist asked him a question to which he responded in English, "let bygones be bygones is the best solution for our country, because it's the only way to reach national reconciliation." In response to another question, he stated: "[A]s we know the Royal Government is [...] spending all its efforts to solve this problem, the problem relative to our national integrity").
130 **E465** Case 002/02 TJ, para. 24.
131 **E465** Case 002/02 TJ, paras 30, 326, 651, 654, 661, 673, 688, 700, 712, 723.
132 **F36** Case 002/01 AJ, para. 762, fn. 1983; Case 001-**F28** *Duch* AJ, paras 96-97.
133 **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, para. 106; **D427/1/30** PTC Second IS Closing Order Decision, para. 235; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 45.
134 *Hadžihasanović* Command Responsibility Decision, para. 34; *Ojdanić* AC Jurisdiction Decision, para. 42; *Čelebići* AJ, para. 173.
135 *Groppera Radio AG v. Switzerland*, para. 68; *Kononov v. Latvia*, para. 238; *S.W. v. The UK*, para. 44; *Jorgic v. Germany*, paras 101, 103-116.
136 IMT Judgment, p. 219 ("it is to be observed that the maxim *nullum crimen sine lege* [...] is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."); *Justice* Judgment, pp. 977-978 ("As applied in the field of international law that principle [of legality] requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally

also confirmed that the gravity of the offence is highly relevant to a foreseeability determination. It fulfils the object and purpose of the legality principle by ensuring, as Appellant repeatedly requires,[137] that he could foresee that his conduct was criminal. The test is not whether Appellant could know for certain that he would be convicted, but rather whether his criminal responsibility was *foreseeable.* When a crime is so grave as to be manifestly unlawful, knowing the "technical definition" is not required. As the TC recognised,[138] and contrary to Appellant's contention,[139] this remains true so long as future interpretations of the contours of an offence do not exceed its "essence", and the existence of judicial uncertainty does not therefore render criminal responsibility unforeseeable.[140]

35. Appellant's assertion that he could not have expected the application of international law during the DK period because the Cambodian legal system is dualist is similarly misguided.[141] Dismissing Appellant's identical argument in Case 002/01, the SCC confirmed that the principle of legality allows for liability for crimes that were either national *or* international in nature at the time they were committed.[142] Thus, as the PTC has pointed out, the question of whether the crime or mode of responsibility is recognised in domestic law may be *relevant* to a foreseeability assessment, but it is not *necessary*.[143]

European Court of Human Rights jurisprudence

36. None of the ECtHR jurisprudence cited by Appellant contradicts these well-established positions. As the TC noted,[144] Appellant conflates the two stages needed to ensure compliance with the principle of legality: first, (i) the crime existed in law in 1975, and (ii) it was accessible and foreseeable. Whilst the ECtHR often dealt with these stages together, they clearly view them as distinct.[145] Thus, contrary to Appellant's

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organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught.").

137 **F54** Appeal Brief, paras 554, 556, 569-572.

138 **E465** Case 002/02 TJ, para. 29 *citing Vasiliauskas v. Lithuania*, para. 155, *Kononov v. Latvia*, para. 185. *See also Jorgic v. Germany*, para. 114.

139 **F54** Appeal Brief, paras 555, 557, 562.

140 *Contra* **F54** Appeal Brief, paras 569-571.

141 **F54** Appeal Brief, para. 568.

142 **F36** Case 002/01 AJ, para. 763; Case 001-**F28** *Duch* AJ, paras 91-95; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, para. 98. *See also* ICCPR, art. 15(1); *Streletz v. Germany*, para. 51; *K.-H. W. v. Germany*, para. 46.

143 **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 45.

144 **E465** Case 002/02 TJ, paras 26-28.

145 *See e.g. Kononov v. Latvia*, para. 187; *Streletz v. Germany*, para. 51; *K.-H. W. v. Germany*, para. 46; *Kafkaris v. Cyprus*, paras 138, 140; *Vasiliauskas v. Lithuania*, para. 154.

interpretation,[146] the Grand Chamber in *Vasiliauskas v. Lithuania* found a violation because of (i) the lack of customary status of genocide of "political groups",[147] and (ii) the inconsistency of the applicant's conviction with the "essence" of genocide as defined in international law at the material time.[148] A similar pattern emerges in all the ECtHR case law cited by Appellant,[149] where, since the crimes were of a highly technical and/or financial nature, the gravity assessment was irrelevant. However, in cases where the crimes were so grave that their criminality was obvious, irrespective of the technical definition of the offence, the ECtHR found no breach of the principle of legality.[150]

Chapeau elements for CAH and Grave Breaches of the Geneva Conventions[151]

37. Appellant's criticism of the TC for its alleged failure to discuss the accessibility and foreseeability of the *chapeau* elements of CAH and GB is without merit.[152] When the TC found CAH and GB accessible and foreseeable,[153] this necessarily included their *chapeau* elements. In any event, the SCC has already confirmed the accessibility and foreseeability of the *chapeau* elements of CAH.[154] The Geneva Conventions ("GCs") were binding on Cambodia following its accession on 8 December 1958,[155] and the *chapeau* requirements are expressly set out therein.[156]

IV. FAIR TRIAL RIGHTS

A. INTRODUCTION

38. The TC applied the correct approach to ensure Appellant received a fair trial, including, in particular: being judged by an independent and impartial tribunal, and informed of the nature and cause of the charges against him; being provided with adequate time and facilities to prepare his defence; and being provided with an opportunity to present an

146 **F54** Appeal Brief, para. 563 *citing Vasiliauskas v. Lithuania*, paras 167-186, 191.
147 *Vasiliauskas v. Lithuania*, paras 178, 181.
148 *Vasiliauskas v. Lithuania*, para. 185.
149 **F54** Appeal Brief, para. 556. *See e.g. Dragotoniu and Militaru-Pidhorni v. Romania*, paras 39-48; *Contrada v. Italy (No. 3)*, paras 64-76; *Žaja v. Croatia*, paras 99-105.
150 *See e.g. Kononov v. Latvia*, paras 238-239, 244.
151 With regard to Appellant's arguments on JCE liability for culpable omissions, *see* response to Ground 226.
152 **F54** Appeal Brief, para. 567 citing **E465** Case 002/02 TJ, paras 300-316 (CAH), 325-355 (GB).
153 **E465** Case 002/02 TJ, paras 300 (CAH), 325-326 (GB). Before coming to those conclusions with regard to GB, it expressly listed the *chapeau* requirements.
154 **F36** Case 002/01 AJ, para. 764; Case 001-**F28** *Duch* AJ, paras 99-104.
155 **E465** Case 002/02 TJ, para. 325.
156 As relevant to Case 002/02, *see* GC III, art. 130 and GC IV, art. 147. "Protected persons" are defined at GC III, art. 4 (prisoners of war) and GC IV, art. 4 (civilians). *See also* GCs, common article 2.

effective defence.[157] Each of his eight grounds,[158] challenging the TC's: independence and impartiality;[159] witness selection notification system;[160] decisions on using evidence admitted in Case 002/01 and the recall of witnesses;[161] assessment of evidence;[162] interpretation of the Co-Prosecutors' disclosure obligations;[163] evidence admissibility criteria and admission of evidence during trial and after the close of hearings;[164] and decision to recharacterise extermination as murder,[165] fail. They are without merit because Appellant misinterprets the law and the totality of the facts relevant to the decisions made, as well as the processes adopted on these issues to protect his fair trial rights, both before and during trial. Consequently, Appellant's argument of the cumulative effect of these alleged fair trial violations is moot.

B. RESPONSE TO GROUNDS

Ground 4: The bias or prejudice of the judiciary[166]

39. **Ground 4 should be dismissed as Appellant fails to establish that the TC erred in law by not, or not sufficiently, responding to Appellant's allegations of bias in Case 002/02 arising out of the TC issuing the Case 002/01 Judgment against Appellant.**

40. The ground fails, as Appellant incorrectly claims that the TC erred by not considering its alleged inability to set aside any bias or prejudgment after trying 002/01,[167] and in never departing from its unitary vision of the trials following the general basis of the opinion in Case 002/01.[168] As the TC correctly held,[169] this question has already been thoroughly addressed before the Special Panel of the TC[170] following the applications of Appellant

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157 **E465** Case 002/02 TJ, paras 110-157.
158 Grounds 4, 6, 7, 8, 9, 10, 14 & 23.
159 Ground 4.
160 Ground 8.
161 Ground 7.
162 Ground 14.
163 Ground 10.
164 Grounds 9 and 23.
165 Ground 6.
166 Ground 4: **F54** Appeal Brief, *The bias or prejudice of the judiciary*, paras 127-133; **F54.1.1** Appeal Brief Annex A, p. 5 (EN), p. 5 (FR), p. 5 (KH).
167 **F54** Appeal Brief, para. 127.
168 **F54** Appeal Brief, paras 128-133.
169 **E465** Case 002/02 TJ, para. 115 ("The Chamber first notes that a number of these submissions were rejected by the Special Panel of the Trial Chamber in its decision on disqualification requests.").
170 **E314/12** Special Panel TC Judges Disqualification Decision Reasons, pp. 3-4. Of the five judges appointed, Judge Rowan Downing, Judge Chang-ho Chung, Judge Huot Vuthy and Judge Prak Kimsan all belong to the PTC while Judge Thou Mony is a reserve judge from the TC, ensuring impartiality in addressing this matter.

and Nuon Chea to disqualify the judges.[171] As this issue has already been raised,[172] and dismissed,[173] it cannot be subject to appeal.[174]

41. In any event, the argument fails as Appellant does not demonstrate actual bias in the TC's reasoning in this ground, nor in other grounds where the issue is raised.[175] In order to demonstrate actual bias, Appellant must provide convincing evidence that a judge's mind is, or would be tainted by a predisposition to resolve matters that come before her or him in a prejudiced manner.[176] Appellant must show that the TC rulings are not genuinely related to the application of law or assessment of the relevant facts.[177]

42. In this ground, Appellant's argument is premised on his erroneous view that a TC which has convicted an Accused in a prior inter-related case cannot judge in an unbiased manner a subsequent case against the same Accused. The law does not support this position. Where bias allegations are based on prior judicial findings against an Accused, to determine if judicial findings prejudged the guilt of Appellant, it is important to examine whether the Judges ruled in Case 002/01 on all the elements of a Case 002/02 offence and found Appellant guilty beyond a reasonable doubt of committing that offence.[178] No bias will be found as long as the TC assesses anew whether the evidence relied upon satisfies the constitutive elements of each crime charged in Case 002/02 in relation to which criminal responsibility was not attributed in Case 002/01.[179]

43. In this case, although the charges involve the same Appellant and share some overlapping

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171 **E314/1** Khieu Samphan's Request for Reconsideration of the Need to Await Final Judgment in Case 002/01 Before commencing Case 002/02 and the Appointment of a New Panel of Trial Judges, 25 Aug. 2014; **E314/6** Nuon Chea's Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara, 29 Sept. 2014; **E314/8** Renewed Application for Disqualification of the Current Judges of the Trial Chamber Who Are to Hear Case 002/02, 10 Oct. 2014.

172 **E314/8** Renewed Application for Disqualification of the Current Judges of the Trial Chamber Who Are to Hear Case 002/02, 10 Oct. 2014, para. 10 ("The Defence also refers to the findings in the Notice of Appeal dated 29 September which lists the findings in the Judgement that will undoubtedly have an influence on Case 002/02 as they 'pre-judge' Mr Khieu Samphan's guilt based on facts in 002/02 that have not yet been debated.").

173 **E314/12/1** Special Panel TC Judges Disqualification Decision Reasons.

174 IR 34(8).

175 **F54.1.1** Appeal Brief Annex A, Grounds 2, 3, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 32, 164, 165, 166, 170, 174, 176, 181, 199, 202, 204, 206, 207, 222, 223, 244, 250, 252.

176 **F36** Case 002/01 AJ, para. 112.

177 **E314/12/1** Special Panel TC Judges Disqualification Decision Reasons, para. 36; **11** Special Panel Decision re. Six Appeal Judges, para. 119.

178 **E314/12/1** Special Panel Decision, para. 62; **11** Special Panel Decision re. Six Appeal Judges, para. 70.

179 **E301/9/1/1/3** SCC Additional Severance and Scope Decision, para. 85; **E314/12/1** Special Panel TC Judges Disqualification Decision Reasons, para. 96; **11** Special Panel Decision re. Six Appeal Judges, paras 71, 82.

issues, Case 002/01 and 002/02 are substantially different.[180] Moreover, the Case 002/01 Judgment does not address the ultimate issue of the responsibility of Appellant in relation to the charges raised in Case 002/02.[181] It is insufficient for Appellant to simply claim that the TC ruled in the same way on matters similar to those on which it had already ruled in Case 002/01 to demonstrate the existence of bias.[182]

44. More specifically, in this ground, Appellant attempts to illustrate this bias by only one specific example, that in Case 002/01 "the Chamber had already made a decision" in relation to the CPK's forced marriage policy.[183] Appellant's argument as to bias fails, however, as he mischaracterises the Case 002/01 TC's findings, which, consistent with the TC's evidentiary analysis,[184] relate to a broader policy of "regulation" of marriage,[185] not "forced" marriage as Appellant alleges.[186] Further, the finding cannot constitute pre-judgment, being merely relevant to the "background" of Case 002/01,[187] distinct from the question of "criminal responsibility" for forced marriage raised in Case 002/02.[188] Indeed, the TC clearly stated in Case 002/01 that "evidence concerning the nature and implementation of the policy of regulation of marriage, and its extent will be the subject of Case 002/02."[189] Nonetheless, the argument fails considering the reasoned decision-making demonstrated by the TC in Case 002/02 in finding the existence of a policy of regulation of marriage.[190]

Ground 8: Decisions about appearances made as the trial progressed[191]

45. **Ground 8 should be dismissed as Appellant fails to establish the TC abused its discretion by not deciding on all appearances at the commencement of an over two-year trial, and by allegedly failing to give timely and sufficient reasons for decisions on appearances during trial.**

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180 **E314/12/1** Special Panel TC Judges Disqualification Decision Reasons, para. 93; **E301/9/1/1/3** SCC Additional Severance and Scope Decision para. 82, fn. 196; **11** Special Panel Decision re. Six Appeal Judges, para. 71.
181 **E314/12/1** Special Panel TC Judges Disqualification Decision Reasons, para. 94.
182 **F54** Appeal Brief, paras 129, 131.
183 **F54** Appeal Brief, para. 130.
184 **E313** Case 002/01 TJ, paras 128-129.
185 **E313** Case 002/01 TJ, para. 130.
186 **F54** Appeal Brief, para. 130.
187 **E313** Case 002/01 TJ, para. 103, fn. 287 ("The existence of other policies is examined for background purposes only. Their implementation will be the subject of future trials.").
188 **E301/9/1** TC Additional Severance and Scope Decision. p. 21.
189 **E313** Case 002/01 TJ, para. 130.
190 *See* response to Grounds 160-174.
191 Ground 8: **F54** Appeal Brief, *Decisions about appearances made as the trial progressed*, paras 175-181; **F54.1.1** Appeal Brief Annex A, p. 6 (EN), p. 6 (FR), pp. 7-8 (KH).

46. Appellant wrongly argues that (i) the TC abused its discretion on matters related to the conduct of trial by failing to decide on witness appearances at the commencement of the trial;[192] and (ii) this alleged abuse of discretion resulted in prejudice to Appellant's rights to an expeditious trial, adequate time and facilities to prepare a defence, and legal and procedural certainty.[193] Further, Appellant argues that (iii) the TC abused its discretion by failing to give timely and adequate reasons for decisions made on appearances during the trial;[194] and (iv) this resulted in prejudice to Appellant's rights to reasoned decisions and to be informed of the nature of the grounds against him.[195] Appellant has failed to prove there was a discernible error in exercise of discretion or that the error prejudiced Appellant.[196]

47. First, Appellant erroneously argues that the TC abused its discretion by failing to provide a comprehensive list of witnesses to appear at the commencement of the trial.[197] This argument fails, however, considering the deference given to the TC's discretion,[198] especially in a case of this size and complexity,[199] and Appellant's failure to demonstrate any error in the TC's reasoning. Indeed, as explained by the TC, the phased approach was adopted due to the "unpredictability of whether witnesses contacted at the beginning of trial will be available to testify on a date far in the future and the limited resources of the Witness and Expert Support Unit to contact every proposed individual".[200] Therefore, providing a comprehensive list of all witnesses before trial, as Appellant wished, was "impracticable and unnecessary to the proper administration of these proceedings".[201]

48. Second, Appellant incorrectly argues the alleged abuse of discretion resulted in prejudice to his fair trial rights.[202] Since, however, Appellant fails to show an abuse of discretion, any delay caused by the phased approach cannot be considered "unnecessary", nor can

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192 **F54** Appeal Brief, paras 176, 177.
193 **F54** Appeal Brief, paras 177, 181.
194 **F54** Appeal Brief, paras 176, 179-180.
195 **F54** Appeal Brief, paras 179-181.
196 **F36** Case 002/01 AJ, paras 97-98, 100.
197 **F54** Appeal Brief, paras 176-177.
198 **F36** Case 002/01 AJ, para. 133.
199 *See e.g.* **F36** Case 002/01 AJ, paras 94, 103, 286; **E51/14** TC Internal Rules Decision, para. 9; **E301/9/1/1/3** SCC Additional Severance and Scope Decision, para. 59; **E459** TC Witness, Civil Parties, and Experts Decision, para. 13.
200 **E363/3** TC Disclosure Obligations Decision, para. 26. *See also* **E315** TC Trial Sequencing Decision, para. 7 ("Further, the sequencing [...] of witnesses is subject to modification depending on *inter alia,* case management needs and/or availability of witnesses, civil parties and experts, as well as health of the Accused.").
201 **E363/3** TC Disclosure Obligations Decision, para. 26.
202 **F54** Appeal Brief, paras 176-178.

any legal or procedural uncertainty be prejudicial.[203] Appellant further argues he had "difficulties created by the lack of short- and long-term visibility on its preparation" but does not even attempt to demonstrate any specific instances.[204] Regardless, where there was *potential* for unfairness, the TC flexibly adopted appropriate safeguards. For example, in one instance giving rise to possible uncertainty and inadequate preparation time, the TC elected to communicate a combined witness list for the Treatment of the Vietnamese and the Cham, departing from its usual practice of publishing the lists prior to the commencement of each trial segment.[205]

49. Contrary to Appellant's claim that the TC limited his short and long term ability to prepare for the trial, the TC provided a clear order of the subject matter of the segments of the trial four months before the evidentiary hearings commenced.[206] Regarding his short term ability to prepare for the exact witnesses to testify, as Appellant acknowledges, the TC notified all parties in advance of each segment.[207] This gave Appellant adequate time to prepare for questioning of the witnesses, particularly as they were selected from lists submitted by the parties to the TC much earlier in the pre-trial process. Moreover, Appellant fails to demonstrate that the timing of the provision of those specific lists by the TC in advance of each trial segment did not give him sufficient time to prepare for questioning of these specific witnesses.[208]

50. Third, Appellant argues without merit that the TC abused its discretion by failing to give timely and adequate reasons for its decisions on appearances throughout the trial.[209] The TC's obligation to give reasons, however, is not absolute, nor does it require the TC to articulate every step in its reasoning.[210] In any event, this argument fails due to the extensive and timely reasoning provided by the TC in relation to appearances admitted under IR 87(4).[211] Contrary to Appellant's argument that the reasoning did not provide adequate information,[212] in explaining, *inter alia,* relevance to "ascertainment of the truth" and "repetitive" nature of evidence,[213] the TC applied the correct legal standard

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203 **F54** Appeal Brief, para. 177.
204 **F54** Appeal Brief, para. 177.
205 **E364/1.1** TC Combined Witness List Notification Email.
206 **E465** Case 002/02 TJ, 12-13.
207 **E465** Case 002/02 TJ, 176.
208 **F54** Appeal Brief, para. 175-181.
209 **F54** Appeal Brief, paras 179-181.
210 **F36** Case 002/01 AJ, paras 304, 349.
211 **E459** TC Witness, Civil Parties, and Experts Decision, paras 22-194.
212 **F54** Appeal Brief, para. 180.
213 *See* **E459** TC Witness, Civil Parties, and Experts Decision, paras 9-10, 18, 30-40, 52-60, 76-89, 105-144, 152-161, 178-186, 190-194.

under IR 87(4),[214] consequently no prejudice is established.

51. Further, Appellant's assertion of error in discretion due to delayed provision of reasons[215] fails, as he ignores the impractical nature of preparing reasons for selection of witnesses considering an uncertain witness list subject to rapid change. In any event, Appellant does not establish any prejudice in the TC's delayed reasons for decisions as those reasons did not impact on his ability to prepare for trial. Consequently, the requisite unreasonableness or unfairness is not demonstrated.[216]

52. Fourth, Appellant argues the TC's abuse of discretion resulted in prejudice to his right to a reasoned decision and to be informed of the nature of the charges against him. Appellant's argument fails because there was no insufficiency or unreasonable delay in provision of reasons.[217] Regardless, Appellant has not demonstrated prejudice due to any delay in reasoning as, contrary to Appellant's argument,[218] the Case 002/02 TC's *saisine* in relation to "internal purges" was clear throughout the trial both within the IS and this Chamber's Severance Order.[219]

Ground 7: Illustration from an evidentiary perspective[220]

53. **Ground 7 should be dismissed as Appellant fails to establish that the TC erred in law by unduly relying on evidence from Case 002/01 or abused its discretion by failing to recall witnesses Stephen Heder, François Ponchaud and Philip Short.**

54. Appellant wrongly argues that the TC erred in law by (i) relying on analyses of evidence undertaken in Case 002/01 to make conclusions in Case 002/02;[221] (ii) giving undue weight to testimony transcripts from Case 002/01;[222] (iii) relying on testimony from Case 002/01 without taking into account that the relevant witnesses had not been cross-examined;[223] and (iv) erred in exercising its discretion under IRs 87(3) and 87(4) by failing to recall Stephen Heder, François Ponchaud and Phillip Short.[224] Further, Appellant asserts the TC's errors caused him prejudice as the first error impinged on his

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214 *See* response to Ground 9.
215 **F54** Appeal Brief, para. 179.
216 **F36** Case 002/01 AJ, para. 97.
217 *See* response above.
218 **F54** Appeal Brief, para. 179.
219 *See* response to Ground 58; **E301/9/1/1/3** SCC Additional Severance and Scope Decision, paras 74-75.
220 Ground 7: **F54** Appeal Brief, *Illustration from an evidentiary perspective*, paras 158-174; **F54.1.1** Appeal Brief Annex A, p. 6 (EN), p. 6 (FR), pp. 6-7 (KH).
221 **F54** Appeal Brief, para. 159.
222 **F54** Appeal Brief, paras 161-162.
223 **F54** Appeal Brief, paras 163-171.
224 **F54** Appeal Brief, paras 166-171.

right to a reasoned judgment,[225] and the second, third and fourth errors undermined his rights to an adversarial trial, equality of arms and to have his case heard.[226]

55. Appellant fails as he generalises from an incorrect claim that the TC erred in law and fact by not re-analysing evidence from Case 002/01.[227] Contrary to Appellant's sole example, Appellant's argument that the TC erroneously attributed to him a speech made between 11 and 13 April 1976 at the PRA[228] does not warrant appellate intervention as it had no impact on the verdict. One instance of such error would be inadequate to demonstrate a general pattern of failure, especially since it can be explained by mere oversight in such a complex trial.[229]

56. Second, Appellant fails to demonstrate the TC erred in law in its assessment of the weight of transcripts of testimony heard in Case 002/01.[230] Not only does Appellant's contention lack any legal support,[231] he relies on the false assumption that he possesses an absolute right to cross-examine.[232] Further, the SCC has stated that, until 23 July 2013, the hearing was a "single (formally speaking) main hearing" for Case 002 as a whole, meaning evidence heard in Case 002/01 did not require formal repetition in Case 002/02.[233] Moreover, informally, severance does not affect probative value of testimony heard in Case 002/01 as the evidence was led by the same parties, subject to cross-examination by the same parties, and heard by the same judges in both cases.[234] In any event, Appellant does not attempt to demonstrate how this error invalidates the Judgment.[235]

57. Third, Appellant fails to substantiate any legal error in the TC's alleged failure to take into account a lack of cross-examination when assessing probative value.[236] Appellant misinterprets (i) the permissible scope of examination in Case 002/01; and (ii) the TC's reasoning in Case 002/02.[237] According to the SCC, until 23 July 2013 – when the cases became definitively severed – all evidence was common to the entirety of Case 002,[238]

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225 **F54** Appeal Brief, paras 159, 174.
226 **F54** Appeal Brief, paras 160, 174.
227 **F54** Appeal Brief, para. 159.
228 *See* response to Ground 17; *contra* **F54** Appeal Brief, paras 1699-1700.
229 *See e.g.* **F36** Case 002/01 AJ, para. 1023.
230 **F54** Appeal Brief, paras 161-162.
231 *See* **F54** Appeal Brief, paras 161-162; **E457/6/4/1** KS Case 002/02 Closing Brief, paras 552-556.
232 *See e.g.* **F36** Case 002/01 AJ, paras 133, 285-287 ("The right to cross-examine is fettered by, *inter alia*, expeditiousness of proceedings.").
233 **E301/9/1/1/3** SCC Additional Severance and Scope Decision, para. 74.
234 **E301/9/1/1/3** SCC Additional Severance and Scope Decision, para. 75.
235 *See* Standard of Review (Errors of Law).
236 **F54** Appeal Brief, paras 163-171.
237 **F54** Appeal Brief, paras 163-171.
238 **E301/9/1/1/3** SCC Additional Severance and Scope Decision, para. 74.

and not just "the subject of Case 002/01", as Appellant incorrectly assumed.[239] Instead, Appellant's decision to not cross-examine in relation to Case 002 as a *whole* was strategically taken despite being legally permitted to do so. Every witness who Appellant states he *chose* not to cross-examine testified before 23 July 2013 and thus, Appellant had no reason to limit his questioning to Case 002/01.[240] Appellant's misrepresentation of his opportunity to cross-examine is illustrated by the fact that the impugned witnesses only testified in relation to Buddhist policy for very limited periods of time.[241] Contrary to Appellant's argument,[242] cross-examination on such limited material would not have required substantial allocation of the overall time available to Appellant for witness examination. In fact, instead Appellant repeatedly chose not to cross-examine certain witnesses *at all*,[243] rendering moot whether he could have allocated time to Case 002/02 issues.[244] However, when Yun Kim testified on Buddhist policy[245] (11 mins 15 secs), Appellant also chose to cross-examine him on the issue (5 mins 20 secs).[246] Thus, any prejudice caused by such lack of cross-examination is tempered by the fact that Appellant had the *opportunity* to cross-examine if he so wished but chose not to do so.

58. Moreover, Appellant fails to show the TC erred in discharging its obligation to address lost opportunities to cross-examine[247] as a result of a shifted focus of proof after 23 July 2013.[248] For instance, contrary to Appellant's arguments,[249] the TC considered whether parties had had an opportunity to question Chhaom Se in Case 002/01 before relying on his testimony.[250] Moreover, Appellant ignores that the TC is not required to state every

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239 **F54** Appeal Brief, paras 164-165.

240 **F54** Appeal Brief, para. 164, fn. 186. The witnesses referred to and their respective testimony *dates* were: Em Oeun (23 August 2012), Pean Khean (2 May 2012), Yun Kim (19, 20 June 2012), Khiev En (1 Oct. 2012), Hun Chhunly (6, 7 Dec. 2012), Pin Yathay (7 Feb. 2013), Nou Mao (19 June 2013), Sim Hao (12 June 2013), Ong Thong Hoeung, Klan Fit (6 Dec. 2011), Kim Vannady (6 Dec. 2012), Sophan Sovany (30 May 2013).

241 **F54** Appeal Brief, para. 164, fn. 186. The witnesses referred to and their respective testimony *lengths* in relation to Buddhist policy were: Em Oeun (3 mins 14 secs), Pean Khean (4 mins 59 secs), Yun Kim (19 mins 11 secs), Khiev En (7 mins 44 secs), Hun Chhunly (4 mins 52 secs), Pin Yathay (5 mins), Nou Mao (4 mins 59 secs), Sim Hao (4 mins 50 secs), Ong Thong Hoeung (2 mins 23 secs), Klan Fit (4 mins 1 sec), Kim Vannady (2 mins 42 secs), Sophan Sovany (2 mins 17 secs).

242 **F54** Appeal Brief, paras 164-165.

243 *See e.g.* **E1/128.1** Khiev En, T. 2 Oct. 2012, 14.00.24-14.00.54, p. 68, lines 10-13. *See also* **E1/17.1** Klan Fit, T. 6 Dec. 2011; **E1/149.1** Kim Vannady, T. 6 Dec. 2012; **E1/199.1** Sophan Sovany, T. 30 May 2013.

244 **F54** Appeal Brief, para. 164.

245 **E1/88.1** Yun Kim, T. 19 June 2012, 11.38.41 – 11.49.56, p. 50, line 4-p. 53, line 7.

246 **E1/89.1** Yun Kim, T. 20 June 2012, 14.01.31- 14.06.51, p. 76, line 19- p. 78, line 3.

247 **F54** Appeal Brief, paras 163-171.

248 **E301/9/1/1/3** SCC Additional Severance and Scope Decision, para. 75.

249 **F54** Appeal Brief, para. 163.

250 *See e.g.* **E465** Case 002/02 TJ, para. 2860 ("The Chamber in Case 002/01 permitted certain questions to be put to the witness that were directly or incidentally relevant to the scope of Case 002/02. Insofar as the

element of its reasoning when assessing evidence,[251] and the evidence of each impugned witness was cited amidst a plurality of corroborating evidence.[252] Specifically, amongst 25 testimonies supporting the finding that monks were defrocked post-1975, only six testimonies were from Case 002/01; the remaining 19 were heard during Case 002/02.[253] Further, in relation to the destruction of pagodas, only three of seven testimonies cited were from Case 002/01 witnesses,[254] and for the repurposing of pagodas, only six of 20 testimonies cited were from Case 002/01 witnesses.[255] Similarly, to support the finding that Buddhist worship was banned, including rituals and traditions, the TC cited only six Case 002/01 testimonies from 16 total testimonies relied upon.[256]

59. Fourth, Appellant fails to show discernible error in the TC's exercise of discretion in its decision not to recall Stephen Heder, François Ponchaud and Philip Short.[257] While the TC's exercise of discretion in relation to recalling witnesses is primarily governed by IRs 87(3) and 87(4), the TC also considered whether parties had sufficient opportunity to question the proposed person in Case 002/01.[258]

60. Appellant incorrectly asserts the TC did not consider his inability to examine François Ponchaud and Stephen Heder in its decision not to recall them.[259] In rejecting the witnesses as repetitious under IR 87(3)(a), the TC not only listed the areas relevant to Case 002/02 on which the impugned witnesses had *already* testified in Case 002/01 but particularly noted the significant duration of questioning,[260] thereby addressing whether Appellant had sufficient opportunity to cross-examine both witnesses. Further, the selection of Stephen Morris as an expert on armed conflict was within the discretion of the TC.[261] Considering that Stephen Heder had already been heard by the TC[262] prior to the impugned decision,[263] the decision not to recall was clearly reasonable.

61. Further, Appellant misinterprets the substantive material cited in support of his claim that

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substance of these responses was open to examination by the Parties in court, the Chamber has relied upon the witness' responses in making findings in this section."); *See also* response to Ground 128.

251 **F36** Case 002/01 AJ, paras 304, 349.
252 **E465** Case 002/02 TJ, paras 4015-4017, fns 13300-13314, 3679.
253 **E465** Case 002/02 TJ, para. 4015, fn. 13300.
254 **E465** Case 002/02 TJ, para. 4015, fn. 13301.
255 **E465** Case 002/02 TJ, para. 4015, fns 13302-13306.
256 **E465** Case 002/02 TJ, para. 4015, fns 13307-13310.
257 **F54** Appeal Brief, paras 166-171.
258 **E302/5** TC Directive on Recall Procedure, para. 8.
259 **F54** Appeal Brief, paras 167-169.
260 **E408/6/2** TC Decision on Hearing Stephen Heder and François Ponchaud, paras 5-6.
261 *See e.g.* IRs 31(1), 80*bis*, 87(3).
262 *See* **E485.1** Stephen Morris, T. 18 Oct. 2016; **E486.1** Stephen Morris, T. 19 Oct. 2016; **E487.1** Stephen Morris, T. 20 Oct. 2016.
263 **E408/6/2** TC Decision on Hearing Stephen Heder and François Ponchaud.

the TC erred by not recalling Philip Short.[264] In asserting that the TC had revoked the permission to examine Philip Short broadly, Appellant incorrectly states an inconsistency in the TC's jurisprudence.[265] The TC's directions consistently required the parties to focus on material relevant to Case 002/01 but permitted going beyond scope if an issue was within the expert's unique area of expertise.[266] The requirement to question within the unique area of expertise was justified, as the probative value of the testimony will be maximised within this sphere.[267] It was further reasonable because experts cannot testify as to ultimate issues of law, which are reserved for the court.[268] Indeed, contrary to Appellant's arguments,[269] the curtailing of Philip Short's testimony[270] and the TC's refusal to admit certain documents,[271] both in relation to genocide, are not explained solely by irrelevance to Case 002/01.

62. Appellant fails to establish the second, third and fourth arguments; thus, Appellant's right to be heard, to equality of arms and to an adversarial trial are not undermined. It is of significance to note the SCC's clarification of what is meant by adversarial trial, adversarial proceedings:

> the principle of adversarial proceedings requires foremost that all Parties are given an opportunity to comment on the evidence adduced

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264 **F54** Appeal Brief, paras 170-171.

265 **F54** Appeal Brief, para. 170.

266 *Compare* **E215** TC Case 002/01 Experts Decision, para. 4 ("However, in view of the Chamber's concern to ensure the conduct of a speedy trial and the fact that previous waivers to questioning beyond the confines of the first trial have frequently led to lengthy questioning, the parties are reminded that their questions should continue to focus on matters relevant to the first trial. *Questions beyond this scope should be limited to those areas where the party considers that the applicant is the only person capable of providing answers.*") (emphasis added); **E459** TC Witness, Civil Parties, and Experts Decision, para. 193 ("The Chamber notes that Philip Short TCE 92 was among the experts proposed prior to the severance of Case 002 and it therefore *allowed for more extensive questioning within his unique area of expertise* in order to avoid recalling him unnecessarily.") (emphasis added); **E1/189.1** Philip Short, T. 6 May 2013, 09.03.00-09.06.02, p. 1, lines 13-23 ("regarding the expert witness Philip Short, that he could be questioned on all the areas that is able to be responded by him according to his knowledge. The Trial Chamber in fact encourages all the parties to question the expert based on the severance of Case 002 [...]. *So the scope for questioning of this witness is rather extensive within Case 002*. However all the parties should focus their questioning on the relevant part of the severed cases, in particular 002/01.") (emphasis added).

267 **F36** Case 002/01 AJ, para. 328 ("(ii) when testifying to issues outside their expertise, their testimony "will be treated as personal opinions of the witness and will be weighed according" (suggesting that it may still be considered by the trier of fact).").

268 **F36** Case 002/01 AJ, paras 328-329. *See also* **E312** Response by Co-Prosecutors to Rule 87 Requests by Ieng Sary and Nuon Chea to use Material During the Examination of Philip Short, 5 September 2012, para. 2; **F36** Case 002/01 AJ, para. 130 ("Upon review of the documents concerned and of the Trial Chamber's Decisions [E260], the Supreme Court Chamber finds that the rejection of Nuon Chea's request was not unreasonable.").

269 **F54** Appeal Brief, para. 170.

270 **E1/189.1** Philip Short, T. 6 May 2013, 11.52.32-11.54.06, p. 59, lines 15-19.

271 **E260** TC Response to Rule 87(4) Requests for Documents Related to Witness and Expert Testimonies, paras 7-8.

> at trial and on the opposing party's submissions, with a view to influencing the court's decision. This principle does not require that such an opportunity be given at a particular time during the proceedings, for instance, before evidence is admitted. Nor does the principle require that a party actually make submissions in relation to a given piece of evidence, as long as each party had an opportunity to do so.[272]

Ground 14: Distortion/misrepresentation of evidence[273]

63. **Ground 14 should be dismissed as Appellant fails to establish that the TC erred in law or fact by misrepresenting and distorting the evidence.**

64. Appellant wrongly asserts that the TC misrepresented or distorted specific evidence as a result of its allegedly biased approach to evidence, thus invalidating findings reliant on the impugned evidence.[274] Primarily, Appellant relies on other paragraphs of his brief to demonstrate instances of alleged distortion[275] in relation to implementation of marriage regulations,[276] forced marriage as a policy,[277] Appellant's documents, speeches,[278] and trial testimony.[279] These examples remain inadequate, however, as they do not go beyond Appellant's disagreement with the TC's analysis. Taking a holistic view of the evidence and recalling the TC's discretion in assessing the probative value of evidence, the response to Ground 27 herein clearly demonstrates Appellant's failure to demonstrate any misrepresentation or distortion of the evidence leading to an invalidation of the relevant portion of the Judgment[280] or actual miscarriage of justice.[281]

65. Further, Appellant provides only one example to substantiate his claim: the TC's erroneous attribution to Appellant of the DK Assembly's inaugural speech of 11 April 1976.[282] Appellant's argument does not warrant appellate intervention as it is unsubstantiated and has no impact on the verdict. He does not substantiate why this error goes beyond a mere oversight in the Judgment of a complex trial.[283] The impugned

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272 **F36** Case 002/01 AJ, para. 185. At para. 495, the SCC also found that there was no breach of this principle in the TC's reliance on a WRI instead of in-court testimony where the TC carefully assessed the evidence and provided a reasoned opinion on why it relied on that evidence.

273 Ground 14: **F54** Appeal Brief, *Distortion/misrepresentation of evidence*, paras 232-233; **F54.1.1** Appeal Brief Annex A, p. 9 (EN), p. 8 (FR), p. 12 (KH).

274 **F54** Appeal Brief, paras 232-233.

275 **F54** Appeal Brief, para. 233, fn. 312 *citing* para. 257.

276 **F54** Appeal Brief, para. 1244.

277 **F54** Appeal Brief, paras 1395-1398.

278 **F54** Appeal Brief, paras 1526-1535.

279 **F54** Appeal Brief, paras 1536-1540.

280 *See* Standard of Review (Errors of Law).

281 *See* Standard of Review (Errors of Fact).

282 **F54** Appeal Brief, para. 233.

283 **F36** Case 002/01 AJ, para. 129.

speech was part of a voluminous set of speeches and meetings relied upon by the TC to make the ultimate findings that a common purpose existed,[284] and that Appellant shared this common purpose.[285] Thus, the requisite criticality of the impugned speech to the ultimate verdict[286] and its potential to invalidate the Judgment[287] is absent, occasioning no invalidation or actual miscarriage of justice.

66. Moreover, Appellant attempts to link alleged misrepresentations from Case 002/01 to show continuous bias in the TC's approach to evidence that pervaded Case 002/02.[288] This argument fails, however, as any assessment of evidence in Case 002/01 is irrelevant because Appellant has completely failed to show pre-judgment by the TC.[289]

67. In any event, Appellant does not demonstrate that, if the error occurred, it was critical to the verdict reached nor has it occasioned an actual miscarriage of justice.[290]

Ground 10: Materials from Case Files 003 and 004[291]

68. **Ground 10 should be dismissed as Appellant fails to establish that the TC erred in law by misinterpreting the Co-Prosecutors' disclosure obligations under IR 53(4), or that the TC abused its procedural discretion in its disclosure decisions.**

69. Appellant erroneously argues that the TC (i) erred in law by misconstruing the Co-Prosecutors' obligations to disclose under IR 53(4);[292] and (ii) abused its discretion by allowing voluminous disclosure from Case 003 and 004 investigations with "late" and "insufficient" safeguards, resulting in undue delay and inadequate preparation time.[293]

70. Appellant argues the TC erred in law by failing to direct "the Prosecution to introduce only potentially exculpatory material in the future" as allegedly required by IR 53(4).[294] This argument fails, as Appellant erroneously interprets IR 53(4). The SCC has stated that IR 53(4) requires the Co-Prosecutors to disclose all material that is exculpatory or may affect reliability of evidence, including prior witness statements which may affect

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284 **E465** Case 002/02 TJ, paras 3734-3743.
285 **E465** Case 002/02 TJ, paras 3734, 3736-3737, 3739-3743.
286 Case 001-**F28** *Duch* AJ, para. 19.
287 **F36** Case 002/01 AJ, para. 99.
288 **F54** Appeal Brief, para. 233.
289 *See* response to Ground 4.
290 *See* Standard of Review (Errors of Law and Errors of Fact).
291 Ground 10: **F54** Appeal Brief, *Materials from case files 003 and 004*, paras 198-215; **F54.1.1** Appeal Brief Annex A, p. 8 (EN), p. 7 (FR), pp. 9-10 (KH).
292 **F54** Appeal Brief, paras 198-201, 211-215.
293 **F54** Appeal Brief, paras 198, 202-203, 205, 208-209, 215.
294 **F54** Appeal Brief, para. 201.

credibility.[295] As disclosure under IR 53(4) has no bearing on admission of evidence[296] and therefore the basis on which the Judgment could be made, his argument that the TC's decision to allow disclosure invalidated the verdict has no merit.

Ground 9: Disregard for the exceptional character of Rule 87-4[297]

71. **Ground 9 should be dismissed as Appellant fails to establish that the TC erred in law in admitting "excessive amounts" of new evidence during the trial.**

72. Appellant wrongly argues that (i) the TC erred in law by ignoring the exceptional nature of IR 87(4),[298] allowing for the admission of new evidence which led to subsequent errors in the TC's exercise of discretion,[299] and (ii) this error resulted in extraneous evidence being admitted, causing undue delay, uncertainty, and denying Appellant adequate time to prepare his defence. To warrant appellate intervention, Appellant has to prove there was both a discernible error in the TC's exercise of its discretion and that the error prejudiced Appellant.[300] Appellant has failed to establish both conditions.

73. First, Appellant argues the TC erred in exercising its discretion under IR 87(4).[301] He fails to substantiate the claim, however, and misinterprets the limited jurisprudence cited on IR 87(4).[302] Fundamentally, by incorrectly framing IR 87(4) as exceptional, Appellant ignores the flexible nature of IR 87(4), which justifies discretionary admission.[303]

74. Appellant erroneously interprets exceptions to IR 87(4) as rendering the rule itself exceptional in nature.[304] In interpreting the TC Directive on Witness Lists and Admissibility Challenges,[305] Appellant wrongfully reads the interests of justice test into IR 87(4),[306] when the SCC in that case in fact clarified that the interests of justice test is

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295 **F2/4/2** SCC Decision on Part of NC's Third Additional Appeal Evidence Request, para. 17.
296 **E363/3** TC Disclosure Obligations Decision, para. 36. (The TC clarifies that admission can be sought directly by the parties without disclosing under IR 53(4): "The Chamber […] shall rely on the Co-Prosecutors' discretion […] to determine for which documents admission should be sought directly, pursuant to Internal Rule 87(4).").
297 Ground 9: **F54** Appeal Brief, *Disregard for the exceptional character of Rule 87-4,* paras 182-197; **F54.1.1** Appeal Brief Annex A, p. 8 (EN), p. 7 (FR), pp. 8-9 (KH).
298 **F54** Appeal Brief, paras 182-188.
299 **F54** Appeal Brief, paras 189-196.
300 **F36** Case 002/01 AJ, paras 97-98, 100.
301 **F54** Appeal Brief, paras 183-189.
302 **F54** Appeal Brief, paras 187-188.
303 **F36** Case 002/01 AJ, para. 174; **E313** Case 002/01 TJ, para. 24; **E319/7** TC Decision on Admission of TKC and KTC Documents and Case 003 & 004 WRIs, para. 8.
304 **F54** Appeal Brief, paras 187-188.
305 **E131/1** TC Directive on Witness Lists and Admissibility Challenges, p. 4, EN 00747686.
306 **F54** Appeal Brief, paras 187-188.

an exception when "conditions of IR 87(4) [are] not fulfilled".[307] In addition, Appellant mischaracterises Case 002/02 practice when he alleges the TC evaluated admissibility "without reference to IR 87(4)" but on an "exceptional basis" to avoid undue delay.[308] Finally, Appellant incorrectly equates a high threshold requirement for IR 87(4)[309] with its exceptional nature without any legal support other than arguing erroneously that admitting newly discovered evidence during trial after a long investigation and pre-trial phase would not allow the parties to prepare for trial.[310]

75. To satisfy IR 87(4), *parties* must demonstrate the new evidence was not available and/or could not have been discovered with due diligence prior to the trial, and that the evidence is conducive to ascertaining the truth.[311] The TC may reject any evidence that does not satisfy IR 87(3), i.e., it must be "*prima facie* relevant and reliable".[312] Appellant's claims that the TC "drastically departed from this jurisprudence"[313] fails to consider the broad discretion conferred upon the TC by IR 87(4).[314] In this case, the TC properly exercised this discretion within legal limits. Contrary to Appellant's claim that the TC "automatically admitted documents *en masse*" by erroneously equating relevance and utility to the ascertainment of truth,[315] the TC not only provided clear reasoning but also applied the correct legal test: "new evidence must appear *prima facie* relevant to the ascertainment of the truth".[316]

76. Appellant further erroneously argues that admitting new evidence was not necessary due to the voluminous nature of pre-existing evidence,[317] and alleges that, because the new

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307 **F36** Case 002/01 AJ, paras 173-174. *See also* **E307/1** TC Decision on the Application of Rule 87(4), para. 3 ("the Chamber has in the past *exceptionally* admitted new evidence which does not satisfy the [IR] 87(4) criteria where the interests of justice so require") (emphasis added). *See e.g.* **E363/3** TC Disclosure Obligations Decision, paras 28, 30; **E357/1** TC Decision on Sector 5 Document Corrections, para. 2; **E276/2** TC Response to Rule 87(4) Requests, para. 2.

308 **E307/1/2** TC Decision on Request for *de novo* Ruling on the Application of Rule 87(4), paras 10-11 (The TC stated it would be impractical to justify "the failure to include [the large volume of] documents in their 2011 lists.").

309 **E307/1** TC Decision on the Application of Rule 87(4), para. 3.

310 **F54** Appeal Brief, paras 187-188.

311 **E313** Case 002/01 TJ, para. 25.

312 **E313** Case 002/01 TJ, para. 26.

313 **F54** Appeal Brief, para. 189.

314 **F36** Case 002/01 AJ, paras 175 (SCC reads IR 80(3) together with IR 87 to note IR 80(3) is a "managerial tool that does not seek to exclude any piece or category of evidence"), 174 (IR 87(4) is a tool to balance "the needs of proper trial management with flexibility when required to ensure fair proceedings"). *See also* **F36** Case 002/01 AJ, para. 174 ("Internal Rule 39, [...] grants the Chambers wide discretion in determining the consequences of deadlines [which] are set by Chambers"); **E319/7** TC Decision on Admission of TKC and KTC Documents and Case 003 & 004 WRIs, para. 8; **E313** Case 002/01 TJ, para. 24.

315 **F54** Appeal Brief, para. 189.

316 **E313** Case 002/01 TJ, para. 25, fn. 64; **E190** TC New Documents Decision, fn. 38; Case 001-**E5/10/2** TC New Materials Admissibility Decision, para. 6.

317 **F54** Appeal Brief, para. 190.

evidence was ultimately not relied upon, it was not "crucial" or "essential" to the interests of justice.[318] Stemming from Appellant's wrongful reading of IR 87(4) referred to above, this argument fails to consider both the TC's discretion in admitting evidence and that, as IR 87(4) was satisfied, the interests of justice test is irrelevant.[319] Further, whether the evidence was ultimately referred to in the Judgment is an improper exercise of hindsight to undermine the exercise of broad judicial discretion, especially as the TC is not required to refer to all evidence relied upon.[320]

77. Appellant's argument that the TC should have employed "heightened scrutiny" in admitting evidence throughout the trial, not just near the end, is also without merit.[321] Appellant fails to appreciate the rationale behind the TC's 28 June 2016 memorandum, which was issued solely due to the temporal proximity to the conclusion of the trial to ensure Appellant was not overwhelmed by uncertainty and had adequate time to respond to any new evidence admitted.[322]

78. As to Appellant's second argument, he fails to demonstrate that the alleged TC error in applying IR 87(4) caused undue delay, uncertainty, or denial of his right to have adequate time to prepare his defence. Appellant had adequate time between the admission of evidence and the end of trial, as the instances of prejudicial admissions Appellant relies on occurred well before the conclusion of trial.[323] Further, Appellant's implicit position that admitting, *inter alia,* "entire books at the end of trial" caused *undue* delay[324] cannot establish the requisite prejudice, as he has not demonstrated an erroneous admission or insufficiency of time to respond.[325] Finally, time spent by Appellant in opposing applications by the Co-Prosecutors[326] is not in itself a reason for the TC to intervene, but

318 **F54** Appeal Brief, para. 196.
319 **F54** Appeal Brief, para. 190.
320 *See* **F36** Case 002/01 AJ, paras 349, 352.
321 **F54** Appeal Brief, para. 192.
322 **E319/47/3** TC Decision on 87(3) and 87(4) WRI Admission, para. 23 ("The value that additional evidence may have in ascertaining the truth must be weighed against the uncertainty created by allowing the admission of large amounts of new evidence near the close of the proceedings when other parties may not have a sufficient opportunity to assess and respond to the information.").
323 **F54** Appeal Brief, para. 189. The dates were 24 December 2014, 8 April 2015, 17 July 2015, 18 February 2016 and 25 May 2016 – significantly prior to the conclusion of the substantive hearings on 11 January 2017.
324 **F54** Appeal Brief, para. 194.
325 **F54** Appeal Brief, para. 194; **E431/5** TC Written Reasons for Kasumi Nakagawa Decision and Admission of Documents, paras 26-28 (That is especially so when the TC reasoned admitting the book was in the interests of justice due to the updates, recent publication and value in assessing credibility, especially as it pre-existed in the case file as required by IR 87(3)).
326 **F54** Appeal Brief, para. 196.

is a result of the right of the Co-Prosecutors to make applications under IR 87(4).[327]

Ground 23: Prior/subsequent statements[328]

79. **Ground 23 should be dismissed as Appellant fails to demonstrate the TC abused its discretion by not admitting disclosed statements by Ek Hen and Chuon Thy during the deliberation phase of Case 002/02.**

80. Appellant wrongly argues that (i) the TC erred in law by abusing its discretion by not re-opening the proceedings to admit the Written Records of Interview ("WRIs") of Ek Hen and Chuon Thy;[329] and (ii) the TC's error caused prejudice to Appellant as he lost the opportunity to orally contest the findings based on testimony from those witnesses.[330]

81. First, Appellant argues the TC erred in law by departing from its own jurisprudence, which imposed an obligation to admit all statements from Cases 003 and 004 given by witnesses who had also testified in Case 002/02.[331] The argument fails, however, as Appellant unduly extends the TC's ruling,[332] made during the substantive hearings,[333] to the deliberation phase. The TC's practice of automatically admitting statements of witnesses who had appeared was an exception to IR 87(4).[334] However, IR 87(4) only applies "during the trial". In contrast, reopening the case during deliberations is governed by IR 96(2), where different considerations dictate the TC's discretion. As clearly outlined by the ICTY Appeals Chamber, in exercising discretion to reopen a case, a TC must consider whether the probative value of the evidence substantially outweighs any delay caused by reopening the case, keeping in mind the stage of the trial at which the request is made.[335] Appellant does not attempt to show a discernible error by the TC with reference to this test, but instead, incorrectly asserts an error of law by applying the wrong legal standard.

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327 **F54** Appeal Brief, para. 196.

328 Ground 23: **F54** Appeal Brief, *Prior/subsequent Statements*, paras 244-246; **F54.1.1** Appeal Brief Annex A, p. 12 (EN), p. 11 (FR), p. 16 (KH).

329 **F54** Appeal Brief, para. 244.

330 **F54** Appeal Brief, paras 244-246.

331 **F54** Appeal Brief, paras 244-245.

332 **F54** Appeal Brief, paras 244-245.

333 *See e.g.* **E313** Case 002/01 TJ, para. 51; **E363/3** TC Disclosure Obligations Decision, para. 25; **E421/4** TC Decision on 87(4) Deadlines, para. 12.

334 **F54** Appeal Brief, paras 244-245.

335 *Čelebići* AJ, paras 283 (In the context of reopening proceedings, the Appeals Chamber stated: "the Trial Chamber has the discretion to admit it and should consider whether its probative value is substantially outweighed by the need to ensure a fair trial"), 290 (When making its determination, the TC should consider the stage in the trial at which the evidence is sought to be adduced and the potential delay that would be caused to the trial.).

82. Second, applying the correct legal standard for the exercise of discretion under IR 96(2) reveals no discernible error. Appellant claims the impugned WRIs should have been admitted by reopening the case as they have a "great impact on the assessment of the reliability and credibility of their testimony".[336] However, this is not borne out in the contents of either statement. In fact, Ek Hen's WRI did not contradict her previous statements and testimony,[337] but rather corroborated their inculpatory nature. Likewise, Chuon Thy's WRI repeated his previous testimony, albeit with further anecdotal details.[338] It was thus reasonable for the TC to conclude any additional value of the statements in ascertaining the truth was outweighed by any delay in doing so.[339] The fact that this Chamber took a broad view of its innate discretion to admit statements under IR 104(1)[340] does not indicate the TC should have done so, as the admission regimes are distinct. Considering the deference given to the TC's broad discretion in procedural matters,[341] especially since it had the opportunity to familiarise itself with the specific case for at least three years, Appellant fails to show the requisite unreasonableness or unfairness.[342]

83. Second, contrary to Appellant's arguments, any error in the exercise of discretion caused him no prejudice. For a TC's exercise of procedural discretion to be reversed, the outcome must be grossly unfair considering all phases of proceedings, including measures taken during any appeals.[343] Accordingly, as the impugned statements have now been admitted for the purposes of the appeal,[344] Appellant has had the opportunity to contest the findings in his Appeal Brief. Thus, any potential prejudice from lost opportunity is negated.

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336 **F54** Appeal Brief, para. 246.

337 *See* **F51/1** Co-Prosecutor's Response to Khieu Samphan's Request to Admit Additional Evidence, 24 Oct. 2019, paras 23-28.

338 *See* **F51/1** Co-Prosecutor's Response to Khieu Samphan's Request to Admit Additional Evidence, 24 Oct. 2019, paras 30-34.

339 **F51/1** Co-Prosecutor's Response to Khieu Samphan's Request to Admit Additional Evidence, 24 Oct. 2019, para. 19. The disclosure was made on 3 September 2018, at which point the deliberations had been ongoing for 1 year, 4 months, rendering the need to avoid undue delay particularly salient to protect the fair trial rights of Appellant.

340 **F51/3** SCC Decision on KS Additional Evidence Request, para. 38.

341 **F36** Case 002/01 AJ, paras 97-98.

342 **F36** Case 002/01 AJ, paras 97-98.

343 *See* Standard of Review (Procedural errors).

344 *See* **F51/3** SCC Decision on KS Additional Evidence Request.

Ground 6: Unlawful legal recharacterisation[345]

84. **Ground 6 should be dismissed as Appellant fails to establish that the TC erred in law by finding that it had the authority to recharacterise, as the CAH of murder, facts characterised in the Closing Order as the CAH of extermination.**[346]

85. The ground fails as the TC performed the recharacterisations for the Tram Kak ("TK") Cooperatives, 1st January Dam ("1JD"), Trapeang Thma Dam ("TTD"), and Kampong Chhnang Airport ("KCA") (collectively, the "Four Sites")[347] in full compliance with its obligations to respect the boundaries of its *saisine* and to protect Appellant's fair trial rights. In any event, Appellant has now presented his full substantive defence on all facts and law relevant to the recharacterised charges. Any procedural defect in the TC's recharacterisation would thus be cured by the SCC's review of the TC's convictions.

86. Contrary to Appellant's contention,[348] the TC did not violate IR 98(2) by adding any constitutive element *vis-à-vis* the Indictment when it recharacterised, as murder with *dolus eventualis*, the facts concerning deaths of individuals as a result of living and/or working conditions at the Four Sites. Appellant erroneously relies on a blinkered comparison of the material elements of murder and extermination in the Case 002/01 Appeal Judgment[349] to assert that the TC has introduced "a new charge with a new constitutive element: *dolus eventualis*".[350]

87. However, prior to the SCC's Judgment in Case 002/01,[351] the TC,[352] SCC,[353] and importantly, the CIJs in the Case 002 Indictment,[354] all understood the *mens rea* of extermination to include *dolus eventualis*. Only in November 2016 did the SCC clarify that the *mens rea* of extermination requires direct intent to kill.[355] Therefore, when the

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345 Ground 6: **F54** Appeal Brief, *Unlawful legal recharacterisation*, paras 135-157; **F54.1.1** Appeal Brief Annex A, pp. 5-6 (EN), pp. 5-6 (FR), p. 6 (KH).
346 **F54** Appeal Brief, paras 135-157.
347 **E465** Case 002/02 TJ, paras 152-157 (legal principle), 1144 (TK Cooperatives), 1388 (TTD), 1672 (1JD), 1804 (KCA). The Co-Prosecutors note that, in the Judgment Disposition, the TC stated that it had recharacterised the CAH of extermination as the CAH of murder, including with *dolus eventualis*, deaths that occurred "due to the conditions and circumstances imposed [on] the victims" at the S-21, KTC and PK security centres. However, elsewhere in the Judgment, the TC found that those facts had been characterised in the Closing Order as the CAH of murder. *See* **E465** Case 002/02 TJ, paras 2560-2561 (S-21), 2811 (KTC), 3115 (PK).
348 **F54** Appeal Brief, paras 136, 148-152.
349 **F54** Appeal Brief, paras 149-154 *citing* **F36** Case 002/1 AJ, paras 516-522.
350 **F54** Appeal Brief, para. 152.
351 **F36** Case 002/01 AJ was pronounced on 23 Nov. 2016.
352 Case 001-**E188** *Duch* TJ, para. 338; **E313** Case 002/01 TJ, paras 417-420.
353 Case 001-**F28** *Duch* AJ, para. 323.
354 **D427** Closing Order, para. 1389. *See also* fn. 5263 *citing Blagojević & Jokić* TJ, para. 572; *Stakić* TJ, para. 639 (*see* para. 642); *Kayishema & Ruzindana*, para. 146.
355 **F36** Case 002/01 AJ, paras 522, 525.

CIJs characterised deaths due to conditions at the Four Sites as extermination, they made *all* the relevant factual findings necessary to fulfil the elements of murder, including those necessary to conclude that the direct perpetrators acted with *dolus eventualis*.[356] Expressly acknowledging this,[357] the TC remained strictly within the confines of its *saisine*, as defined by the Indictment, when it performed its recharacterisation.

88. The TC also ensured that Appellant had notice of the possibility of recharacterisation in light of the SCC's Case 002/01 extermination finding,[358] in order to ensure that he was fully informed of the nature and cause of the case against him, and could defend himself against the reformulated charges.[359] As the TC confirmed, this notice was given by the Case 002/01 Appeal Judgment itself, in which the SCC performed an *identical* recharacterisation, following its confirmation that a higher *mens rea* applied to extermination in CIL than the one relied on by the TC in the Case 002/01 Trial Judgment (and the CIJs in the Case 002 Closing Order). The SCC expressly confirmed, to the *same parties*, represented by the *same counsel*, in respect of the *same Closing Order*, specifically regarding deaths that occurred in *analogous circumstances*, namely due to the conditions and circumstances imposed on the victims,[360] that:

> it was open to the [TC] – and now it is open to the [SCC] on appeal – to recharacterise the factual allegations contained in the Closing Order (D427), which the [CIJs] had considered to amount to the crime of extermination, to the crime of murder.[361]

89. Appellant cannot plausibly claim that he was not on notice of the same recharacterisation in Case 002/02.

90. Appellant's assertion that there was an *additional* obligation on the TC to deliver further notice to him, despite this unequivocal statement from the SCC,[362] is misplaced. There is no special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.[363] Moreover, Appellant was not

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356 **D427** Closing Order, paras 311-313 (Tram Kak Cooperatives), 336-342 (Trapeang Thma Dam), 359-360, 362-363 (1st January Dam), 390-392 (Kampong Chhnang Airfield), 1387, 1389.

357 **E465** Case 002/02 TJ, paras 153-154 (legal principle), 1144 (Tram Kak Cooperatives), 1388 (Trapeang Thma Dam), 1672 (1st January Dam), 1804 (Kampong Chhnang Airfield).

358 Prior to Nov. 2016, there was no need to recharacterise these facts, given the common understanding that the *mens rea* for extermination included *dolus eventualis*.

359 **E465** Case 002/02 TJ, paras 153-157. *See also* ICCPR, art. 14; ECHR, art. 6(3); Case 001-**E188** *Duch* TJ, paras 497-498 and related footnotes. *See also Dallos v. Hungary*, para. 47; *Pélissier and Sassi v. France*, para. 51; *Sipavičius v. Lithuania*, para. 27.

360 **E465** Case 002/02 TJ, para. 156.

361 **F36** Case 002/01 AJ, para. 562.

362 **F54** Appeal Brief, paras 136, 138-147, 156-157.

363 *Dallos v. Hungary*, para. 47; *Pélissier and Sassi v. France*, para. 53; *Sipavičius v. Lithuania*, para. 28.

"unable to debate" the recharacterisation,[364] or to defend himself against a murder charge incorporating the lower *mens rea*.[365] Indeed, throughout almost the entire trial, Appellant understood he was defending a charge of extermination, defined to include a *mens rea* of *dolus eventualis*. Appellant simply chose to turn a blind eye to the notice given to him by the SCC, *and* to miss the additional opportunity offered to him by the TC to make submissions and request clarifications after the Case 002/01 Appeal Judgment.[366]

91. Even if the SCC were to deem its Case 002/01 Appeal Judgment insufficient notice of the possible recharacterisation, Appellant errs in his contention that such a procedural error "invalidates the decision".[367] Assessed with regard to proceedings as a whole,[368] including measures that were taken in the course of the appeals phase,[369] there has been no "grossly unfair outcome in judicial proceedings".[370] This appeals process has afforded Appellant a meaningful opportunity to defend himself against the reformulated charges before a judicial body capable of reviewing and overturning the impugned convictions. Appellant has already submitted, for SCC review, grounds of appeal challenging *substantive* legal and factual aspects of his murder convictions: he challenges the CIL status of the CAH of murder committed with *dolus eventualis*,[371] and contests the factual basis of the murder convictions at all Four Sites, including asserting that the *dolus eventualis* standard has not been proved BRD.[372] Thus, any defect in the failure to give requisite notice would be cured by the confirmation of the convictions pursuant to this Chamber's review.[373]

C. CUMULATIVE EFFECTS OF ALLEGED FAIR TRIAL VIOLATIONS

92. Appellant's contentions regarding the cumulative effect of the alleged fair trial violations are meritless.[374] As already demonstrated, Appellant has failed to establish *any* violation of *any* of his fair trial rights, and as such, there are no breaches to accumulate. His rights

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364 **F54** Appeal Brief, para. 155.
365 **F54** Appeal Brief, paras 139-147, 153-154, 157.
366 **E465** Case 002/02 TJ, para. 157 *referring to* **E449** TC Memorandum, para. 4.
367 **F54** Appeal Brief, paras 135, 155, 672, 758, 768, 814.
368 **F36** Case 002/01 AJ, para. 100; *Dallos v. Hungary*, para. 47; *Pélissier and Sassi v. France*, para. 53; *Sipavičius v. Lithuania*, para. 27.
369 **F36** Case 002/01 AJ, para. 100; *Dallos v. Hungary*, paras 49, 52; *Sipavičius v. Lithuania*, para. 30.
370 **F36** Case 002/01 AJ, para. 100.
371 *See* Appellant's Appeal Ground 86: **F54** Appeal Brief, paras 575-636; **F54.1.1** Appeal Brief Annex A, p. 34 (EN), p. 31 (FR), p. 48 (KH). *See also* **E457/6/4/1** KS Case 002/02 Closing Brief, paras 394-429.
372 With regard to Appellant's challenges to the fulfilment of the *mens rea* for the CAH of murder, *see* Appeal Grounds 87, 100, 102 (TK), 88, 113 (TTD), 89, 117 (1JD), 90, 123 (KCA); **F54** Appeal Brief, paras 683-685 (TK), 760-762 (TTD), 783-786 (1JD), 822-824 (KCA).
373 *Dallos v. Hungary*, paras 50-52; *Sipavičius v. Lithuania*, paras 30-33.
374 **F54** Appeal Brief, paras 97, 331-333; **F54.1.1** Appeal Brief Annex A, p. 17 (EN).

to: (i) be tried without undue delay;[375] (ii) be tried by a tribunal that respects the scope of its jurisdiction and is established by law;[376] (iii) be informed of the nature and cause of the charge against him;[377] (iv) legal and procedural certainty;[378] (v) an independent and impartial tribunal;[379] (vi) the presumption of innocence;[380] (vii) have adequate time and facilities for the preparation of his defence;[381] (ix) an adversarial trial;[382] (x) be heard;[383] (xi) have an effective defence;[384] (xii) transparency of proceedings;[385] (xiii) reasoned decisions and a reasoned judgment;[386] (xiv) equality of arms;[387] and (xv) not be tried or punished again for an offence for which he has already been finally convicted or acquitted,[388] have all been protected.

93. In any event, Appellant fails to substantiate his claim, providing no explanation as to how the "cumulative effect of the Trial Chamber's alleged errors undermined the fairness of his trial in a manner different than each individual factor".[389]

V. APPROACH TO EVIDENCE

A. INTRODUCTION

94. The TC applied the correct approach in assessing the evidence.[390] Appellant's 25 grounds[391] challenging this approach fail, as he adopts a piecemeal analysis in his own discussions of the evidence, frequently misstating both the TC's findings and the evidence. He further ignores fundamental features of criminal trials, including: the TC's duty to assess the evidence *in toto* and determine its weight; the presumption that the TC has considered all the evidence; the deference given to its general assessment of the

375 *See* response to Grounds 8, 9, 10.
376 *See* Section VI. *Saisine* & Scope of Trial.
377 *See* Section VI. *Saisine* & Scope of Trial and response to Grounds 6, 8.
378 *See* response to Grounds 1, 8, 9.
379 *See* response to Grounds 4, 14, 17, 26-27, 163, 165-167, 173, 174-179, 181, 183, 185, 189, 199, 202-203, 207, 218, 222, 236.
380 *See* response to Ground 28.
381 *See* Section VI.B.2 Scope of the Case: Indictment and *saisine* of the TC, and response to Ground 8.
382 *See* response to Ground 7, 30, 151, 163.
383 *See* response to Grounds 1, 7.
384 *See* response to Ground 1.
385 *See* response to Grounds 1, 6.
386 *See* response to Grounds 1, 7.
387 *See* response to Grounds 7, 131.
388 *See* response to Grounds 5, 83, 150.
389 *Renzaho* AJ, para. 244. The Co-Prosecutors note further that where any proven defects have been cured, or did not result in prejudice, the question of the number of defects is secondary. The key question is whether Appellant was materially prejudiced by the cumulative effect of those errors. *See e.g. Nyiramasuhuko* AJ, para. 1277.
390 **E465** Case 002/02 TJ, paras 35-109.
391 Grounds 11-13, 15-19, 20-22, 24-37.

evidence, including the testimony of witnesses whose demeanour it had the opportunity to observe, its resolution of evidentiary inconsistencies and conflicts, and its determination as to the reliability of the evidence *in toto*; the deference given to the discretion it exercises to accept or reject the fundamental features of the evidence without obligation to justify that determination; and that not all facts must be proved beyond reasonable doubt. Appellant further does not demonstrate any error on the part of the TC warranting SCC intervention.[392]

B. BURDEN OF PROOF

Ground 13: Intime conviction v. beyond reasonable doubt[393]

95. **Ground 13 should be dismissed as Appellant fails to establish that the TC erred in law by allegedly applying a lower standard of proof than BRD. His intertwined allegations that the TC erred by drawing unreasonable conclusions through evidentiary errors should be summarily dismissed as mere assertions which he has not substantiated.**

96. The ground fails, as Appellant demonstrates no error in the TC's discussion of *intime* conviction and proof BRD. First, Appellant admits that the TC "correctly recalled" that proof BRD is the standard to be applied.[394] Second, the TC correctly stated the language regarding standard of proof in both the English and French versions of the IRs,[395] and then clarified that it would use the BRD standard of proof.[396] Third, other than its discussions in paragraphs 38-40, nowhere in the French version of its Judgment does the TC use the term "intime conviction" in reference to the standard of proof it applied.[397]

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392 *See* Standard of Review (Errors of Law, Errors of Fact).

393 Ground 13: **F54** Appeal Brief, *Intime conviction v. beyond reasonable doubt,* paras 227-231; **F54.1.1** Appeal Brief Annex A, p. 9 (EN), p. 8 (FR), pp. 11-12 (KH).

394 **F54** Appeal Brief, para. 229.

395 **E465** Case 002/02 TJ, para. 38 *citing* IR 87(1), English version, in relevant part: "In order to convict, the Chamber must be convinced of an Accused's guilt 'beyond reasonable doubt'."; French version, in relevant part: "*Pour déclarer un accusé coupable, la Chambre doit avoir 'l'intime conviction' de sa culpabilité*" (emphasis added).

396 **E465** Case 002/02 TJ, para. 38, (EN) ("Upon a reasoned assessment of the evidence, the Chamber interprets any doubt as to guilt in the Accused's favour."); (FR) ("*Ainsi, se fondant sur une analyse raisonnée des éléments de preuve, elle a interprété tout doute quant à la culpabilité des Accusés en faveur de ces derniers*") (emphasis added).

397 In addition to the discussion in **E465** Case 002/02 TJ, paras 38-40 (FR) (the term "intime conviction" is found only once in the TJ, at para. 1887, but not in reference to standard of proof, rather, in terms of being personally convinced: "Même en admettant qu'un tel plan ait existé ou que les dirigeants du PCK ait eu *l'intime conviction* de son existence, la Chambre considère que cela ne saurait justifier l'exécution généralisée à S-21, en dehors de toutes garanties procédurales, de cadres et de civils au motif pris de ce qu'ils auraient participé à la préparation ou à la mise en œuvre de ce plan.") (emphasis added); para. 1887 (EN) ("Even if there were such a plan or even if the CPK leaders were *personally convinced* that it existed, the Chamber does not consider that the existence of such a plan or the mere belief that such a plan existed

Instead, throughout the French version of the Judgment, the TC uses terms consistent with proof BRD.[398]

97. As he does throughout his Appeal Brief, Appellant intertwines other submissions in this ground of appeal, including that the TC drew unreasonable conclusions and made evidentiary errors.[399] Other than stating these submissions will be "demonstrated *below* in this factual errors brief", Appellant provides no references to paragraphs in his Appeal Brief,[400] thereby making it impossible to directly respond to these unsubstantiated allegations. Nor do his references to the dissenting opinion in *Katanga*[401] establish these alleged errors. These "mere assertions" should be dismissed summarily as unsubstantiated.[402] Where these unidentified "assertions" are developed sufficiently in other parts of Appellant's Appeal Brief, however, they will be addressed in other parts of this Response.[403]

Ground 17: Burden of proof[404]

98. **Ground 17 should be dismissed as Appellant fails to establish that the TC erred in law by allegedly contradicting itself in its reasons regarding the burden of proof and not respecting that the burden of proof lies with the Prosecution. The ground also fails to establish that the TC inadequately assessed the evidence.**

99. This ground, unclearly articulated, fails, as Appellant simply asserts without substantiation that the TC shifted the burden of proof from the Prosecution to the Defence. He does not explain how the TC contradicted itself in applying the burden of proof. Appellant's Annex A cites to no paragraphs in his brief, but only to "factual parts *infra*". In the corresponding section in Appellant's Appeal Brief, paragraph 237, he then only further refers to paragraph 1421 of his Appeal Brief, which does not address the supposed error regarding burden of proof. Nor do the other paragraphs he cites in

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would justify the wholesale execution at S-21 of cadres and civilians allegedly involved in its preparation or implementation without due process") (emphasis added).

398 The TC used phrases such as "*au-delà de tout doute raisonnable*", *e.g.* at **E465** Case 002/02 TJ, (FR) paras 38, 40, 64, 287, 336, 337, 551, 628, 1222, 1423, 1575, 1653, 1667, 1684, 1759, 1780-1781, 1786, 1792, 1841, 2347, 2375, 2401, 2531, 2563, 2749, 2819-2820, 2896, 2927, 2947, 2962, 3015-3018, 3075, 3108, 3118, 3174, 3211, 3321, 3367, 3416, 3439, 3464, 3471, 3482, 3491, 3499, 3505, 3510, 4076, 4156, 4192; "*il ne fait aucun doute*", *e.g.* at (FR) paras 561, 628, 651, 938, 946.

399 **F54** Appeal Brief, paras 229-321.

400 **F54** Appeal Brief, para. 229.

401 **F54** Appeal Brief, para. 230 *citing Katanga* Wyngaert Minority Opinion, para. 172.

402 *See* Standard of Review (Summary Dismissal).

403 **F36** Case 002/01 AJ, para. 304.

404 Ground 17: **F54** Appeal Brief, *Burden of proof*, para. 237; **F54.1.1** Appeal Brief Annex A, pp. 10-11 (EN), pp. 9-10 (FR), p. 13 (KH).

paragraph 1421 refer to any error regarding burden of proof.[405]

100. Rather, paragraph 1421 of Appellant's Appeal Brief, and the referenced paragraphs within, argue without merit that the TC's alleged incorrect assessment of the evidence requires appellate intervention. In paragraph 1421, Appellant disputes the TC's alleged attribution to Appellant of a speech made during the first session of the People's Representative Assembly held between 11 and 13 April 1976.[406] Appellant's argument does not warrant appellate intervention as it has no impact on the verdict.

101. Appellant ignores the comprehensive reasoning in which the TC engaged before finding him responsible for the crimes of which he was convicted, comprising some 90 pages and including consideration of the many roles and functions of Appellant, his knowledge, and his liability under JCE and A&A modes of liability, all gleaned from multiple sources of evidence.[407] Thus, removing this one conclusion would in no way invalidate those findings and convictions.

102. Appellant's allegation at paragraph 1723 that to hold Appellant responsible, the TC relied on his participation in the 1976 and 1978 CPK Congresses, "without any evidence of his presence" is misleading and false[408] – misleading for the reasons discussed in paragraph 101 above, and false in that the testimony of Sao Sarun to which Appellant refers in paragraph 1725[409] clearly gives rise to the reasonable conclusion that Appellant was at the 1978 Party Congress.[410] With regard to the Fourth Party Congress, of significance is that Appellant became a full-rights member of the CC in 1976 at that Congress.[411] Appellant agreed that he became a full-rights member in 1976.[412] Conferring such status upon him at the Congress is consistent with its role, i.e. to "'designate the political line

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405 **F54** Appeal Brief, para. 1421, fn. 2675 *citing* his paras 1723-1728.

406 **F54** Appeal Brief, para. 1421. Appellant repeats this allegation at **F54** Appeal Brief, paras 159, 237 (fn. 328), 1699-700. *See* response to Grounds 7, 14, 176, 202.

407 **E465** Case 002/02 TJ, paras 562-624 (Roles and Functions – Khieu Samphan), paras 4201-4329 (The Criminal Responsibility of Khieu Samphan).

408 **F54** Appeal Brief, para. 1723. This allegation is also referred to in **F54** Appeal Brief, paras 1718, 1741, 1750.

409 **F54** Appeal Brief, fns 3339-3341.

410 **E1/84.1** Sao Sarun, T. 11 June 2012, 09.48.02-09.49.24, p. 18, line 22 ("During the Party's anniversary, *probably* in September 1978") (emphasis added), 09.51.04-09.52.48, p. 20, lines 4-5 ("The persons who attended in the opening and closing sessions included [...] Khieu Samphan"), 09.54.42-09.56.12, p. 21, lines 11-16 ("the congress last[ed] for 10 days [...] It was a large congress; there were representatives from all provinces across the country"), 09.57.19-09.59.07, p. 22, line 25 (the CC members were called to the stage), 09.59.07-10.01.05, p. 23, line 7 (witness was about 10 metres from the stage), 10.02.58-10.04.32, p. 24, lines 10-21 (witness confirms that all members of the CC, namely Pol Pot, Khieu Samphan, Nuon Chea, Ieng Thirith, and Ieng Sary, as well as the representatives of all provinces and the representatives of all divisions participated in the Great Congress).

411 **E465** Case 002/02 TJ, para. 574, particularly fn. 1789.

412 *See e.g.* **E3/27** Khieu Samphan WRI, EN 00156751.

and Statute' of the Party and select and appoint the members of the Central Committee".[413] It is reasonable to conclude he was present at such a meeting where his status in the CC was elevated.

103. Equally, Appellant's protest of the TC's apparent discounting of his statement that there were only three Party Congresses, excluding the one in 1978,[414] ignores the evidence of Sao Sarun and the TC's discretion to accept only part of a witness' testimony.

104. Finally, Appellant's assertions seemingly alleging that the TC judges were biased or acted in bad faith[415] are unsubstantiated and warrant summary dismissal. Where these "assertions" are developed sufficiently in other parts of Appellant's Appeal Brief, they will be addressed under the relevant sections of this Response.[416]

Ground 19: Extrapolations/generalisations[417]

105. **Ground 19 should be dismissed, as Appellant does not demonstrate that the TC erred in law or fact by extrapolating and generalising evidence.**

106. The ground fails as Appellant does not demonstrate that the TC's findings of guilt were erroneous as a matter of law. Indeed, he fails to specify with sufficient detail what the alleged "multiple errors of law"[418] are and how they invalidate the Judgment in whole or in part. Appellant also fails to establish any error of law in the TC's assessment of the evidence.

107. To the extent his alleged error of inadequate assessment of the evidence constitutes an alleged factual error, Appellant fails to specify with sufficient particularity what the alleged erroneous extrapolations/generalisations are[419] and does not demonstrate how these unspecified extrapolations were unreasonable.[420] Nor does Appellant offer, as required, alternative inferences or explanations why no reasonable Trial Chamber could have excluded those alternative inferences.[421]

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413 **E465** Case 002/02 TJ, para. 345.

414 **F54** Appeal Brief, para. 1726. To the extent Appellant disputes other terms used to describe these Congresses, it should be noted that in **E3/27** to which he refers in fn. 3342, Appellant uses the term "general meetings", which he then characterises in his Appeal Brief as congress/es or convention/s.

415 *See e.g.* **F54** Appeal Brief, para. 1421 ("The Chamber erred again in its desire to implicate Khieu Samphan"), ("The finding of the Chamber, which is symptomatic of the lack of impartiality regarding Khieu Samphan").

416 **F36** Case 002/01 AJ, para. 304.

417 Ground 19: **F54** Appeal Brief, *Extrapolations/generalisations,* para. 239; **F54.1.1** Appeal Brief Annex A, p. 11 (EN), p. 10 (FR), p. 19 (KH).

418 **F54** Appeal Brief, para. 239.

419 *See* Standard of Review (Errors of Fact).

420 **F36** Case 002/01 AJ, para. 598.

421 **F36** Case 002/01 AJ, para. 90.

108. Appellant once again resorts to a selective assessment of the evidence, ignoring that a holistic evaluation of the evidence is required to determine if the standard of proof BRD has been met.[422] In support of his sweeping allegations, Appellant refers to his ground of appeal relating to a deductive approach/circumstantial evidence. However, his piecemeal approach to the evidence and SCC jurisdiction in this ground also fails to establish error, as fully discussed in response to Ground 18.[423]

109. In his only example,[424] Appellant unsuccessfully refers to paragraphs dealing with the Preah Vihear cooperative to argue that the TC erred in attributing to him knowledge of the situation at cooperative sites countrywide. However, the TC made clear that, in determining Appellant's criminal responsibility, including requisite knowledge, it properly considered the totality of the evidence before it.[425] The TC's assessment was extensive, considering in-court testimony, out-of-court statements, Appellant's own statements and writings, and other documentation.[426]

110. Appellant's disagreement with the TC's assessment of the testimony of Meas Voeun about conditions in Preah Vihear does not equal TC error.[427] First, Appellant agrees he learned of the arrest of his wife's relatives in Preah Vihear province.[428] Second, he accepts that the witness did testify he sent a report to Appellant which included conditions there;[429] absent credible evidence to the contrary, it can be reasonably presumed that in the regular course of business, the letter was delivered to Appellant.

111. Third, Appellant admits that the witness sent that report to Appellant after Appellant asked him about the situation in Preah Vihear, and that the witness was tasked on Pol Pot's orders to investigate to determine if some people were arrested and imprisoned.[430]

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422 *See* Standard of Review (Errors of Fact, Proof BRD).

423 **F54** Appeal Brief, para. 239 fn. 334 *citing* his para. 238. *See* response to Ground 18.

424 **F54** Appeal Brief, para. 239 fn. 336 *citing* his paras 1829-1835 (knowledge of cooperative sites).

425 **E465** Case 002/02 TJ, para. 4203 (TC's assessment of Appellant's criminal responsibility rested on assessment of his roles, functions and conduct during the DK period as presented during Case 002. The TC considered the totality of Khieu Samphan's statements and conduct including, where appropriate, statements made after the fall of the DK in evaluating the extent of his contemporaneous knowledge of, and contribution to, the commission of crimes and/or intent to commit the crimes). *See also* **F36** Case 002/01 AJ, para. 871 (based on the totality of the evidence, the TC's overall conclusion was reasonably reached).

426 **E465** Case 002/02 TJ, paras 562-624 (Roles and Responsibilities), 4201-4319 (Criminal Responsibility). The TC found that contemporaneous knowledge and Appellant's 1987 concession that 20,000 people died from illness and food shortage was consistent with his knowledge of the "abject working conditions at cooperatives and worksites" during the DK period (para. 4216). *See also* response to Grounds 209, 225, 232, 233, 245, 248, 249.

427 **F54** Appeal Brief, paras 1834-1835.

428 **F54** Appeal Brief, paras 1831-1832.

429 **F54** Appeal Brief, para. 1834.

430 **F54** Appeal Brief, para. 1834.

It is interesting to note the timing; the witness may have been sent to investigate after Appellant's relatives were arrested, which would be consistent with his close relationship with Pol Pot. Timing aside, it is reasonable to conclude Appellant directed the inquiry to the witness because he knew the witness was in a position of authority in Preah Vihear,[431] providing further evidence of Appellant's access to information *vis-à-vis* his close relationship with Pol Pot and his position within the CPK. That Appellant did not travel to the province to learn of the situation there or inquire about his wife's relatives evidences the power and authority he had. He did not need to travel there. The witness testified he was told that Sector 103 was under Appellant's supervision;[432] so, Appellant could be confident that someone would take the time to report to Appellant about the situation with his wife's family members and render assistance to resolve the situation.[433]

Ground 16: Exculpatory evidence omitted[434]

112. **Ground 16 should be dismissed, as Appellant does not demonstrate that the TC erred in law by omitting exculpatory evidence in its assessment of the evidence.**

113. The ground fails as Appellant does not establish that the TC did not consider "good character" evidence, the same that was heard in Case 002/01, during its deliberations in this case.[435] Appellant places false reliance on the arguments at paragraphs 2177 to 2183 of his Appeal Brief, as they do not show the TC failed to consider exculpatory evidence. That the TC did not change its assessment of the same evidence does not constitute omitting alleged exculpatory evidence or ignoring it.[436] The TC quite rightly simply did not find this evidence sufficient to affect its determination of an appropriate sentence.[437]

114. In addition, Appellant mischaracterises the evidence on which he seeks to rely. The witnesses cited may have come "to testify on the facts that unanimously proved his good

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431 **E465** Case 002/02 TJ, para. 4233 (witness was head of Sector 103 (Preah Vihear)).
432 **E1/130.1** Meas Voeun, T. 4 Oct. 2012, 14.26.30-14.28.34, p. 78, line 1-p. 79, line 13.
433 **E465** Case 002/02 TJ, para. 4233; **E1/130.1** Meas Voeun, T. 4 Oct. 2012, 14.26.30-14.28.34, p. 78, line 1-p. 79, line 13.
434 Ground 16: **F54** Appeal Brief, *Exculpatory evidence omitted*, paras 235-236; **F54.1.1** Appeal Brief Annex A, p. 10 (EN), p. 9 (FR), p. 13 (KH).
435 **F54** Appeal Brief, para. 236, fn. 321 *citing* his paras 2177-2183. Note that his para. 2178, fns 4179 and 4181 cite the testimony of the same witnesses to whom Appellant refers in **F17** Case 002/01 Appeal Brief, para. 656, fn. 1361 (*citing* **E295/6/4** Khieu Samphan's Case 002/01 Final Trial Brief, para. 275, fn. 491). The SCC dismissed Appellant's argument in Case 002/01, finding that the TC *did* consider good character evidence (*see* **F36** Case 002/01 AJ, paras 1115-1116).
436 **F54** Appeal Brief, para. 2179.
437 **E465** Case 002/02 TJ, fn. 14190 (*noting* its prior consideration of five-character witnesses who testified on Appellant's behalf). *See also* **E313** Case 002/01 TJ, paras 1099-1103.

character",[438] but they did not do so; they did not give "unanimously laudatory accounts".[439] This evidence does not establish that the TC omitted exculpatory evidence and is certainly not of the quality to change the TC's determination of an appropriate sentence, in light of the seriousness of the crimes of which Appellant stands convicted. Appellant's reliance on arguments in paragraphs 756 and 1279-1280 of his Appeal Brief are similarly misplaced; these arguments do not establish that the TC omitted exculpatory evidence.[440]

Ground 18: Deductive approach/circumstantial evidence[441]

115. **Ground 18 should be dismissed, as Appellant's piecemeal approach to the evidence does not establish the TC committed any factual or legal errors in its deductive reasoning and its holistic assessment of the evidence.**

116. Specifically, the ground fails as Appellant does not demonstrate that the factual conclusions based on extrapolations made by the TC were unreasonable. Although Appellant correctly cites a portion of this Chamber's holding in Case 002/01 regarding generalised findings, he omits critical parts of that holding:[442] to the extent that the *conviction* depends on such a generalised finding, it has to be established BRD. Nevertheless, the *burden remains on the appellant alleging a factual error to demonstrate that the extrapolation made by the first-instance chamber in reaching the finding was unreasonable.*[443] Appellant has failed to meet this standard.

117. Appellant's broad assertions referencing a few "examples"[444] do not show which, if any, convictions depended on allegedly erroneous generalisations, nor does he demonstrate that the TC's generalised findings were unreasonable. In addition, as required, he offers no reasonable alternative inferences nor explains why no reasonable TC could have

438 **F54** Appeal Brief, para. 2179.
439 **F54** Appeal Brief, para. 2180. *See* response to Ground 256.
440 The arguments in **F54** Appeal Brief, para. 236 fn. 322 *citing* to his para. 756 challenging the TC's finding that Vietnamese in TK District were rounded up, deported and/or disappeared do not raise any issue of exculpatory evidence and fail for reasons set forth in response to Grounds 103, 104, 105. The arguments in his paras 1279-1280, which challenge the TC's finding that Vietnamese were victims of enforced disappearance, fail as discussed in the response to Grounds 84, 111, 112.
441 Ground 18: **F54** Appeal Brief, *Deductive approach/circumstantial evidence,* para. 238; **F54.1.1** Appeal Brief Annex A, p. 11 (EN), pp. 9-10 (FR), p. 13-14 (KH).
442 **F54** Appeal Brief, para. 238 *citing* **F36** Case 002/01 AJ, para. 598.
443 **F36** Case 002/01 AJ, para. 598 (emphasis added).
444 **F54** Appeal Brief, para. 238, fn. 333 *citing* to his paras 695, 910, 1611 and 1881.

excluded those alternative inferences.[445] In short, he has simply not made his case.[446]

118. Reviewing the totality of the evidence, as is required,[447] Appellant's four "examples" fail, as fully discussed in other sections of this Response. His first example, alleging mistaken conclusions on the forced transfer of a large number of Vietnamese people, makes broad assertions without substantiating them[448] and without specifying what Judgment paragraphs he is challenging.[449] In any event, the TC undertook an *in toto* examination of the evidence, including in-court testimony and WRIs, to arrive at its conclusions regarding forced transfer and deportation.[450] Appellant's second example alleging insufficient evidence of the presence of Cham and their execution at Wat Au Trakuon is likewise of no assistance.[451] Whereas Appellant refers to only two paragraphs in the Judgment,[452] the TC undertook an 18-paragraph assessment of the evidence, including in-court testimony, before arriving at its findings.[453]

119. As for his third example relating to CPK cadres who were purged,[454] Appellant's presence at S-21 is not required to establish his liability under JCE or A&A, the modes of liability under which Appellant was convicted of the purges at S-21.[455] Appellant also ignores the TC's extensive assessment of the evidence regarding his knowledge and intent.[456] He does not establish the unreasonableness of the TC's conclusions, he simply disagrees with its assessment of the evidence. Appellant's fourth example, impugning

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445 **F36** Case 002/01 AJ, para. 90.

446 S*ee also* response to Ground 32. Appellant's alternative explanation for the disappearance of Doeun is not reasonable. It is simply not sustainable to explain that he thought the sudden disappearance of Doeun, who never returned throughout the remaining two-year period of the DK regime, was because Doeun travelled a lot, especially where Appellant took over Doeun's responsibilities and admits "disappearance" equated to arrest. *See* **F54** Appeal Brief, para. 1863 cited in his para. 1611, which was cited in his para. 238. *See further* **E465** Case 002/02 TJ, para. 4225 (Doeun); *see also* response to Ground 205.

447 *See* Standard of Review (in assessing alleged errors regarding proof beyond a reasonable doubt, the totality of the evidence is considered, not just selective pieces of evidence in a piecemeal fashion). *See also* **F36** Case 002/01 AJ, para. 871 (SCC looked at the totality of the evidence to conclude that the TC's overall conclusion was reasonable).

448 **F54** Appeal Brief, para. 695 (*cited* as a factual example in **F54** Appeal Brief, fn. 333).

449 **F54** Appeal Brief, para. 695.

450 **E465** Case 002/02 TJ, paras 1110-1125, 1156-1159, 3429-3440, 3502-3507 (movement of Vietnamese from Cambodia to Vietnam, deportation).

451 **F54** Appeal Brief, para. 910 (*cited* as a factual example in **F54** Appeal Brief, fn. 333).

452 **F54** Appeal Brief, para. 910, fns 1651 (*citing* **E465** Case 002/02 TJ, para. 3302), 1652 (*citing* **E465** Case 002/02 TJ, para. 3306).

453 **E465** Case 002/02 TJ, paras 3291-3308. *See also* response to Ground 137.

454 **F54** Appeal Brief, para. 1611 (*cited* as a factual example in **F54** Appeal Brief, fn. 333).

455 **E465** Case 002/02 TJ, Section 15: Applicable Law: Individual Criminal Responsibility, paras 3702-3715, 3721-3724, 4306, 4316-4318, 4326-4328.

456 **E465** Case 002/02 TJ, paras 562-624 (Roles and Responsibilities), 4201-4319 (Criminal Responsibility). *See also* response to Grounds 216, 217, 235.

one paragraph of the Judgment relating to targeting of the Cham, also fails.[457] Nowhere in that paragraph does the TC find in a vague manner that Appellant was aware of "some crimes" as he alleges,[458] so we are once again left to guess to which part of the Judgment, if any, he refers. Moreover, Appellant again ignores the extensive evidentiary analysis the TC undertook to arrive at its finding.[459]

C. ASSESSING EVIDENCE

Ground 15: Double standard in the treatment of inculpatory and exculpatory evidence[460]

120. **Ground 15 should be dismissed as Appellant does not establish that the TC erred in law and fact by applying a double standard in its evaluation of inculpatory evidence compared to exculpatory evidence.**

121. The ground fails as Appellant insufficiently specifies the alleged legal and factual errors, instead making a broad unsupported assertion. Appellant's assertion offers no argument to substantiate his claim of error, merely referring to paragraphs in the Judgment and his Appeal Brief.[461] Indeed, contrary to this unsupported claim, the TC did deal with exculpatory evidence, sometimes accepting, sometimes rejecting it.[462] Nonetheless, to the extent his claim is sufficiently developed, paragraph references to his Appeal Brief are dealt with in other parts of this Response.[463]

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457 **F54** Appeal Brief, para. 1881 (*cited* as a factual example in **F54** Appeal Brief, fn. 333), fn. 3644 *impugning* **E465** Case 002/02 TJ, para. 4236.

458 **F54** Appeal Brief, para. 1881.

459 **E465** Case 002/02 TJ, fn. 13822 *citing* Section 13.2.5.4 Conclusion on the CPK Policy Targeting the Cham, Section 16 Common Purpose, para. 3990; fn. 13823 *citing* Section 13.2.5.4 Conclusion on the CPK Policy Targeting the Cham; fn. 13824 *citing* Section 13.3.5.2 Evidence of a Policy Targeting the Vietnamese, Section 13.3.10.5 Treatment of the Vietnamese: Legal Findings: Genocide.

460 Ground 15: **F54** Appeal Brief, *Double standard in the treatment of inculpatory and exculpatory evidence,* para. 234; **F54.1.1** Appeal Brief Annex A, p. 10 (EN), p. 9 (FR), p. 12 (KH).

461 **F54.1.1** Appeal Brief Annex A, p. 10 (EN), p. 9 (FR) *citing* **E465** Case 002/02 TJ, paras 36, 38, 40, 49, 53, 60-66, 69, 71-73, 194, 344, 351, 354, 470- 472, 479; **F54** Appeal Brief, paras 234, 392-395, 397, 3471. The Judgment references simply reflect the TC's framework for assessment of evidence, while his Appeal Brief references simply send the reader to additional paragraphs of his brief (*e.g.* para. 234, fn. 316 *cites* his paras 241-242, 293-305, 312-313, 314-319, 329-330, factual examples 891, 922, 999, 1195, 1235, 1383, 1529, 1752, fn. 3400 (there is no fn. 3400 in para. 1752, fn. 3400 is in para. 1761)).

462 *See e.g.* **E465** Case 002/02 TJ, *Exculpatory evidence*, paras 1373-1374; paras 1007, 1135, 1346.

463 **F54** Appeal Brief, para. 234, fn. 316 *citing* **F54** Appeal Brief, paras 241-242 (Ground 21: Corroboration), 293-305 (Ground 30: Written Statements - Probative Value), 312-313 (Ground 32 (Hearsay)), 314-319 (Ground 33: CPAs, Ground 34: CP Trial Testimony), 329-330 (Ground 37: Experts), 891 (Ground 135: OIA through enforced disappearances at PK – evidence of Sao Sarun), 922 (Ground 139: Extermination – Unreasonable findings re. intent to kill Cham – lack of evidence of order given), 1195 (Ground 165: Forced marriage – Errors re. two conditions of marriage set out by CPK – corroboration of cadres wrongfully dismissed), 1235 (Ground 166: Forced marriage – credibility granted wrongly to testimony of CP Chea Deap), 1529 (Ground 179: Security Centres and Execution Site "Policy" – Distortion of texts, Errors in understanding the DK Constitution), 1752 (Ground 203: Member of the CC & SC); fn. 3400 (Ground 204: Errors relating to the content of political training).

122. Two paragraphs will be addressed herein: paragraph 999, alleging the TC erroneously relied on a copy of a contemporaneous document of "low probative value" and paragraph 1383, alleging the TC applied a double standard in the assessment of evidence. A review of these paragraphs, their references and *all* relevant paragraphs of the Judgment demonstrate Appellant's failure to show the TC applied the alleged double standard in its assessment of the evidence.

123. Appellant establishes no error in the TC's reliance on a 19 March 1978 Division 164 report to establish the murder of Vietnamese fishermen and refugees.[464] Nor does he rebut the presumption of relevance and reliability (including authenticity) afforded to the copy of this contemporaneous DK-era Documentation Center of Cambodia ("DC-Cam") document.[465] Appellant had the opportunity to request access to the originals of copies of documents supplied by DC-Cam,[466] so should not now be heard to complain that the document is a copy. The TC's six paragraph review leading to its findings[467] led to it rightly relying on this report, submitted in the regular course of the military reporting system.

124. The Deputy Commander of Division 1 testified as to orders to capture Vietnamese boats that came into DK waters, including those with refugees, and take captive those in the boats.[468] As part of this system, Pak Sok, a member of Division 164, testified that if there were arrests, reports would be sent to battalion and then on to Division, from one level to another, following the chain of command upward.[469] The impugned report is from Division 164 Political Division. This reporting is consistent with the order about which the Deputy Commander testified, the procedure noted by Pak Sok, and with the type of information to which Pak Sok testified, the same type of information contained in one other report from Division 164 admitted into evidence.[470]

125. Appellant's speculation as to the fate of the persons whose boat was sunk as recorded in

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464 **F54** Appeal Brief, para. 999.

465 **E3/997** Report on Confidential Telephone Message to Respected Brother 89 About Situation on the Sea, 20 Mar. 1978. *See also* **E465** Case 002/02 TJ, para. 46 (presumption of *prima facie* relevance and reliability for DC-Cam documents, upheld by the SCC at **F36** Case 002/01 AJ, para. 375); **E185** Case 002/01 Documents Decision, paras 24-28 (presumption of *prima facie* relevance and reliability (including authenticity) of contemporaneous DK era documents originating from DC-Cam).

466 **E465** Case 002/02 TJ, para. 348.

467 **E465** Case 002/02 TJ, paras 3456-3461, 3493 (finding).

468 **E465** Case 002/02 TJ, para. 3456.

469 **E465** Case 002/02 TJ, para. 3457. Each ship had a radio operating system, and reports would be sent immediately when there was a capture. Sometimes written reports would be sent as well.

470 **E3/929** Report on Confidential Telephone Messages, 1 Apr. 1978.

the 19 March report establishes no error.[471] The report makes no reference to any survivors of that sinking. As the orders were to capture those on board the boats, it is reasonable to assume that survivors would have been captured and their capture noted in the report, as it was with regard to 76 Vietnamese taken from two other captured boats.[472] Contrary to Appellant's speculation, the report gives no basis to conclude there were "several Vietnamese boats present" when the boat was fired on and sunk.[473] Rather, only that the boat which was sunk was reported at that time and location, [474] with two other Vietnamese boats captured hours later at a different location.[475] So, it is not "plausible" the people on the boat that was fired on and sunk were rescued by other Vietnamese boats.[476]

126. Assuming *arguendo* the TC erred in its reliance on this report, Appellant fails to establish that such possible error was critical to the verdict reached so as to constitute a miscarriage of justice.[477] The TC found that murder as a crime against humanity was established in relation to intentional killings in multiple locations, including the impugned killings herein;[478] the alleged error would not have been critical to that finding or resulted in a different verdict in whole or in part. [479]

127. Appellant's reliance on paragraph 1383 of his Brief[480] is similarly misplaced. He provides no references for his unsubstantiated assertions that the TC ignored all cadre statements except where incriminatory and corroborated, but accepted as credible all Civil Party ("CP") statements. His arguments regarding the CPs whose evidence he challenges – Om Yoeurn,[481] Preap Sokhoeurn,[482] Mom Vun[483] – simply rehash unsuccessful arguments from trial, which the TC considered, rejected, and gave reasons

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471 **F54** Appeal Brief, para. 998.

472 **E3/997** Report on Confidential Telephone Message to Respected Brother 89 About Situation on the Sea, 20 Mar. 1978, para. 3.

473 **F54** Appeal Brief, para. 998.

474 **E3/997**, Report on Confidential Telephone Message to Respected Brother 89 About Situation on the Sea, 20 Mar. 1978, para. 1.

475 **E3/997**, Report on Confidential Telephone Message to Respected Brother 89 About Situation on the Sea, 20 Mar. 1978, para. 3.

476 **F54** Appeal Brief, para. 998.

477 *See* Standard of Review (Errors of Fact).

478 **E465** Case 002/02 TJ, para. 3499.

479 *See* Standard of Review (Errors of Law, Errors of Fact).

480 **F54** Appeal Brief, fn. 316 *citing* his para. 1383 as one of eight examples of fact assessments in which the TC allegedly applied a double standard when it came to its treatment of inculpatory and exculpatory evidence.

481 **F54** Appeal Brief, para. 1386.

482 **F54** Appeal Brief, para. 1387.

483 **F54** Appeal Brief, para. 1388.

for accepting the evidence.[484] Finally, Appellant's assertion that, as CPs, these individuals had a vested interest in conviction should be dismissed as purely speculative.

Ground 20: Number of evidentiary items and probative value[485]

128. **Ground 20 should be dismissed, as Appellant does not establish that the TC erred in law by (i) inconsistently and inadequately evaluating the evidence, (ii) assessing the evidence in a piecemeal fashion, or (iii) "adding up" pieces of evidence to meet the burden of proof BRD.**

129. Appellant does not establish that the TC erroneously found, based on an assessment of the evidence *in toto*, that "all facts forming the elements of the crime and mode of liability and the facts indispensable for entering a conviction were established [beyond reasonable doubt]".[486] His piecemeal approach to the evidence and the TC's findings fails to demonstrate that the TC also applied a piecemeal approach to the evidence or that it reached findings beyond reasonable doubt based on the "sheer number of evidentiary items" regardless of their probative value.[487]

130. Appellant's broad assertions of legal error find no support in the paragraphs of his appeal or the TC Judgment paragraphs to which he cites.[488] For example, paragraph 4271 is but one of four paragraphs in which the TC draws conclusions based on earlier exhaustive analysis of the evidence *in toto*, just as Appellant alleges it should have done.[489] The TC's footnotes reference earlier evidentiary analyses, are more numerous than Appellant

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484 **E465** Case 002/02 TJ, paras 3648-3653.

485 Ground 20: **F54** Appeal Brief, *Number of evidentiary items and probative value,* para. 240; **F54.1.1** Appeal Brief Annex A, p. 11 (EN), p. 10 (FR), pp. 14-15 (KH).

486 **F36** Case 002/01 AJ, para. 418.

487 **F36** Case 002/01 AJ, para. 419.

488 **F54** Appeal Brief, para. 240, fn. 338 *citing* for factual submissions his para. 2026 and **E465** Case 002/02 TJ, para. 4271, fns 13938-13939 (which cross-refer to TJ paras 3390 and 3517 and para. 3517 in turn cross-refers to TJ paras 3385, 3390, 3391, 3396). Appellant's para. 2026 further cites his paras 1075, 1759, 1892-1894 and **F51** Khieu Samphan's Request for Admission of Additional Evidence, 8 Oct. 2019 ("Additional Evidence Request"), paras 20-28.

489 **E465** Case 002/02 TJ, paras 4271 (Section 18.2.1.4 *Instructing on the implementation of the Common Purpose through its policies*), 4271-4274 (sub-section of the TC's conclusory evaluation of the evidence re. JCE), 3727-4074 and 4255-4308 (re. Appellant's JCE liability), fn. 13938 (*citing* Section 13.3 *Treatment of the Vietnamese,* para. 3390, which was one of a multitude of paras in *Evidence of a policy targeting the Vietnamese*, paras 3382-3417), fn. 13939 (*citing* Section 13.3 *Treatment of the Vietnamese,* para. 3517), fn. 13935 (*citing* Section 13.3 *Treatment of the Vietnamese,* fn. 11437 (testimony of Ek Hen and corroborative evidence)), fn. 11436 (*citing* testimony about sessions attended by Appellant where he made anti-*Yuon* statements or did not disassociate himself when others made such statements), fn. 13936 (*citing* Section 13.3 *Treatment of the Vietnamese,* para. 3400 (anti-Vietnamese speech by Appellant that is corroborative of the testimony of Ek Hen (*see* paras 3390, 3406 (fn. 11484), 3216 (fn. 10825), 4272) and CP Preap Chhon (*see* para. 3961)), fn. 13937 (*citing* Section 13.3 *Treatment of the Vietnamese,* para. 3416 (CPK rhetoric against Vietnamese soldiers and indiscriminate reference to *Yuon* directed against all Vietnamese)).

describes, and establish no error in the TC's assessment of evidence. The TC is not required to repeat earlier analyses and conclusions, but may properly refer back to them via footnotes.

131. Appellant's concern that the only source for his speeches is the witness Ek Hen[490] is misplaced. In addition to multiple corroborative sources, CP Preap Chhon testified that Appellant stated in a speech that "[W]e made a revolution in order to eliminate the Lon Nol regime. And another point was to eliminate the capitalist, the feudalist, the intellectuals. He [Appellant] didn't want them to exist."[491] Appellant's concern also demonstrates his misapprehension of the extensive evidentiary analysis on which the TC rightly relied to find as proven Appellant's knowledge and intent regarding crimes committed during the Khmer Rouge regime.[492]

132. Appellant's reliance on the additional paragraphs in his Appeal Brief to establish error is likewise misplaced. These paragraphs, and his *Additional Evidence Request* dispute the TC's assessment of the credibility of Ek Hen,[493] ignore the TC's analysis of the totality of the evidence. A review of the witness' in-court testimony and statements shows no error in giving Ek Hen's testimony credibility. She gave detailed information, including about the study session led by Appellant. She remained adamant that it was Appellant who talked about Pang being a traitor during that study session.[494] This is important, as it assisted the TC in determining the date of Appellant's study session - dates often becoming confused with the passage of time - since other evidence indicated that Pang was arrested around April 1978.[495] She clearly and reasonably explained an alleged discrepancy regarding the length of study sessions, noting that the duration of the session itself was about a day or a morning, but it was followed by self-criticism sessions which lasted about a week.[496]

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490 **F54** Appeal Brief, para. 240, fn. 338 *referring to* para. 2026.

491 **E465** Case 002/02 TJ, para. 3961. This renders moot Appellant's argument in his para. 2026 that the TC's finding attributing this statement to Appellant was unsourced. The TC's citation in para. 4272, fn. 13941 to para. 4272 was obviously an administrative error.

492 **E465** Case 002/02 TJ, paras 562-624 (Roles and Functions), 4201-4319 (Criminal Responsibility). *See also* response to Ground 22 and Section VIII. C. Intent/Contribution, 22 (contribution to JCE).

493 **F54** Appeal Brief, para. 240, fn. 338 *citing* his para. 2026 (participation in the common purpose as other than a contribution to the crimes, alleged instructions) which *cites* his paras 1075 (*mens rea* genocide, intent to destroy the Vietnamese group as such, errors concerning declarations attributed to the leaders), 1759 (residual functions, education sessions, credibility of Ek Hen), 1892-1894 (Vietnamese, inferring knowledge from CPK policy, deportation).

494 **E319/71.2.7** Ek Hen WRI, A43, 45; **E3/474** Ek Hen WRI, EN 00205049 (Pang was arrested because he was a traitor collaborating with the *Yuon*); **E1/217.1** Ek Hen, T. 3 July 2013, 11.09.16-11.26.06, pp. 39-44, lines 14-24 (Pang was arrested because he was a traitor collaborating with the *Yuon*).

495 **E465** Case 002/02 TJ, para. 2315, fn. 7823 and the evidence cited therein.

496 **E1/217.1** Ek Hen, T. 3 July 2013, 15.17.13-15.23.37, pp. 97-98, lines 1-11.

133. Her evidence also has internal indicia of reliability; she said that it was at this study session she learned that Pang was "Chairman of Office 870",[497] with no indication she had independent knowledge of this fact. Appellant relies on a selective reading of the witness' testimony to argue that his statement that "there were no '*Yuons*' in Cambodia" is open to various [presumably allegedly benign] interpretations.[498] A holistic reading of the witness' testimony regarding this statement belies that assertion. The witness testified in the context of the situation at the time Appellant stated that Pang was a traitor who collaborated with the *Yuon*. She testified that at that time, "'*Yuon*' was not regarded as our friends because in our country, in those days, there were only Cambodians, no '*Yuons*'. And he [Appellant] also mentioned something about this. He said Khmer had to be united and Khmer shall be free of Vietnamese, or the '*Yuon*'".[499] In addition, these challenges fail as discussed in response to Grounds 23 (admission of her WRI) and 204 (political training identifying enemies).

Ground 21: Corroboration[500]

134. **Ground 21 should be dismissed, as Appellant does not establish that the TC erred in law and fact by inconsistently applying the framework it established for assessing corroborative evidence, a framework Appellant does not dispute.**

135. Appellant's ground fails as he once again refers to paragraphs in his brief which provide no support.[501] His reliance on paragraph 238, relating to the TC's assessment of circumstantial evidence, fails, as he ignores critical language in the SCC's findings in Case 002/01: "to the extent, however, that the *conviction* depends on such a generalised finding, it has to be established beyond reasonable doubt. […] [T]he *burden remains on the appellant alleging a factual error to demonstrate that the extrapolation made by the first-instance chamber in reaching the finding was unreasonable.*"[502] As explained elsewhere in this Response, Appellant fails to meet this burden and fails to provide

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497 **E3/474** Ek Hen WRI, EN 00205049; **E319/71.2.7** Ek Hen WRI, A39, 43 (study session with Appellant who talked of Northern Zone cadres who had betrayed them, and later that betrayal spread to Office 870, where Pang was a "chief". Appellant said Pang betrayed them.); **E1/217.1** Ek Hen, T. 3 July 2013, 11.10.24-11.16.44, pp. 40-41, lines 4-23 (the witness stands by her WRI **E474** wherein she says Appellant told of the arrest of Pang, Chairman of Office 870), 14.32.47-14.36.29, pp. 88-89, lines 18-8 (Appellant said Pang arrested and spoke of Office 870). It is of note that Appellant speculated that Pang became chairman of Office 870 (**E465** Case 002/02 TJ, para. 364).

498 **F54** Appeal Brief, para. 1075.

499 **E1/217.1** Ek Hen, T. 3 July 2013, 11.29.00-11.33.02, p. 47, lines 6-22.

500 Ground 21: **F54** Appeal Brief, *Corroboration*, paras 241-242; **F54.1.1** Appeal Brief Annex A, p. 12 (EN), pp. 10-11 (FR), p. 15 (KH).

501 **F54** Appeal Brief, para. 242, fns 341 *(citing* his paras 238, 312-313), 342 *(citing* paras 781, 866).

502 **F54** Appeal Brief, para. 238, fn. 330; **F36** Case 002/01 AJ, para. 598 (emphasis added).

alternative reasonable explanations for the conclusions reached by the TC.[503] His reference to paragraphs 312-313,[504] relating to the TC's assessment of hearsay evidence, fails for similar reasons: Appellant does not establish that (i) the TC failed to apply the framework it set out for such assessment, (ii) the TC erred in law and fact in its assessment of that evidence, and (iii) no reasonable fact finder could have relied on the challenged evidence in reaching the challenged finding.[505]

136. Likewise, Appellant finds no support in his paragraphs 781 and 866.[506] His arguments in paragraph 781, relating to alleged lack of evidence to establish deaths caused by accidents at 1st January Dam,[507] establish no error in the TC's reliance on the in-court evidence of eyewitnesses[508] and the hearsay evidence of several others[509] regarding landslide accidents, some resulting in death, to "corroborate that such [landslide] accidents took place". The testimony of these witnesses and CPs was clear and responsive as to what they observed and what they were told. They gave sufficient evidence of the source of their information; Hun Sethany testified that a colleague told her of the landslide; Un Rann said that those who went to see the accident told her.[510] Appellant's incorrect assertion that this evidence could not serve as corroboration for deaths from a landslide ignores both that a TC may rely on uncorroborated hearsay to even establish an element of a crime – though such evidence must be used with caution – and the SCC finding in Case 002/01 that out-of-court evidence, the nature of which was of inherently low probative value, could be used to corroborate the in-court evidence.[511] The assertion also

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503 *See* response to Ground 18.

504 **F54** Appeal Brief, para. 242, fn. 341 *citing* paras 312-313.

505 *See* response to Ground 32.

506 **F54** Appeal Brief, para. 242, fn. 342 *citing* paras 781, 866.

507 *See* response to Ground 116.

508 **E465** Case 002/02 TJ, para. 1535 *citing* **E1/339.1** Nuon Narom; T. 1 Sept. 2015, 11.13.47-11.19.02, p. 40, lines 7-14 (in response to Defence Counsel question if she "observe[d] anybody being – or getting *injured* by an accident", the CP, who was testifying regarding events at 1JD, responded that she saw the soil collapse where youths were digging a hole (emphasis added)); **E465** Case 002/02 TJ, para. 1628 *citing* **E1/305.1** Meas Laihour, T. 26 May 2015, 09.40.37-09.42.49, p. 17, lines 2-8 (she saw a landslide killing people digging soil), 10.34.23-10.36.10, p. 30, lines 3-8 (the landslide happened in a segment where people from a different village were working).

509 **E465** Case 002/02 TJ, para. 1628 *citing* **E1/305.1** Hun Sethany, T. 26 May 2015, 15.46.36-15.49.15, p. 95, lines 19-23 (heard someone had died from soil collapse); **E1/309.1** Uth Seng, T. 3 June 2015, 13.42.39-13.45.54, p. 54, line 25-p. 55, line 5 (witness heard of a fatal landslide caused by earth dug very deep); **E1/307.1** Un Rann, T. 28 May 2015, 09.34.36-09.37.13, p. 14, lines 18-23, 15.21.40-15.23.52, p. 79, lines 23-25, 15.21.40-15.23.52, p. 80, line 4 (told by those who went to see the accident that a soil collapse killed some workers, one on the spot).

510 **E1/305.1** Hun Sethany, T. 26 May 2015, 15.46.36-15.49.15, p. 95, lines 19-23; **E1/307.1** Un Rann, T. 28 May 2015, 09.34.36-09.37.13, p. 14, lines 18-23, 15.21.40-15.23.52, p. 79, line 23-p. 80, line 4 (told by those who went to see the accident).

511 **F36** Case 002/01 AJ, paras 430, 435.

ignores that a TC may rely on one witness to support a finding;[512] here we have two eyewitnesses who clearly saw landslides that caused death or injury.[513]

137. Appellant's paragraph 866 also fails to establish error.[514] That paragraph, relating to the use of the WRIs of two deceased individuals, Uong Dos and Sok El, to establish the murder of a man named Heus, ignores that such evidence may be used where, as here, the declarants are deceased.[515] There is no absolute rule of evidence that a trier of fact cannot convict on the basis of evidence from one or more witnesses who have not been subject to defence examination.[516] Indeed, exceptions are permitted where (i) there was a good reason for non-attendance of a witness, as is clearly the case here, and (ii), in the event that the conviction is based solely or decisively on the evidence, sufficient counterbalancing factors were in place permitting a fair assessment of the evidence.[517] The TC correctly considered this circumstance, and recalled the need for caution when relying on these WRIs.[518] Appellant has not established that the TC did not exercise such caution in its assessment of the clear, detailed, credible eyewitness accounts given by these witnesses.[519]

138. Finally, Appellant does not show that a conviction was based solely or decisively on this evidence[520] as the convictions were based on cumulative killings, not individual deaths. If it can be argued that this was the case, the clear, convincing cross-corroboration was a sufficient counterbalancing factor to permit a fair assessment of the evidence.[521] Given the cumulative nature of the convictions, even assuming error, reducing the number of those killed by a small number would not warrant SCC intervention.

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512 *Nahimana* AJ, para. 949.

513 **E465** Case 002/02 TJ, para. 1535 *citing* **E1/339.1** Nuon Narom; T. 1 Sept. 2015, 11.13.47-11.19.02, p. 40, lines 7-14 (in response to Defence Counsel question if she "observe[d] anybody being – or getting *injured* by an accident", the CP, who was testifying regarding events at 1JD, responded that she saw the soil collapse where youths were digging a hole (emphasis added)); **E465** Case 002/02 TJ, para. 1628 *citing* **E1/305.1** Meas Laihour, T. 26 May 2015, 09.40.37-09.42.49, p. 17, lines 2-8 (she saw a landslide killing people digging soil), 10.34.23-10.36.10, p. 30, lines 3-8 (the landslide happened in a segment where people from a different village were working).

514 *See* response to Ground 131.

515 **F36** Case 002/01 AJ, para. 296.

516 **F36** Case 002/01 AJ, para. 296.

517 **F36** Case 002/01 AJ, para. 296 *citing Al-Khawaja & Tahery v. The UK*, paras 127, 147, *Kazakov v. Russia*, para. 29, *Popović* AJ, para. 96.

518 **E465** Case 002/02 TJ, para. 3094.

519 **E3/7703** Uong Dos WRI, EN 00242171-72 (killing by beating of a prisoner named Heus); **E3/7702** Sok El WRI, EN 00239510 (killing by beating of the former husband of Sok El's current wife).

520 **F36** Case 002/01 AJ, para. 296.

521 **F36** Case 002/01 AJ, para. 296.

Ground 22: Inconsistencies[522]

139. **Ground 22 should be dismissed, as Appellant does not establish that the TC erred in law in assessing the evidence with regard to any contradictions or inconsistencies in testimony.**

140. Appellant accepts the legal framework set forth by the TC to assess the evidence of CPs, then seems to ignore all the factors save for discrepancies with other versions.[523]

141. Appellant fails to show that the TC erred by finding the evidence of CP Em Oeun credible, considering the testimony *in toto* and factors relevant for such a determination, such as corroboration.[524] Appellant once again focuses on the CP's difficulty to recall the dates events occurred, without considering that the CP testified consistently regarding material facts – in particular, that Appellant was present at a political training session at Borei Keila and what he said at that session.[525] Throughout the CP's lengthy testimony, he responded reasonably and forthrightly to challenges to the alleged inconsistencies in his statements, explaining multiple times that he may have gotten dates wrong, but the contents of his statements, "the elements of the event are there".[526]

142. Appellant mischaracterises the CP's evidence regarding the political training session. Contrary to Appellant's assertion, the CP did not testify that "all speakers repeated the same thing";[527] the CP testified that the speakers at this training "linked their speech to one another",[528] each "picked up a few words" from the previous speaker before making their contributions.[529] Appellant falsely relies on his selective reference to the CP's evidence regarding his forced marriage to discredit his evidence.[530] The CP clearly explained the circumstances surrounding, and the forced nature of, his marriage and why

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522 Ground 22: **F54** Appeal Brief, *Inconsistencies,* para. 243; **F54.1.1** Appeal Brief Annex A, p. 12 (EN), p. 11 (FR), p. 15 (KH).

523 **E465** Case 002/02 TJ, para. 49 (factors include credibility, demeanour, possible ulterior motivations, corroboration, and all circumstances of the case).

524 **E465** Case 002/02 TJ, para. 49.

525 **E465** Case 002/02 TJ, para. 3942.

526 **E1/116.1** Em Oeun, T. 28 Aug. 2012, 10.08.58-10.10.15, p. 25, lines 3-9. *See also e.g.* **E1/116.1** Em Oeun, T. 28 Aug. 2012, 09.26.16-10.10.15 pp. 10-25 (not precise on dates), 10.07.01-10.08.58, p. 24, lines 13-21 (the exact date was during the rainy season, sorry if cannot recall the exact date, did not care so much about the date, focused on how to survive), 14.59.06-15.01.56, p. 77, lines 17-22 (story the same, problem is the date is not correctly input), 15.03.15-15.04.00, p. 78, lines 21-24 (has problem remembering the exact date), 15.58.38-16.01.24, p. 93, lines 4-13 (content of the statement was correct, may have made mistakes in the dates); **E1/117.1** Em Oeun, T. 29 Aug. 2012, 10.04.02-10.06.39, p. 24, line 23-p. 25, line 4 (apologises for "not being able to recollect the facts in good sequences").

527 **F54** Appeal Brief, para. 1757.

528 **E1/113.1** Em Oeun, T. 23 Aug. 2012, 14.30.56-14.32.48, p. 82, line 17-p. 83, line 2; **E1/115.1** Em Oeun T. 28 Aug. 2012, 09.45.25-11.05.25, pp. 16-20.

529 **E1/113.1** Em Oeun, T. 23 Aug. 2012, 14.32.48-14.35.53, p. 83, lines 15-19.

530 **F54** Appeal Brief, para. 1172 *cited* in para. 1758, fn. 3396.

he remained married to his first wife.[531] While a TC may rely on the testimony of one witness to establish a finding,[532] Appellant ignores that this CP's evidence is one source of many for most of the TC's citations which include it.[533]

Ground 24: Review before appearance[534]

143. **Ground 24 should be dismissed as Appellant fails to establish any error of law in the TC's practice of instructing VWU to allow all witnesses to review their prior statements before they testified at trial.**

144. This ground fails as Appellant is unable to demonstrate any instance where the TC failed to apply the comprehensive assessment framework it set out for its evaluation of testimony of witnesses who had read their prior statements before testifying.[535] Appellant also does not establish any basis to reverse the SCC's conclusion in Case 002/01 that "actual risks resulting from the review or prior statements in this case were not great", based in part on the considerations set out by the TC herein, and others equally applicable in this case.[536] Appellant is simply voicing his disagreement with a practice the SCC found did not constitute error.[537]

145. Appellant also fails to establish legal error in that the evidence was "open to contradictory discussion in the course of the proceedings".[538] He does not show that witnesses did not speak orally, that they were allowed to read from prepared statements,[539] that parties were denied either "the right to test a witness' credibility on areas within or beyond his prior statements"[540] or to "ask further questions only where there was a need for clarification relevant to matters that are insufficiently covered by these statements or not dealt with during questioning before the Co-Investigating Judges".[541] Finally, unless the witnesses had a photographic memory, their in-court testimony would not be substantially altered

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531 **E1/113.1** Em Oeun T. 23 Aug. 2012, 15.53.21-15.59.41, p. 103, line 21-p. 106, line 5, 16.01.45-16.04.47, p. 107, lines 1-10; *see also* response to Ground 165.

532 *Nahimana* AJ, para. 949.

533 *See e.g.* **E465** Case 002/02 TJ, paras 607 (fn. 1904), 3621 (fn. 12092), 3739 (fn. 12473), 4015 (fn. 13301). Unlike the other cited paras, para. 3967 (fn. 13204) only cites Em Oeun because the TC was directly quoting his evidence.

534 Ground 24: **F54** Appeal Brief, *Review before appearance*, paras 247-252; **F54.1** Appeal Brief Annex A, pp. 12-13 (EN), p. 11 (FR), p. 16 (KH).

535 **E465** Case 002/02 TJ, paras 49, 53 (including demeanour, inconsistencies regarding *material* facts, possible ulterior motives and corroboration).

536 **F36** Case 002/01 AJ, para. 268.

537 **F36** Case 002/01 AJ, paras 269, 262, 263.

538 **F54** Appeal Brief, para. 251.

539 **F54** Appeal Brief, para. 251.

540 **E465** Case 002/02 TJ, para. 52.

541 **E465** Case 002/02 TJ, para. 52.

by an out-of-court review of prior statements.

146. Appellant's argument that "the Supreme Court should not have validated such an approach [allowing witnesses to re-read their statements prior to testifying], which undermines the principle of oral proceedings"[542] should be dismissed as without merit. Appellant is asking the SCC to reconsider its analysis of international jurisprudence on this issue and reverse its conclusion that resort to such practice was not erroneous.[543] Appellant has not established any change in the impugned practice in this case, or any basis which would warrant such a reconsideration or reversal of the SCC's position.[544]

147. The *Lubanga* case does not support Appellant's arguments.[545] In citing what could perhaps best be described as *dicta*, Appellant fails to note that the *Lubanga* Chamber upheld the practice of review of prior statements before testifying.[546] That decision is of particular importance, as "[t]he ICC's procedural model is the one most similar to that adopted by the ECCC Trial Chamber, in that, at the ECCC, the Witnesses and Experts Support Unit, a neutral organ of the Court, makes the statements available to the witnesses".[547]

148. Contrary to Appellant's claims, the TC and SCC can "establish a practice of re-reading previous depositions",[548] based on resort to procedural rules established at the international level in accord with IR 2, Article 33 new of the ECCC Law, and Article 12(1) of the ECCC Agreement ("UN-RGC Agreement").[549] The TC properly did so in this case as it did in Case 002/01, and, as Appellant has established no error, the practice should once again be upheld by the SCC.

Ground 25: Reason to lie[550]

149. **Ground 25 should be dismissed, as Appellant does not demonstrate that the TC erred in law by failing to systematically take into account the possible motive to lie in its evaluation of the evidence of witnesses, CPs and experts.**

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542 **F54** Appeal Brief, para. 250.
543 **F36** Case 002/01 AJ, paras 263-269.
544 **F2/10/3** SCC Decision on NC's Reconsideration Request for Additional Evidence, p. 3, EN 01202790 (compelling reasons); *Milutinović* TC Decision on Reconsideration of Additional PMs for Witness K56, para. 2 (clear error in reasoning, interests of justice).
545 **F54** Appeal Brief, para. 251.
546 **F36** Case 002/01 AJ, para. 265 *citing Lubanga* TC Decision on Witness Proofing, paras 51-57.
547 **F36** Case 002/01 AJ, para. 265.
548 **F54** Appeal Brief, para. 251.
549 **F36** Case 002/01 AJ, paras 263, 269.
550 Ground 25: **F54** Appeal Brief, *Reason to lie*, para. 253; **F54.1** Appeal Brief Annex A, p. 13 (EN), pp. 11-12 (FR), pp. 16-17 (KH).

150. Appellant's arguments fail as he is simply asking the SCC to substitute his preferred assessment of the evidence for that of the TC.[551] Appellant's reliance on "assurances of non-prosecution"[552] to demonstrate TC error is misplaced, as it does not demonstrate that a double standard was applied. It is commonly accepted that people lie or minimise criminal or socially condemned conduct for reasons other than fear of prosecution, such as fear of social stigmatisation or self-rationalisation of negative conduct. In addition, the TC did consider, in part, that former cadres who testified regarding consent to marry tended to "minimise their own responsibility".[553] The TC considered this, however, as part of a larger review of evidence regarding consent to marry, including the coercive environment negating the ability to give genuine consent,[554] not due to any application of a double standard, as fully addressed in the Response section on the Regulation of Marriage.[555]

151. Appellant's emphasis on the TC's decision not to call François Ponchaud to testify[556] is similarly misplaced, as it does not demonstrate that the TC applied double standards regarding exculpatory and inculpatory evidence. First, the TC's decision was well grounded in law. In reaching its decision, the TC recalled that this individual testified in Case 002/01 on various topics including forced marriage, which "remain[s] part of the evidence available in Case 002/02".[557] Second, Appellant has not demonstrated that the TC did not consider this evidence.

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551 **F54** Appeal Brief, para. 253 *citing* his paras 1194-1195, 1233-1242 which further cite his paras 167, 1157-1188, 1212-1213, 1271-1272, and **E465** Case 002/02 TJ, paras 3557 (fn. 11493), 3569, 3570 (fn. 11980), 3613, 3617, 3623, 3675, 4247 (fn. 13861). *See response* to Grounds 165, 166, 169.

552 **F54** Appeal Brief, para. 253.

553 **E465** Case 002/02 TJ, para. 3623.

554 **E465** Case 002/02 TJ, Section 14.3.6.2 Consent, paras 3617-3625.

555 *See* response to Grounds 162, 167, 169, 170. International jurisprudence and Rules of Evidence acknowledge the reality that a coercive environment and a climate of fear, which are present in most cases involving international crimes, vitiate genuine consent. *See e.g. Kunarac* AJ, para. 130 ("it is worth observing that the circumstances [...] that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. *That is to say, true consent will not be possible.*" (emphasis added)); *Gacumbitsi* AJ, para. 155 (coercive circumstances proving non-consent); *Sesay* AJ, para. 736 (in instances of forced marriage by force, threat of force, coercion, or taking advantage of coercive circumstances, **consent is impossible**). The Rules of Procedure and Evidence of these courts recognised the coercive environment in which victims lived during the commission of international crimes (SCSL Rules of Procedure and Evidence, Rule 96; ICTY Rules of Procedure and Evidence, Rule 96; ICTR Rules of Procedure and Evidence, Rule 96).

556 **F54** Appeal Brief, para. 1195 *cited* in para. 253, fn. 373.

557 **E408/6/2** TC Decision on Hearing Stephen Heder and François Ponchaud, para. 6.

Ground 26: Cultural bias[558]

152. **Ground 26 should be dismissed as Appellant fails to establish that the TC erred in law and in fact in its assessment of the evidence in the context in which the crimes were committed, or that the judges distorted facts due to cultural bias.**

153. The ground fails as Appellant provided no legal or jurisprudential basis to assert that cultural bias should be recognised in the assessment of the context within which the crimes were committed. After noting that the TC "relies upon the guidance of its Cambodian members in the assessment of witness credibility in order to avoid cultural bias",[559] Appellant wrongfully argues that "if the international judges relied on the national judges in order to avoid any distortion due to cultural prejudices, it was on the condition that the national judges assessed these facts in the light of the Khmer culture at the time of the facts being judged".[560] The argument can be characterised as ill-formed since, if this logic were to be followed, only Khmer judges who have lived under the Khmer Rouge regime could evaluate the context in which the crimes were committed. The ground also fails as Appellant demonstrates no instance in which the TC was culturally biased in assessing the context.

154. For example, Appellant misrepresents the challenged evidence when he asserts that "the Judges were culturally biased when, talking about the living conditions and hygiene [...] they remembered that 'there were always many flies around the food'".[561] The TC's consideration of this evidence was rightly based on its analysis of the evidence *in toto*. Appellant's allegation that this was a frequent occurrence in the countryside ignores the seriousness of this condition. Appellant also omitted that this factual conclusion was not based on the Judges' "contemporary view"[562] but, rather, based on evidence provided by CPs and witnesses who had to endure this condition.[563] They could hardly be said to be culturally biased with respect to Khmer culture in 1975-1978 and did not find those food conditions to be part of their culture.[564]

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558 Ground 26: **F54** Appeal Brief, *Cultural bias*, paras 254-256; **F54.1.1** Appeal Brief Annex A, p. 13 (EN), p. 12 (FR), p. 17 (KH).

559 **F54** Appeal Brief, para. 254.

560 **F54** Appeal Brief, para. 255.

561 **F54** Appeal Brief, para. 255 *erroneously citing* **E465** Case 002/02 TJ, para. 1298, fn. 4648. The correct reference is para. 1327, fn. 4548.

562 **F54** Appeal Brief, para. 255.

563 **E465** Case 002/02 TJ, fn. 4548.

564 **E1/323.1** Sen Sophon, T. 22 July 2015, 15.21.26-15.23.55, p. 70, lines 23-25 ("If you talk about flies, there were swarms of flies and you could actually see the darkness of flies on your bowl of gruel."); **E1/333.1** Tak Boy, T. 19 Aug. 2015, 13.49.56-13.52.27, p. 60, lines 14-18 ("The food was not protected or covered; it was exposed and therefore covered by flies."). *See also* **E465** Case 002/02 TJ, para. 1586 *citing* **E1/306.1**

155. Similarly, in relation to forced marriage, Appellant has not demonstrated that the factual finding was based on a wholly erroneous evaluation of the evidence,[565] or that the TC characterised the facts of the case with a contemporary view.[566] Contrary to his invalid alleged similarity between arranged marriage before 1975 and forced marriages during the DK period,[567] the TC's assessment of the evidence demonstrated numerous meaningful differences, allowing it to conclude that "arranged marriage in Cambodian culture is very different from forced marriage in the DK regime."[568]

Ground 32: Hearsay[569]

156. **Ground 32 should be dismissed as Appellant fails to establish that the TC erred in law and fact in assessing and relying on hearsay evidence.**

157. Appellant quite rightly agrees the TC correctly enunciated factors to consider when assessing the probative value of hearsay evidence and that such evidence must be viewed with caution.[570] He fails to establish, however, that the TC did not apply those criteria or exercise caution in its assessment of such evidence. His argument that the TC generally misapplied the standard for the treatment of hearsay evidence, without substantiation, must be rejected.[571]

158. The ground fails with regard to the alleged legal and factual errors as Appellant does not satisfy the SCC's requirement that "it is for the appealing party to demonstrate that no reasonable trier of fact could have relied upon [hearsay evidence] in reaching a specific finding".[572] Appellant also fails to accept that, while it must be viewed with caution, hearsay is admissible if it has probative value; indeed, uncorroborated hearsay evidence

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Hun Sethany, T. 22 May 2015, 09.17.17-09.20.15, p. 7, lines 4-10 ("you could hear the combined sound and every ladle of soup that was placed on to a bowl contained many flies and we had to just pick the flies one by one out of the soup bowl and we had to eat whatever left in the bowl."), **E1/317.1** Yean Lon, T. 16 June 2015, 11.27.22-11.30.02, p. 42, lines 7-10 ("Talking about flies, it was unimaginable. There were many, many flies and they just hang onto your food. And many people actually got sick because of the flies.").

565 Case 001-**F28** *Duch* AJ, para. 17 *citing Kupreškić* AJ, para. 30.

566 **F54** Appeal Brief, para. 1140.

567 *See* response to Ground 162.

568 **E465** Case 002/02 TJ, para. 3688. *See also Brima* AJ, para. 194. *See also Brima* TJ Sebutinde Separate Concurring Opinion, paras 8-12; *Brima* TJ Doherty Partly Dissenting Opinion, paras 22-36.

569 Ground 32: **F54** Appeal Brief, *Hearsay*, paras 312-313; **F54.1.1** Appeal Brief Annex A, p. 15 (EN), p. 14 (FR), p. 20 (KH).

570 **F54** Appeal Brief, para. 312 *citing* **E465** Case 002/02 TJ, para. 63.

571 *See* response to Ground 32; **F36** Case 002/01 AJ, para. 304.

572 **F36** Case 002/01 AJ, para. 302 *citing Karera* AJ, paras 39, 196. *See also* **F36** Case 002/01 AJ, para. 889 (anonymous in the nature of double hearsay is not *per se* unreliable, it could be considered in light of corroborating evidence).

may be relied upon to establish an element of a crime if viewed with caution.[573] As illustrated below, Appellant also misstates or misrepresents much of the evidence to which he refers in this piecemeal fashion and fails to consider the full extent of the TC's reasoning.

159. Appellant cites 19 paragraphs of his brief in which he argues that the TC contradicted its stated approach to the assessment of hearsay evidence. However, Appellant's claims merely label evidence as hearsay, and assert that the TC could not rely on it.[574] As set out in other sections of this Response, these claims do not establish error.[575] For example, regarding deportation of Vietnamese from Pou Chentam village in Prey Veng,[576] contrary

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573 **F36** Case 002/01 AJ, para. 302 *citing Gacumbitsi* AJ, para. 133, fn. 320, *Hategekimana* AJ, para. 270.

574 **F54** Appeal Brief, fn. 484 *citing* his paras 908, 919, 921, 971, 975, 987, 991-992, 1004-1005, 1007, 1011, 1013-1014, 1044, 1095, 1266, 1762, 1868.

575 **F54** Appeal Brief, paras 312, fn. 484 – arguments in the following cited paragraphs fail because they: **908** (killing Cham at Wat Au Trakuon – misrepresent TC's findings including direct evidence from villagers, members of security forces and militiamen that the Cham were systematically rounded up and taken to WAT; Muy Vanny was one of the corroborative sources; *see* response to Ground 137); **919** (order to arrest Cham – misrepresent TC's findings which were not based solely on specific orders; ignore that the finding was based on assessment of evidence that killings were organised and deliberate pursuant to CPK policy; misrepresent testimony of Yean Lon; *see* response to Ground 139); **921** (killing of Cham – orders from higher echelon, as testified by Say Doeun; *see* response to Ground 139); **971** (deportation of Vietnamese – Sao Sak's evidence misrepresented: she said she did not witness the events, but was told Vietnamese families who disappeared every few days in the village were sent to Vietnam; she did not change her evidence re. deportation, but said over time that Vietnamese were taken to be killed rather than deported; *see* response to Ground 151); **975** (challenge to Em Bunnim and Bun Reun's WRIs – both corroborate Sao Sak's testimony and said they witnessed the Vietnamese being sent from Anglung Trea back to Vietnam; *see* response to Ground 151); **987** (murder of Vietnamese in Svay Rieng, evidence of Sin Chhem – he had an adequate basis of knowledge regarding the arrest or execution of Vietnamese including that he knew of Vietnamese families in the area, lived closely to and worked with them, was told of their disappearance and killing by people living closely to the Vietnamese, and was told by the commune chief that mixed marriage Vietnamese wives and children were taken away and killed; *see* response to Ground 152); **1004-1005** (murder of Vietnamese in West Zone – Prak Doeun's source, Hoem, was in the area of Prak Doeun's wife and children's executions and detailed how and why they were killed; obvious typographic error regarding killings on Ta Movas island; no error warranting intervention as the TC properly found Appellant responsible for killing of one child; *see* response to Ground 154); **1007, 1011** (*see* response to Ground 155 (murders of Vietnamese at Wat Khsach)); **1013-1014** (murders at Wat Khsach ordered by higher echelon – Sean Song was told by village chief the order to kill the Vietnamese came from higher echelon; villagers told Y Vun that village chief had received his orders to kill from higher echelon; *see* response to Ground 155); **1044** (matrilineal ethnicity; *see* response to Ground 158); **1095** (2 Jan. declaration – testimony of CP Heng Lai Heang and omission of exculpatory evidence; ex-DK soldier in question is Meas Voeun, who testified he was instructed Vietnamese were to be smashed, then changed his testimony the next day in court with no explanation; witness Pak Sok testified that at trainings after 1976 he was told to kill Vietnamese, including infants, because they were the hereditary enemy; *see* response to Ground 159); **1266** (marriage, Sihanouk book, marriage of young girls to disabled soldiers – misrepresent evidence and findings; *see* response to Ground 169); **1762** (political training – misrepresent the testimony of Chea Say: she also said Appellant included instructions on how to fight against enemies who had infiltrated; Ong Thong Hoeung: never met KS until testified in court; Philip Short said that until 1975 Appellant had a reputation for honesty and probity; *see* response to Grounds 204, 256; *see also* **E465** Case 002/02 TJ, para. 3401 (TC noted that lack of opportunity to test in-court the statements made by Nordom Sihanouk in his book diminished their evidentiary value)); **1868** (Appellant's knowledge of Chou Chet's execution – mischaracterises the evidence on which TC relied, not torture-tainted; *see* response to Ground 28).

576 **F54** Appeal Brief, para. 313.

to his claims, Doung Oeurn's knowledge is based on her observations of Vietnamese mothers and their children or Vietnamese men being taken or disappearing from her Pou Chentam village. No Vietnamese ever returned to her village; the Khmer husband of a Vietnamese wife returned, but not his wife or children. The source of her information that her Vietnamese husband was taken away was her mother, who saw him taken away by a militiaman, never to return.[577] Moreover, the TC's conclusion was that deportation of Vietnamese from *Prey Veng Province* was established BRD, of which *Pou Chentam village* was but one part of the underlying factual findings. Thus, should the evidence of deportation from the village be discounted, there would be no impact on the findings regarding the province.

160. Appellant's suggestion that the TC failed to address the source of hearsay statements during trial testimony erroneously disregards that he had the opportunity to question those who testified regarding the provenance of any statement.[578] For instance, Appellant never asked Doung Oeurn any question regarding the basis of her knowledge that Vietnamese were forced from Pou Chentam village to Vietnam, nor queried the extent of her personal knowledge.[579] Instead, Appellant asked questions focused only on the occupation of Doung Oeurn's husband,[580] in an unmerited attempt to justify the arrest and disappearance of this person.[581] In any event, Appellant also ignores that, in fact, as noted above, Doung Oeurn testified that her mother told the CP that she, the mother, saw the CP's husband taken away by a militiaman.[582]

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577 **E1/381.1** Doung Oeurn, T. 25 Jan. 2016, 09.21.21-0925.30, p. 8, lines 5-11, 10.41.58-10.45.49, p. 30, lines 2-22 (CP's mother told CP that CP's Vietnamese husband taken away by militiaman, he never came back), 09.30.16-09.33.45, p. 10, line 24-p. 11, line 15 (Ta Ki and Yeay Min and their children from her village "returned to VN", but only the husband returned after the collapse of DK), 09.37.12-09.41.13, p. 13, line 10-p. 14, line 7, 11.00.49-11.05.12, p. 38, lines 6-24 (Lach Ny's family and children were sent away but Lach Ny was spared – his wife was Vietnamese, he did not see her taken away but "she was gone like the rest of them"), 09.39.14-09.45.35, p. 14, line 8-p. 15, line 23 (Ngang was also sent away and never returned, his parents were Vietnamese), 11.20.35-11.22.36, p. 45, lines 16-19 (after the DK regime there were no Vietnamese left in the village), 13.49.32-13.54.30, p. 55, line 23-p. 56, line 18 (in response to Defence question if, in other words, the CP's husband was the only Vietnamese person from his family who stayed in Pou Chentam, the CP replied yes, that her husband refused to go, even when the CP told him everyone else had gone back).

578 **F54** Appeal Brief, para. 312.

579 **E1/381.1** Doung Oeurn, T. 25 Jan. 2016, 14.16.58-14.28.44, p. 65, line 13-p. 69, line 23.

580 **E1/381.1** Doung Oeurn, T. 25 Jan. 2016, 14.16.58-14.28.44, p. 65, line 13-p. 69, line 23.

581 *See* **E457/6/4/1** KS Case 002/02 Closing Brief, para. 2191.

582 **El/ 381.1** Doung Oeurn, T. 25 Jan. 2016, 10.43.58-10.45.49, p. 30, lines 7-15.

D. DOCUMENTARY EVIDENCE

1. GENERAL ASSESSMENT

Ground 36: Documentary evidence and authenticity[583]

161. **Ground 36 should be dismissed as Appellant fails to establish the TC erred in law or fact in assessing documentary evidence and contemporaneous documents.**

162. In particular, the ground fails as Appellant does not demonstrate the TC erred in law and fact (i) in the adequacy of its assessment of documentary evidence or (ii) by noting that, where such existed, original documents in the possession of DC-Cam were accessible to the parties in order to check authenticity of originals and accuracy of copies.

163. Appellant's arguments fail as he simply disagrees with the TC's assessment of evidence. He also fails to take into account: that all evidence is admissible unless expressly prohibited by the IRs;[584] there is no procedural requirement to call witnesses to authenticate documents[585] or that only original documents may be placed in evidence; and, that it is for the TC to determine the weight it assigns to the evidence before it, in light of the totality of the evidence.[586]

164. Appellant's arguments fail in relation to accessibility of originals where copies were used in the case;[587] his related concern about the location of the original documents held by DC-Cam[588] is also without merit. He had no need to know that location to avail himself of the opportunity to request to see the original documents, and he has made no showing that he attempted unsuccessfully to obtain access to originals where such existed. His decision to refrain from taking advantage of this opportunity does not equate to error by the TC. The TC also noted that, in its assessment of probative value of the document, it took into account those instances where no original of the document was available.[589] Appellant has not proved it failed to do so.

165. Once again, the paragraphs in his Appeal Brief and in the Judgment on which Appellant seeks to rely do not support his arguments. In relation to the admission and use of

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583 Ground 36: **F54** Appeal Brief, *Documentary evidence and authenticity*, paras 323-328; **F54.1.1** Appeal Brief Annex A, p. 16 (EN), p. 15 (FR), pp. 21-22 (KH).
584 IR 87(1).
585 **E185** Case 002/01 Document Decision, para. 21(7), *cited* by the SCC without overturning it in **F36** Case 002/01 AJ, para. 372 (Decision on Objections).
586 **F36** Case 002/01 AJ, para. 357. *See also Karera* AJ, para. 19; *Setako* AJ, para. 31.
587 **F54** Appeal Brief, para. 323.
588 **F54** Appeal Brief, para. 327.
589 **E465** Case 002/02 TJ, para. 57.

Professor Goscha's documents,[590] he has failed to demonstrate the TC's detailed assessment was inadequate[591] and ignores the TC's statement that it would use such documents for corroboration only.[592] His challenge of the TC's admission of the S-21 Orange Logbook[593] is similarly misplaced, as he once again ignores the TC's assessment of that evidence, including that it was identified by a witness who had custody and control of it at S-21, information from the man who took it from S-21 and had it in his possession until turning it over to the ECCC, the opportunities Appellant had to make argument in relation to its admission and use, and the TC's consideration of those arguments.[594] The admission of the Combined S-21 Notebook[595] also fails to establish error in the TC's assessment of that evidence, which included corroborative evidence.[596]

166. Appellant's challenge to the TC's consideration of two interviews he gave[597] is without merit. Appellant ignores the vast amount of evidence on which the TC relied to determine his knowledge of crimes,[598] which are largely corroborative of these two interviews. A fair reading of these interviews leads to the conclusion that they are based in large part on his individual recollection of contemporaneous events, not on his research into the work of others, such as his admission that he implemented the SC's decision about buying medicine.[599] Appellant's complaints about the TC's supposed omissions in its excerpts of these interviews is similarly without merit. They are not relevant to the significance of the extracts, including that, regardless of how the food and medical shortages were occasioned, the regime forced people who were sick and could barely

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590 **F54** Appeal Brief, para. 324, fn. 518 *citing* his paras 217-225. *See also* response to Ground 11 (Admission of Goscha documents).

591 **E465** Case 002/02 TJ, paras 352-354 including footnote references.

592 **E465** Case 002/02 TJ, para. 354.

593 **F54** Appeal Brief, para. 324, fn. 518 *citing* his para. 226. *See also* response to Ground 12 (Admission of the S-21 Orange Logbook).

594 **E443/3** TC Decision on Orange Logbook and Two S-21 Witnesses. *See also* response to Ground 12 (Admission of the S-21 Orange Logbook).

595 **F54** Appeal Brief, para. 324, fn. 518 *citing* his para. 1464.

596 **E465** Case 002/02 TJ, paras 2131, 2133-2134 (TC assessment). *See also* **F54** Appeal Brief, para. 1464, fn. 2755 (Appellant cites to only para. 3822 of **E465**, disregarding the TC's 18-paragraph assessment of the 1978 evidence of Chronological Overview of CPK's Notion of Enemies (at paras 3817-3834) and the TC's factual findings (at paras 3835-3863), of which the Combined Notebook was only one evidentiary item).

597 **F54** Appeal Brief, para. 324, fn. 518 *citing* paras 1819-1828, 1875 *citing* **E3/4050, E3/4043** Transcript of Recorded Interview with Khieu Samphan.

598 **E465** Case 002/02 TJ, paras 4203 (bases for assessment of Appellant's criminal responsibility, contemporaneous knowledge based on totality of his statements and conduct), 4209 (contemporaneous knowledge by canvassing the policies through which the common purpose was implemented), 4209-4218 (knowledge concurrent with commission of crimes), 562-624 (Roles and Responsibilities), 4201-4319 (Criminal Responsibility). *See also* Section VIII.C.3. Intent.

599 **E3/4043** Transcript of Recorded Interview with Khieu Samphan, EN 00786109.

walk, to work, and people died from starvation and lack of medical care.[600] The lack of recorded questions does not detract from the self-evident content of the answers.

167. Appellant's arguments relating to the 1960, 1971, and 1976 CPK Statutes are similarly without merit.[601] In relation to the 1976 Statute, he mischaracterises the nature of the TC's reliance on Nuon Chea to authenticate the statute; the TC did not falsely state such authentication.[602] It noted that Nuon Chea "[clarified] that E3/130 accorded with his recollection of the CPK Statute bearing 30 articles and 8 Chapters", which he did.[603] The TC also noted that Nuon Chea commented on the concept of "democratic centralism" which is contained in Article 6 of the 1976 Statute,[604] which he did. Finally, the TC relied on the testimony of Duch and Ny Kan to authenticate the 1976 Statute.[605]

168. Appellant's complaint about the 1960 Statute is also devoid of merit. He has failed to establish that where, as here, there is sufficient testimony regarding the relevant portions of a document, that document must be before the Court to be considered.[606] The TC based its considerations of the relevant provisions of that version of the Statute primarily on the testimony of Duch,[607] but Nuon Chea also acknowledged the existence of the 1960 Statute.[608] It is of note that the TC determined that it would approach the 1971 Statute with caution and rely on its contents only to the extent the notes containing that Statute were corroborated.[609]

169. In addition to once again raising arguments regarding DC-Cam SC Minutes which the

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600 **E3/4043** Transcript of Recorded Interview with Khieu Samphan, EN 00786109; *contra* **E3/4050** Transcript of Recorded Interview with Khieu Samphan, EN 00789062. *See also* response to Grounds 181, 183.

601 **F54** Appeal Brief, para. 325 and fn. 523 *citing* **E465** paras 344, 398 (discussing these Statutes); *see also* para. 343 (discussing the Statutes).

602 **F54** Appeal Brief, para. 325 ("This statement by the Chamber is false.").

603 **E465** Case 002/02 TJ, para. 344, fn. 951 *citing* **E1/21.1** Nuon Chea, T. 13 Dec. 2011, 10.07.23-10.16.34, p. 23, line 4-p. 24, line 16.

604 **E465** Case 002/02 TJ, para. 344, fn. 951 *citing* **E1/23.1** Nuon Chea, T. 15 Dec. 2011, 10.55.17-11.05.55, p. 32, line 19-p. 36, line 3.

605 **E465** Case 002/02 TJ, para. 344, fn. 951.

606 **F54** Appeal Brief, para. 325; **E185** Case 002/01 Documents Decision, para. 31.

607 **E1/52.1** Kaing Guek Eav, T. 21 Mar. 2012, 13.53.32-13.56.58, p. 70, line 9-p. 71, line 10 (3 statutes – first was 1960, studied that one, also saw the 1976 statute in 1976), 14.05.44-14.09.26, p. 74, line 8-p. 75, line 9 (comparing 1960 statute with 1970 and 1975 statutes); **E1/53.1** Kaing Guek Eav, T. 26 Mar. 2012, 09.27.24-09.31.45, p. 10, line 22-p. 11, line 17 (difference between 1971 and 1966 (sic) Statutes, and difference between them and 1960 Statute); **E1/62.1** Kaing Guek Eav, T. 10 Apr. 2012, 15.18.09-15.19.49, p. 81, line 22-p. 82, line 7 (1960 and later – Statute clearly stated that subordinates obeyed superiors and leadership is CC); *see also* **E465** Case 002/02 TJ, para. 343, fn. 946 *citing* in part **E3/10** *Revolutionary Flag,* Sept.-Oct. 1976, EN 00450506 (creation of the Statute in 1960).

608 **E1/14.1** Nuon Chea, T. 22 Nov. 2011, 14.03.12-14.04.05, p. 82, lines 3-6; **E3/3** National Suspect Statement entitled "History of the Struggle and Movement of our Cambodian peasants from 1954 to 1979" by Nuon Chea, EN 00184662; **E1/17.1** Nuon Chea, T. 6 Dec. 2011, 10.14.21, p. 23, lines 3-9; 10.19.05-10.23.00, p. 25, lines 1-16 (1960 First Party Congress to pass the Party Statute, composed of 30 articles).

609 **E465** Case 002/02 TJ, para. 344.

SCC dismissed in Case 002/01,[610] Appellant also ignores – and shows no error in – the TC's extensive assessment of the reliability (including authenticity) of these Minutes obtained from various sources.[611] The TC noted that, in relation to the DC-Cam documents, it "must […] satisfy itself that [they were] sufficiently reliable including authentic to be the basis of judicial fact finding".[612] Appellant has not established the TC failed to do so.

2. ACCUSED STATEMENTS (CONTEMPORANEOUS & NON-CONTEMPORANEOUS)

Ground 31: Out-of-court statements[613]

170. **Ground 31 should be dismissed, as Appellant does not establish the TC erred in law or fact in the framework on which it relied for assessing extrajudicial statements, in its application of that framework to such evidence, or in its assessment of that evidence.**

171. Appellant's allegations fail as he: (i) merely substitutes his assessment of the evidence for that of the TC; (ii) misleadingly argues without substantiation that "it is legally impermissible to rest a finding BRD on evidence deemed to be of inherently low probative value",[614] ignoring that probative value may be strengthened by similar evidence and thus become capable of satisfying the burden of proof[615] and also ignoring that where "underlying evidence for a factual conclusion appears *weak* on its face, more reasoning is required";[616] and (iii) wrongly asserts that the TC erroneously based convictions solely on out-of-court statements.[617]

172. Appellant's ground fails for other reasons as well. He gains no benefit from relying on his paragraphs 1429-1430 dealing with alleged errors in the TC's assessment of evidence

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610 **F54** Appeal Brief, paras 326-328. *See* **F36** Case 002/01 AJ, paras 369-375.

611 **E465** Case 002/02 TJ, paras 347-354.

612 **E465** Case 002/02 TJ, para. 347.

613 Ground 31: **F54** Appeal Brief, *Out-of-court statements*, paras 306-311; **F54.1.1** Appeal Brief Annex A, p. 15 (EN), pp. 13-14 (FR), pp. 19-20 (KH).

614 **F54** Appeal Brief, para. 307.

615 **F36** Case 002/01 AJ, para. 424.

616 *See* Standard of Review (Errors of Fact) *citing* **F36** Case 002/02 AJ, para. 90 (emphasis added).

617 **F54** Appeal Brief, para. 311, fn. 481 *citing* as examples his paras 731, 1044-1045, 1429-1430, 1525. None of the Judgment paragraphs referenced in these examples rely only on out-of-court statements or documents. All of them are part of a much more extensive TC assessment of evidence relying on in-court testimony and other sources of evidence. *See e.g.* his para. 731 *referencing* **E465** Case 002/02 TJ, para. 1016, which is part of Section 10.1.7 Life and Work in the Cooperatives (paras 968-1051) and more specifically, Section 10.1.7.3.2 Implementation in Tram Kak (paras 1010-1016)). As for his paras 1044-1045 re. matrilineal ethnicity, *see* TJ Section 13.3.6 Identification of Vietnamese and Matrilineal Ethnicity (paras 3418-3428) and, more specifically, Section 13.3.6.3 Matrilineal ethnicity (paras 3424-3428). *See also* response to Grounds 131 and 132 (the TC's use of out-of-court statements of deceased individuals).

relating to communication. In paragraph 1429 he once again argues without merit that he was refused access to original pieces of evidence and chain of custody, followed by resurrection of unsuccessful complaints regarding the TC affording a presumption of reliability to the DC-Cam documents.[618] He has in no way established that he was refused access to original pieces of evidence; rather, as the TC noted, it denied his request that DC-Cam be ordered to put the originals of its documents in the Case File given that Appellant could request he be given access to those originals.[619] His failure to take advantage of this opportunity does not equate to TC error.

173. His reference to various other paragraphs of his brief in paragraph 1430, footnote 2703 does not support his arguments in this ground of appeal, referencing only part of the TC's evidentiary assessment and simply substituting his view for that of the TC. The allegations in these paragraphs also fail for reasons set out in full detail in other sections of this Response.[620]

Ground 27: Khieu Samphan's statements/publications[621]

174. **Ground 27 should be dismissed as Appellant does not demonstrate that the TC committed legal or factual errors in assessing his statements and works.**

175. This ground fails as Appellant does not substantiate his assertion that the TC established a different framework for assessing his statements and publications.[622] He does not explain the difference or how that alleged difference would constitute legal or factual error. Nor does he establish the alleged "contradiction" in the TC's reasons.[623] The two examples he gives in paragraph 257 – the TC's approach to the assessment of his in-court testimony and his publication – do not establish error. There is no demonstrable error

618 **F54** Appeal Brief, para. 1429.
619 **E185** Case 002/01 Documents Decision, paras 19, 28.
620 **F54** Appeal Brief, paras 1090-1091 (re. crimes against Vietnamese – *see* response to Ground 185), 1430 and before (too vague to be considered and para. 1429 dealt with above), 1542, 1624-1626, 1629, 1634, 1639, 1646, 1649, 1711 (all dealing with telegrams and reports to higher level leaders, disputing meaning of terms such as Party Centre, *Angkar*, Office 870 and Appellant's connection with these communications), 1614 (communications and his connection to PK). *See also* **E465** Case 002/02 TJ, Section 6 (Communications Structure); Section VIII.B. Roles and Functions; Section VIII.C.2. Significant Contribution; Section VIII.C.3. Intent (Appellant's *Mens Rea*), Section VIII.D. Aid and Abet, Section VIII.C. Joint Criminal Enterprise.
621 Ground 27: **F54** Appeal Brief, *Khieu Samphan's Statements/Publications*, para. 257; **F54.1.1** Appeal Brief Annex A, pp. 13-14 (EN), p. 12 (FR), pp. 17-18 (KH).
622 **F54** Appeal Brief, para. 257.
623 **F54** Appeal Brief, para. 257. It is unclear what Appellant is asserting as error regarding the analytical framework used to assess Appellant's statements and publications. In Annex A, he argues that the TC provided a framework for assessing his statements and work which it did not respect (*see* **F54.1.1** Appeal Brief Annex A, p. 13 (EN)). In contrast, in his Appeal Brief, para. 257, he states that the TC established *different* analytical frameworks (emphasis added).

regarding the TC's determination it would rely on Appellant's unsworn in-court testimony "subject to the appropriate caution and corroboration".[624] As an accused person facing the possibility of life imprisonment if convicted and – likely – wishing to minimise his criminality, he had motive to lie, making it appropriate for the TC to approach his testimony with caution. Nor was it error to consider the extent to which it was corroborated by other evidence, just as the TC did in its assessment of the testimony of Nuon Chea.[625] In addition, possible ulterior motives and corroboration are general factors the TC indicated it would take into account in assessing evidence.[626]

176. Appellant also fails to demonstrate any error in the TC's approach to his publication, "Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea". The TC rightly determined it would rely on the publication "in a limited sense" and "only insofar as [the publication] proffers unique, unaccredited historical accounts by the accused, or corroborates other reliable accounts before the Chamber".[627] In making this determination, the TC was simply noting that it would take into account as statements of Appellant those passages it could attribute to him, or those passages which corroborated other reliable accounts. Appellant points to nothing unique or erroneous in this approach to assessment of evidence. He has not identified with sufficient particularity the alleged factual errors in either assessment, nor has he shown that no reasonable trier of fact could have relied upon them in reaching specific findings.

177. His reliance on other paragraphs of his brief[628] does not support his allegations that the TC contradicted itself, distorted and misrepresented his statements or documents, or used them only for inculpatory purposes. Paragraph 1244, concerning alleged errors in the implementation of marriage regulations, fails as Appellant simply refers to paragraphs of the Judgment and makes assertions without substantiation. [629] His reliance on paragraphs 1395-1398, relating to alleged factual errors in forced marriage as a policy, is similarly misplaced. He fails to establish that the TC committed grave errors in its holistic assessment of the evidence. That assessment did not "set aside" CPK documentation regarding consensual marriage or disregard or misrepresent evidence "corroborating this principle";[630] rather, the TC rightly concluded that, despite the language in this

624 **F54** Appeal Brief, para. 257, fn. 381 *citing* **E465** Case 002/02 TJ, para. 194.
625 **E465** Case 002/02 TJ, para. 193.
626 **E465** Case 002/02 TJ, paras 49, 62, 195.
627 **E465** Case 002/02 TJ, para. 194.
628 **F54** Appeal Brief, para. 257, fn. 385 *citing* his paras 1244, 1395-1398, 1526-1540.
629 *See* also response to Ground 168.
630 **F54** Appeal Brief, para. 1397.

documentation and "exculpatory" statements and testimony, the totality of the evidence established that marriages were forced pursuant to instructions from top echelon leadership.[631] He also fails to establish that the TC ignored "exculpatory" evidence; it simply assessed and discounted that evidence in light of the evidence *in toto*.

178. His paragraphs 1526-1540 do not establish that the TC distorted documents and speeches. Appellant shows no error in relation to the TC's "understanding" of the DK Constitution, in particular Article 10.[632] Though the article does not explain what is meant by "punishable to the highest degree", the plain language of the CC decision[633] to which the TC referred in determining the "contours of the Party's stance toward the punishment of enemies"[634] clearly does: the right to "smash" (kill) inside and outside the Party ranks. Appellant's argument about a "double standard" in assessing the Constitution also fails as, once again, he does not appreciate that the assessment of the reasonableness of specific findings is done in the context of the evidence as a whole. The totality of the evidence makes clear the language about freedom of religion was contrary to the policies set out by the CPK opposing religions and disallowing freedom of religion.[635]

179. Nor does Appellant substantiate his assertions that the TC used this CC decision in a biased way.[636] His arguments first refer back to his concerns about the authenticity of the document,[637] which are dispelled by the TC's reasoned explanation why it found this document significant, including its analysis of "provenance, chain of custody and probative value".[638]

180. He establishes no error regarding the TC reaching a different conclusion on whether Appellant was present at a June 1974 CC meeting, whether the decision regarding the right to smash was made by the CC or the SC, whether a meeting took place in relation to the decision regarding the right to smash, and whether Appellant attended that

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631 **E465** Case 002/02 TJ, paras 3526-3685 (analysis of issues related to sources of evidence, Defence objections and of the evidence including of policy, notice and consent, monitoring and "exculpatory" evidence (*e.g.* paras 3617-3625) and reference to the Historical Background section of the Judgment), 3586-3694 (legal findings on forced marriage), 3695-3701 (rape in context of forced marriage), 3569-3571 (Appellant's personal involvement), 4062-4067 (policy regarding regulation of marriage). *See also* Section VII.D. Regulation of Marriage.

632 **F54** Appeal Brief, paras 1527-1529 *citing* **E3/259** DK Constitution, 5 Jan. 1976, art. 10.

633 **E465** Case 002/02 TJ, para. 3955 *citing* **E3/12** CPK Central Committee Decision, 30 Mar. 1976, EN 00182809.

634 **E465** Case 002/02 TJ, para. 3955.

635 **F54** Appeal Brief, para. 1529, fn. 2901.

636 **F54** Appeal Brief, para. 1530, fn. 2903 *citing* his paras 1718-1722.

637 **F54** Appeal Brief, para. 1718 *referring* back to his para. 1717.

638 **E465** Case 002/02 TJ, para. 3956.

meeting.[639] The TC fulfilled its duty to judge Case 002/02 based on a fresh examination of the evidence before it; that such examination resulted in a different conclusion about the 1974 meeting is evidence of diligence, not error.[640]

181. Appellant by his own admission was a member of the CC since 1971 and attended SC meetings, so whichever committee issued the decision is of no import, especially since such an important decision would have been conveyed to the CC if made by the SC, at a minimum for dissemination, as Appellant himself stated.[641] Similarly, whether the decision was made at a meeting at which members were physically present or by other consultative means, this decision would have been conveyed to those not present in the regular course of business, especially given Appellant's close relationship with Pol Pot and Nuon Chea. In that regard, however, the TC's finding that Appellant's appointment as a full-rights member of the CC was informally announced by the CC on 30 March 1976 evidences that there was a meeting on that date and that Appellant would have been present to hear that announcement concerning himself. Finally, in arguing that his knowledge, intent, or contribution to crimes could not be inferred from the CC decisions or his membership in the CC,[642] Appellant completely ignores the basis upon which the TC found him guilty of the crimes of which he stands convicted based on JCE liability. In determining the evidence proved his liability BRD, the TC engaged in holistic factual and legal analyses, as is discussed in detail in other sections of this Response.[643]

182. Appellant's arguments that the TC erred in its determination that Appellant became a full-rights member of the CC at the Fourth Party Congress in January 1976[644] likewise establishes no error warranting this Chamber's intervention. That the TC reviewed the evidence and determined that was when he ascended to that status within the CC is within its discretion in resolving conflicts in the evidence and determining which evidence it accepts.[645] In any event, as admitted by Appellant, as he became a member of the CC in

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639 **F54** Appeal Brief, para. 1718.

640 **E465** Case 002/02 TJ, para. 36 ("No importation of criminal responsibility is made between cases and factual findings are not transposed from Case 002/01 to Case 002/02. In this context although there is partial commonality between the oral and documentary evidence in each case the Trial Chamber evaluates all the material now before it different conclusions may be reached including on evidence and matters commonly relevant.").

641 **F54** Appeal Brief, para. 1710.

642 **F54** Appeal Brief, para. 1719.

643 *See e.g.* Section VIII.C.3. Intent (Appellant's *Mens Rea*) and Section VIII.C.2. (significant contribution to JCE); *see also e.g.* **E465** Case 002/02 TJ, Sections 18.1-18.2.3 (criminal responsibility of Appellant under JCE).

644 **F54** Appeal Brief, paras 1720-1722.

645 *See* Standard of Review (Reasoned Decision).

1971 and attended SC meetings, his presence at the Fourth Party Congress and at CC and SC meetings would have been an important part of his leadership role in the CPK. In addition, according to Ieng Sary, by "1975 [Appellant] was *de facto* involved in [CC] affairs".[646] Similarly, he argues to no avail that the TC "distorted" the CC directive published in June 1978 "pardoning 'enemies' engaged in anti-revolutionary activities prior to 1975".[647] Appellant mischaracterises Duch's testimony; Duch testified that he considered the directive to be a deceptive ploy to console the population because purges continued,[648] as is shown by ample evidence of record.

183. Appellant also fails to establish any error in the TC's treatment of his speeches, or that the TC erred in admitting evidence of allegedly low probative value.[649] In relation to his speech of 17 April 1977 wherein he referred to wiping out enemies, it could quite reasonably be interpreted as criminal. Even if the enemy to which he was referring was political – the evidence showing enemy was defined in much broader terms[650] – the evidence in this case shows what the regime did to those they considered political enemies – arrest, torture, executions, among other violence.[651] Appellant made clear what he had in mind for the members of the old regime – extermination.[652] These speeches given by Appellant show the lack of merit in his unfounded attack against the evidence given by CP Preap Chhon[653] – evidence of Appellant's speeches to the same effect, the elimination of the Lon Nol regime, to eliminate capitalists, feudalists, intellectuals, that those who betrayed the Party would be killed.[654]

184. Finally, Appellant's argument that the TC distorted his testimony on criticism and self-criticism also fails.[655] The TC correctly interpreted Appellant's testimony regarding the

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646 **E3/573** Ieng Sary Interview Notes by Stephen Heder, 4 Jan. 1999, EN 00427599.
647 **F54** Appeal Brief, para. 1531.
648 **E465** Case 002/02 TJ, para. 3971, fn. 13214 *citing* **E1/55.1** Kaing Guek Eav, T. 29 Mar. 2012, 15.47.51-15.51.49, p. 101, line 21-p. 103, line 18.
649 **F54** Appeal Brief, paras 1532-1540.
650 *See e.g.* **E465** Case 002/02 TJ, Section 16.3 Real or Perceived Enemies.
651 *See e.g.* **E465** Case 002/02 TJ, paras 2066-2072 (purges), 2560-2635 (S-21 crimes), 3857-3859 (CPK approaches to enemies).
652 *See e.g.* **E465** Case 002/02 TJ, paras 4207 (Appellant praised the destruction of the former regime, "heralding" that the enemy had "died in agony"), 4244 (Appellant announced that the "traitorous Phnom Penh clique" could not "escape complete annihilation" declaring it "absolutely necessary to kill [the] seven traitors" of the Khmer Republic), 4302 (Appellant called to "eliminate" high-ranking Khmer Republic officials and their subordinates, later said the object of the revolution was to "eliminate the Lon Nol regime" including the capitalists, feudalists, and intellectuals who occupied its ranks, and that those who betrayed the Party or the revolution would be killed).
653 **F54** Appeal Brief, paras 1534-1535.
654 **E465** Case 002/02 TJ, para. 3961, 13185 (the TC gave a reasoned explanation why it considered this evidence credible).
655 **F54** Appeal Brief, paras 1536-1540.

use of self-criticism to build class anger: Appellant said that he was criticised at CC meetings as he was asked to "criticize and self-criticize in order to build [his] class stand and class anger".[656] Appellant also misrepresents the TC's conclusion regarding class anger; it did not "use these notions to conclude that the practice of self-criticism would have involved intent to discriminate against New People".[657] Rather, it was Appellant's speeches at mass rallies during the DK period which led the TC to conclude he "directed this class anger at New People".[658] Appellant exhorted others to assign hard labour to New People ("NP"), give them a lot of work and little food to uncover internal enemies,[659] and pay attention to NP as they were "steeped in feudalism", while anyone who opposed the Party was an enemy and was to be smashed.[660] In short, "exterminate enemies of all stripes".[661] In the context of the ongoing crimes being committed against those the CPK perceived as real or perceived enemies, these words were not just rhetoric, they were calls to criminal action and evidenced approval of such criminal action. The TC did not err in interpreting the language and the import of his stigmatisation of the enemy and stirring up of class hatred against real or perceived enemies.

3. OTHER CONTEMPORANEOUS DOCUMENTS

Ground 29: Propaganda[662]

185. **Ground 29 should be dismissed as Appellant fails to establish any error of law or fact in the TC's assessment of propaganda evidence.**

186. Appellant fails to demonstrate any error of law in the TC's assessment of propaganda materials it considered. He has not established that the TC failed to take into account that "statements made for propagandistic purposes may diminish their reliability".[663] Rather, the TC consistently noted that its assessment would take into account the propagandistic nature of certain evidence.[664] Nor has he established that the TC "relied only on

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656 **E1/198.1** Appellant, T. 29 May. 2013, 14.47.19-14.49.14, p. 88, lines 11-15.

657 **E465** Case 002/02 TJ, para. 3967.

658 **E465** Case 002/02 TJ, para. 3967.

659 **E465** Case 002/02 TJ, para. 3967.

660 **E465** Case 002/02 TJ, para. 3943.

661 **E465** Case 002/02 TJ, para. 4269.

662 Ground 29: **F54** Appeal Brief, *Propaganda*, paras 291-292, **F54.1** Appeal Brief Annex A, p. 14 (EN), p. 13 (FR), p. 18 (KH).

663 **F54** Appeal Brief, para. 291, fn. 436 *citing* **E465** Case 002/02 TJ, paras 65, 472, 479. *See also* **E465** Case 002/02 TJ, para. 3747.

664 In addition to the **E465** Case 002/02 TJ, paras 65, 472, 479 *cited* in **F54** Appeal Brief, para. 291, fn. 436. *See also* **E465** Case 002/02 TJ, paras 282 (TC expressed its caution as to the weight to be given to both DK and Vietnamese public propaganda sources), 3747 (mindful that documents for external communication purposes or for ideological training, including *RF* and *RY*, and records of public

propagandistic documents to convict".[665] Indeed, two paragraphs to which he cites defeat this assertion, as in both, the TC bases its finding of intent on evidence of the preparation of lists and the matrilineal policy applied to mixed families *in addition to* contemporaneous publications in the *Revolutionary Flag* ("*RF*") and speeches of leading CPK figures targeting the Vietnamese.[666]

187. Appellant's attempt to use the TC's alleged erroneous assessment of a speech he delivered "regarding Vietnamese at a celebration during DK" fails to serve as a "blatant example" of the TC's alleged errors.[667] He has not identified this "blatant example" with sufficient particularity to make it possible to evaluate his assertion. The paragraphs Appellant references to support the assertion – paragraphs 1551-1560 – do not identify this speech.[668] Nor do these paragraphs establish that the TC failed to apply the correct standard to its assessment of propaganda materials. Such vague assertions do not merit consideration.[669]

188. Appellant's reference to the SCC's consideration of the reliability of evidence that has a "propagandistic purpose"[670] omits that the SCC went on to find that "the underlying evidence does suggest that the Khmer Rouge not only showed neglect toward the population under their control, but also praised, using inflammatory indiscriminate language, the killing of Khmer Republic soldiers".[671] Appellant fails to show that the evidence in this case which "has a propagandistic purpose" was not used by the TC to suggest the same.

Ground 11: Evidence from historians who did not testify[672]

189. **Ground 11 should be dismissed, as Appellant does not substantiate his sweeping**

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appearances by DK leaders, may contain propaganda, and would consider that when assessing such evidence).

665 **F54** Appeal Brief, para. 292.

666 **F54** Appeal Brief, paras 1555, fn. 2968 *citing* **E465** Case 002/02 TJ, para. 3513 and para. 1556, fn. 2969 *citing* **E465** Case 002/02 TJ, para. 3517. These paragraphs are included in Appellant's citations in para. 292, fn. 438 which cites to his paras 1551-1560.

667 **F54** Appeal Brief, para. 292.

668 **F54** Appeal Brief, paras 292, fns 438-439 (*citing* his paras 1551-1560, 1193). His paras 1551-1560 refer to alleged errors regarding the policy against the Vietnamese people. These allegations fail as set forth in more detail in response to Ground 185 (targeting of Vietnamese). His para. 1193 similarly alleges the TC erred in its assessment of the evidence regarding consent in the context of forced marriage. This allegation also fails as discussed in response to Grounds 162 and 165.

669 Case 001-**F28** *Duch* AJ, para. 20.

670 **F54** Appeal Brief, para. 292 *citing* **F36** Case 002/01 AJ, para. 883.

671 **F36** Case 002/01 AJ, para. 884.

672 Ground 11: **F54** Appeal Brief, *Evidence from historians who did not testify*, paras 216-225, *Use of Evidence with Low Probative Value*, para. 1463; **F54.1.1** Appeal Brief Annex A, pp. 8-9 (EN), pp. 7-8 (FR), pp. 10-11 (KH).

assertions of errors of fact in the TC's admission of Professor Goscha's hand-copied SC Meeting Minutes.

190. Appellant once again chooses a selective and inaccurate approach to the TC's decisions and use of the impugned evidence. He refers to multiple paragraphs of the TC Judgment[673] with no explanation justifying his allegation that the use of Professor Goscha's documents "invalidated"[674] either the findings in each of those paragraphs, or the broader TC findings. He makes no attempt to show how the use of the impugned documents resulted in factual findings which no reasonable finder of fact could have made.

191. Appellant ignores the TC's discretion to admit any new evidence which it determines is conducive to ascertaining the truth.[675] Contrary to Appellant's assertion,[676] the TC fully explained how it came to contact Professor Goscha regarding one set of CPK SC Minutes possibly in his possession, the action being initiated based on a Co-Prosecutors' pleading which would have been notified to Appellant.[677] Contrary to Appellant's assertions, the request was for a *complete* copy of SC Minutes of 11 April 1977, not "solely [...] the *excerpt*".[678] The TC also fully explained how this search led it to learn of other documents from Professor Goscha, which were available online in a public archive.[679]

192. Contrary to Appellant's seeming argument,[680] the TC is not obliged to ignore other evidence conducive to finding the truth which it discovers in the search for a particular piece of evidence. Despite his assertion of being "kept in ignorance",[681] in addition to the notified Co-Prosecutors' Request, the TC kept the parties informed of its actions to obtain the documents[682] – with no objections from Appellant – and notified the parties that the impugned documents were available for inspection, offering them the opportunity to make submissions on admissibility before deciding the matter.[683] There is no "bad

673 *See* **F54** Appeal Brief, para. 1463, fns 2756 (*citing* **E465** Case 002/02, TJ, para. 3814), 2753 (*citing* **E465** Case 002/02 TJ, para. 3814, fns 12747-12749), 2758 (*citing* **E465** Case 002/02 TJ, para. 3805); **F54.1.1** Appeal Brief Annex A, p. 8 (EN) *citing* to **E327/4/7** TC Goscha Documents Decision; **E465** Case 002/02 TJ, paras 284, 352-354, 357, 364, 377, 415, 421, 427, 504, 543, 554-556, 1459, 1723, 1763, 2006, 2010, 2016, 3397, 3740, 3805, 3814, 4126.

674 **F54.1.1** Appeal Brief Annex A, pp. 8-9 (EN), pp. 7-8 (FR).

675 IR 87(4).

676 **F54.1.1** Appeal Brief Annex A, pp. 8-9 (EN), pp. 7-8 (FR); **F54** Appeal Brief, para. 217.

677 **E327/4/7** TC Goscha Documents Decision, para. 2.

678 **F54** Appeal Brief, para. 218 (emphasis added).

679 **E327/4/7** TC Goscha Documents Decision, paras 2-3.

680 **F54** Appeal Brief, para. 218 (his apparent complaint that the TC "far exceeded the Prosecutor's request").

681 **F54** Appeal Brief, para. 219.

682 **E327/4/3** TC Decision on 11 April 1977 Request to Obtain Copy of Standing Committee Minutes; **E327/4/7** TC Goscha Documents Decision, para. 18 (interim notices with no objection from Appellant).

683 **E327/4/7** TC Goscha Documents Decision, para 3.

faith"[684] in the TC's handling of this matter. Finally, the TC addressed Appellant's arguments in its decision admitting the documents. [685]

193. Appellant's complaints about the TC's admission and use of these documents are also devoid of merit. The TC correctly and adequately explained the basis upon which it found the documents to be admissible, including relevance and indicia of reliability.[686] Contrary to Appellant's assertion, the TC's consideration of a more complete version of 11 April 1977 SC meeting minutes was not flippant; it included more than the numerical consistency.[687] The TC also noted it must consider factors impacting reliability of the documents and the limitations it would place on the use of these documents.[688] A review of the two paragraphs Appellant cites as examples of the TC's error in using the impugned documents, paragraphs 3805 and 3814, makes clear that he has not established an error; the TC limited use of the contents of the impugned documents to "subject-matter, theme, and general thrust". This use is corroborative of other evidence before the TC.[689]

Ground 12: Admission of the S-21 Orange Logbook[690]

194. **Ground 12 should be dismissed as Appellant fails to establish that the TC erred in law by admitting the S-21 Orange Logbook.**

195. The ground fails as Appellant's erroneous claim that the TC did not "take into consideration Defence submissions on the flaws that tainted the admission into evidence of this Logbook and its very low probative value",[691] lacks merit. The TC did consider

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684 **F54** Appeal Brief, para. 219.

685 **E327/4/7** TC Goscha Documents Decision, paras 7-28.

686 **E327/4/7** TC Goscha Documents Decision, paras 20-27 (Indicia or reliability included: (i) Professor Goscha confirming that he copied verbatim the documents he found in the Vietnamese People's Army library, (ii) Philip Short's note that the Professor is the authority on such matters and, to his knowledge, the only non-Vietnamese to be given access, (iii) that the documents were apparently catalogued by number, and several have the names of translators and dates of translation; (iv) that the documents were maintained in a repository which was likely to maintain the integrity of the documents since the DK period.). *See* **E465** Case 002/02 TJ, paras 352-354.

687 **E465** Case 002/02 TJ, para. 352 (The TC also considered that the same subject matter was discussed, the meeting was attended by many of the same members of the SC and, "crucially" a decision was made regarding internal enemies. More generally, the TC considered that the content of some Goscha-sourced minutes, including the number of people killed (*i.e.* the numerical consistency), were corroborated by an issue of the *RF*).

688 **E327/4/7** TC Goscha Documents Decision, para. 26 (including that the documents are not originals and were hand-copied, that the TC did not have the originals and the Vietnamese translations have not been verified). *See also* **E465** Case 002/02 TJ, para. 354.

689 **E465** Case 002/02 TJ, paras 3805, 3814.

690 Ground 12: **F54** Appeal Brief, *Admission of the S-21 Orange Logbook*, para. 226; **F54.1** Appeal Brief Annex A, p. 9 (EN), p. 8 (FR), p. 11 (KH).

691 **F54** Appeal Brief, para. 226. *See also* response to Ground 36.

those arguments and rightly rejected them.[692] Appellant has not established that he had insufficient time to acquaint himself with the document, that the TC erred by not recalling two witnesses and calling Professor Heynowski before admitting the document, and that the document has little probative value.

196. A review of how this document came to be admitted highlights why Appellant's arguments fail. Nuon Chea filed a request to call Professor Walter Heynowski to testify regarding S-21 original documents, including, *inter alia*, the Orange Logbook, of which he had become aware after viewing the documentary, *Die Angkar*, which the Professor produced.[693] The TC subsequently sought information from Professor Heynowski.[694] In the end, he confirmed to the TC that he was in possession of the Orange Logbook and that he had taken it from the premises of S-21. He provided it and several loose pages to the TC.[695]

197. On 7 December 2016, the TC informed the Parties and "invited [them] to review the documents available on the Shared Materials Drive", also available at the RAU,[696] and "to make oral submissions, including pursuant to Internal Rule 87(4), at the hearings of 9 December 2016".[697] Appellant did not request additional time to review the Orange Logbook before or during the 9 December hearing. At that hearing Appellant requested that two witnesses be recalled, Suos Thy and Duch,[698] and that Professor Heynowski be summoned to appear.[699] After having heard the Parties observations and submissions,[700] the TC issued a memorandum on 27 December 2016 deciding to admit the Orange Logbook into evidence. It found it "directly relevant to a crime site within the scope of the current trial" and "to be *prima facie* relevant and reliable (including authentic)".[701] The TC dismissed Appellant's submissions to call these individuals.[702]

198. During the some 2.5 weeks between the 9 December hearing and the TC's memorandum, Appellant made no requests for additional hearings or written submissions on the issue.

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692 **E443/3** TC Decision on Orange Logbook and Two S-21 Witnesses.
693 **E412** Nuon Chea's Fourth Witness Request for the Case 002/02 Security Centres and "Internal Purges" Segment (S-21 Operations and Documentary Evidence), paras 31-32.
694 **E443** TC Decision on NC's Additional Witness Request, para. 1; **E443/2.1** Letter from TC's Greffier to Prof. Heynowski on 13 Sept. 2016.
695 **E443/2** TC Heynowski Documents Decision, paras 5-6.
696 **E443/2** TC Heynowski Documents Decision, para. 8.
697 **E443/2** TC Heynowski Documents Decision, para. 9.
698 **E1/510.1** T. 9 Dec. 2016, 09.35.40-09.37.57, p. 17, line 24-p. 18, line 16.
699 **E1/510.1** T. 9 Dec. 2016, 09.34.45-09.35.40, p. 17, lines 4-10.
700 **E1/510.1** T. 9 Dec. 2016, 09.15.57-09.46.43, p. 7, line 21-p. 22, line 20.
701 **E443/3** TC Decision on Orange Logbook and Two S-21 Witnesses, para. 3.
702 **E443/3** TC Decision on Orange Logbook and Two S-21 Witnesses, para. 4.

He did not notify the TC of his continuing objections prior to the close of the case on 31 January, despite having almost two months from the initial hearing to do so, objecting to the admission of this document only when filing his Closing Brief on 2 May 2017.[703]

199. This history makes clear that Appellant complains without merit that this admission was on the "final days of the trial",[704] "two weeks before the conclusions of the substantive hearings"[705] or that "[t]hey were afforded very little time to acquaint themselves with it before the hearing on its admissibility".[706] The TC can admit evidence at *any stage* of the trial pursuant to IR 87(4),[707] and Appellant had ample time before the close of the case to comprehensively analyse the document and relevant evidence and formulate his objections and/or request additional hearings on the matter or for reconsideration of the decision to admit the document. He took no such action.

200. Appellant's arguments also fail as he does not demonstrate that the TC erred by declining to call the three requested witnesses – Suos Thy, Duch and Walter Heynowski. As Appellant correctly asserted, Suos Thy was qualified to authenticate the logbook[708] and did so.[709] Duch had no helpful information about the Orange Logbook.[710] So both witnesses were asked about the Orange Logbook and "the parties had an opportunity to question both witnesses as to the content of dozens of similar log sheets".[711] The TC decided not to call Professor Heynowski due to his age and other difficulties associated with video-link testimony.[712]

201. Appellant also fails to establish that the TC wrongly admitted the document because it

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703 **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1185-1193.

704 **F54** Appeal Brief, para. 226.

705 **E457/6/4/1** KS Case 002/02 Closing Brief, para. 1186.

706 **E457/6/4/1** KS Case 002/02 Closing Brief, para. 1185.

707 IR 87(4).

708 **E457/6/4/1** KS Case 002/02 Closing Brief, para. 1186. *See also* **E465** Case 002/02 TJ, para. 2090; **E1/430.1** Suos Thy, T. 2 June 2016, 09.35.22-09.38.00, p. 14, lines 10-15; **E1/432.1** Suos Thy, T. 6 June 2016, 11.15.05-11.17.33, p. 44, lines 5-16 (he was record keeper at S-21 and in charge of most documentation there from late 1975 to Vietnamese liberation).

709 **E1/432.1** Suos Thy, T. 6 June 2016, 14.30.49-14.39.52, p. 74, line 23-p. 78, line 10 ("this is the master list or the book of the master list of prisoners incoming on a daily basis and usually this book of the master list was used when I had to total the number of prisoners for them once in a while."), 11.18.44-11.20.48, p. 45, line 12-p. 46, line 14 (he confirmed it was not ordered to be destroyed in anticipation of the Vietnamese arrival). *See also* **E465** Case 002/02 TJ, paras 2115, 2123, 2549, fn. 7066.

710 **E1/438.1** Kaing Guek Eav, T. 15 June 2016, 15.47.10-15.51.50, p. 91, line 10-p. 92, line 12 (when shown the document, Duch did not recognise it, explaining that he had "never seen such a big book" because he "did not have the information in relation to the incoming and outgoing prisoners").

711 **E443/3** TC Decision on Orange Logbook and Two S-21 Witnesses, para. 4.

712 **E443/7** TC Decision on Hearing Walter Heynowski, para. 4 (the TC concluded that, due to his age, the technical difficulties with a video-link from Germany not an option, and the time-consuming procedural requirements of judicial cooperation, it would not hear him).

has "a very low probative value".[713] The Orange Logbook, by its nature, constitutes "unique material",[714] as it is a rare *original* 335-page document recording many names that entered and exited S-21 in 1977[715] in a case in which Appellant contends there is a "virtually total lack of original documents".[716] In addition, it was sufficiently authenticated by the record keeper who used the document on a frequent basis and by Professor Heynowski, who stated that he took this original documentation from the premises of S-21.[717] Furthermore, it is corroborated by S-21 Daily Controlling Lists that were already filed in Case 002/02 before the Orange Logbook was discovered.[718] The comparison between the Orange Logbook and Daily Controlling lists of prisoners reveals almost identical entries,[719] permitting the TC to find the documents reliable.[720]

202. Finally, Ground 12 fails to establish that the TC erred in law. The evidence with respect to crimes committed at S-21 goes well beyond the Orange Logbook. The TC had abundant evidence, detailed in some 30 pages of the Judgment,[721] to reach its factual findings on crimes committed at S-21, even absent the document.[722]

Ground 28: Evidence obtained through torture[723]

203. **Ground 28 should be dismissed as Appellant fails to establish that the TC erred in law in relation to its use of evidence derived from torture.**

204. The ground fails, more specifically, as Appellant has not established that the TC erred in law by allegedly (i) improperly using evidence obtained through torture for purposes unrelated to the truth of the torture-tainted evidence, i.e. for the sole purpose of establishing what actions were taken as a result of this evidence; (ii) using evidence

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713 **F54** Appeal Brief, para. 226.

714 **E1/510.1** T. 9 Dec. 2016, 09.27.53-09.29.33, p. 13, lines 10-16 (Mr Koppe, Defence Counsel for Nuon Chea: "And this has led to the result that we now have, in fact, the original orange log book, two kilos, I believe, and 200 and something pages, which we believe, is, indeed, unique material because I don't think even Tuol Sleng Museum has such log books in its possession").

715 **E3/10770** Orange Logbook.

716 **E457/6/4/1** KS Case 002/02 Closing Brief, para. 1187.

717 **E443/2** TC Heynowski Documents Decision, para. 3.

718 **E465** Case 002/02 TJ, para. 2123, fn. 7092 (the TC referred to numerous S-21 Controlling Lists but some of them do not have a corresponding page in the Orange Logbook, *e.g.* **E3/9968, E39969, E3/9971**).

719 *See e.g.* S-21 Daily Controlling Lists: **E3/9970, E3/9972, E3/9973, E3/9974, E3/9975, E3/10000, E3/10001.**

720 **E465** Case 002/02 TJ, paras 2119 ("Accordingly, other lists which fall within the seven verified list categories and which bear *sufficient similarity* to the authenticated documents are also found to be reliable by the Chamber.") (emphasis added), 2549.

721 **E465** Case 002/02 TJ, paras 2086-2134.

722 **E465** Case 002/02 TJ, para. 2086.

723 Ground 28: **F54** Appeal Brief, *Evidence obtained through torture*, paras 258 -290; **F54.1.1** Appeal Brief Annex A, p. 14 (EN), pp. 12-13 (FR), p. 18 (KH).

contained in notebooks or logbooks of interrogators at security centres; and (iii) using the testimony of Duch regarding a conversation he had with Pang about Appellant's participation in deliberations about the fate of Chou Chet. The ground also fails to set out with sufficient particularity the harm suffered: alleging that the errors "allowed [the TC] to make findings on important elements of the trial", and "invalidates some findings", does not meet the standard on appeal.[724]

Torture Convention

205. First, Appellant fails to establish that the TC erroneously used evidence derived from torture-tainted evidence. Contrary to his arguments, the TC's uses of this derivative evidence is not prohibited by the 1984 Torture Convention. It must be remembered that this Appellant has been convicted of torture, so the conditional exception set out in Article 15 of the 1984 Torture Convention is applicable herein, i.e., that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings *except against a person* [herein, Appellant] *accused of torture as evidence that a statement was made*."[725] The 1984 Torture Convention was not adopted to shield those convicted of torture, to allow them, the victimisers, to invoke this Convention to avoid criminal responsibility for the torture of their victims.

206. The TC's interpretation of the prohibition found in Article 15 is consistent with this Chamber's conclusion that Article 15 does not "mandate the sweeping exclusion of the whole documentation surrounding the interrogation of the torture victim", finding that "information originating from persons other than the torture victim, [e.g.] from the torturer" may be used.[726] Indeed, the TC relied on this finding as the basis for allowing reference to such information in this case.[727]

207. Similarly, the TC properly determined that it could use objective information within confessions that is not part of the statement, including the recorded identity of the detainee subjected to interrogation, and the dates of arrest, incarceration, and execution.[728] The TC also properly decided, by a supermajority, that it could use derivative torture-tainted evidence "to establish facts other than the truth of the statement,

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724 **F54** Appeal Brief, para. 258; *but see* Case 001-**F28** *Duch* AJ, para. 15 *citing* Rule 105(3); **F36** Case 002/01 AJ, para. 987 (Appellant fails to identify the alleged error/s in relation to specific findings, and to explain how the error/s invalidate/s the trial judgment).

725 1984 Torture Convention, art. 15 (emphasis added).

726 **F26/12** SCC Decision on Document Lists, para. 68.

727 **E465** Case 002/02 TJ, para. 76; **E350/8** TC Torture Evidence Decision, para. 49.

728 **E465** Case 002/02 TJ, para. 76.

but only for the purpose of determining what action resulted based on the fact that a statement was made", e.g. whether individuals named in such statements were subsequently arrested, as proof of a governmental policy.[729] The TC did not use such information to establish or imply the truth of the torture-tainted statement,[730] thus, no reliability concerns arise.[731] These determinations are consistent with both this Chamber's conclusion that Article 15 does not mandate sweeping exclusions of information and with the provisions of 1984 Torture Convention.

208. Appellant's ground also fails as the TC correctly concluded that the jurisprudence is not clear regarding permissible uses of such derivative information in circumstances where the torture-tainted evidence is not coerced by the entity seeking to use it, in other words, by the ECCC or by anyone acting as its direct or indirect agent. Nor was the torture or ill-treatment inflicted on Appellant or a third party criminally associated with Appellant to obtain information or other evidence then used against Appellant. Rather, the torture-tainted evidence was coerced directly by others who participated in – or were used as tools in – the JCE in which Appellant participated and which formed the basis for Appellant's convictions for that torture.

209. For the same reason, the cases on which Appellant relies and to which this Chamber cited in the SCC Decision on Objections do not contradict the TC's impugned uses of torture-tainted evidence; they are distinguishable as they do not address the circumstance in which the TC determined it could use such evidence. It is understandable that the use of such evidence in these cases was found to be counter to the 1984 Torture Convention in general and Article 15 in particular. The overwhelming majority of these cases have involved the torture or ill-treatment of the accused by the entity or its agents which later tried to use the confession or other information so obtained against the accused.[732] Alternatively, they involved the torture or ill-treatment of someone criminally associated with the accused by that entity or its agents.[733] In none of those cases was the accused the one found guilty of the torture which produced the allegedly torture-tainted evidence.

210. To the extent it can be argued that the impugned uses of torture-tainted evidence "cannot be defended on the language of [Article 15] alone", regardless of the fact that this

729 **E465** Case 002/02 TJ, para. 77.
730 **F26/12** SCC Decision on Document Lists, paras 40, 47; **E465** Case 002/02 TJ, para. 77.
731 **F26/12** SCC Decision on Document Lists, para. 42.
732 *See e.g. Gäfgen v. Germany; Saunders v. The UK; Jalloh v. Germany; Desde v. Turkey; Huseyn and Others v. Azerbaijan; Ors v. Turkey; Kolu v. Turkey; Söylemez v. Turkey; Rochin v. California; Harutyunyan v. Armenia; A. and Others v. Secretary of State for the Home Department.*
733 *See e.g. Othman v. The UK; Mthembu v. The State.*

Appellant stands convicted of torture, these uses "have to be vetted against the object and purpose of the exclusionary rule."[734] This vetting demonstrates that the impugned uses are not contrary to that object and purpose; rather, they promote them. The object and purpose of Article 15 of the 1984 Torture Convention is "primarily to prevent the practice of torture by removing an important incentive for its use, namely the possibility of introducing into any formal proceedings information that was extracted through torture".[735] The TC's uses do not promote this incentive; rather, they remove it - it is not the torturer who benefits from these uses. These uses are also consistent with the broader object and purpose of the 1984 Torture Convention: the desire to render "'more effective' the struggle against torture throughout the world".[736] The TC's uses do not interpret the 1984 Torture Convention, including Article 15, in a way that "would weaken the prohibition and prevention of torture",[737] or damage the integrity of the proceedings or the reputation of the Court.[738]

Use of notebooks and interrogation records

211. Second, Appellant fails to establish that the TC erred in law by using "interrogation notebooks and security office interrogation records".[739] The TC rightly determined that notebooks or prisoner logbooks may be used "so long as they are not invoked to establish the truth of statements made by those subject to torture".[740] This is another instance where it is appropriate to rely on this Chamber's conclusion that Article 15 of the 1984 Torture Convention does not require sweeping exclusion of all documentation; rather "information originating from persons other than the torture victim" may be used.[741] The impugned notebooks and logbooks are even more removed from the interrogations than annotations on the interrogations themselves, which this Chamber rightly found permissible to use. The impugned documents included such information as, e.g., S-21 entry lists, control lists, interrogation lists, execution lists,[742] S-21 notebooks including records of events and political training the personnel received, notes of interrogators and

734 **F26/12** SCC Decision on Document Lists, para. 40.
735 **F26/12** SCC Decision on Document Lists, para. 40.
736 **F26/12** SCC Decision on Document Lists, para. 40.
737 **F26/12** SCC Decision on Document Lists, para. 40.
738 **F26/12** SCC Decision on Document Lists, para. 45.
739 **F54** Appeal Brief, paras 258, 289-290; **F54.1.1** Appeal Brief Annex A, p. 14 (EN), pp. 12-13 (FR).
740 **E350/8** TC Torture Evidence Decision, paras 30, 87.
741 **F26/12** SCC Decision on Document Lists, para. 68.
742 **E465** Case 002/02 TJ, para. 2116.

discussion of interrogation techniques.[743]

Testimony of Duch

212. Third, in arguing without merit that the TC erred in finding that Appellant knew about the execution of Chou Chet, Appellant mischaracterises the evidence on which the TC relied, incorrectly asserting as torture-tainted Duch's testimony that Pang told him Appellant was invited to attend a meeting on the fate of Chou Chet.[744] Both Philip Short's and Stephen Heder's evidence was that Appellant was entrusted with conducting delicate investigations to determine if individuals were enemies.[745] Appellant ignores Stephen Heder's evidence that Appellant was sent to see Chou Chet regarding Chou Chet's accusations against his deputy, but the deputy was cleared and instead Chou Chet was executed.[746]

213. Similarly, the allegations regarding the TC's reliance on Duch's evidence of his conversation with Pang[747] are without merit. Appellant has not established that the information Duch received from Pang about Appellant's involvement in the meeting regarding the fate of Chou Chet is torture tainted. He also has not established that Pang was detained at S-21 at the time he provided that information.[748] He has wrongly equated the general language of the UNHCR document to which he refers[749] with the specific language of Duch's judicial WRIs given to the OCIJ and his in-court testimony. The general language does not mention Chou Chet or the meeting that related to his fate. The specific statements and in-court testimony, taken by this Court's judicial entities,[750] speak specifically about Appellant's presence at that meeting.

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743 **E465** Case 002/02 TJ, para. 2131.

744 **F54** Appeal Brief, paras 1867-1868; **F54.1.1** Appeal Brief Annex A, p. 14 (EN), pp. 12-13 (FR).

745 **E465** Case 002/02 TJ, para. 4228, fn. 13799.

746 **E465** Case 002/02 TJ, para. 4228, fn. 13801 *citing* **E3/3169** Working Paper on "Pol Pot and Khieu Samphan" by Stephen Heder, p. 26. *See also* pp. 15-16 (Appellant being sent to investigate).

747 **F54** Appeal Brief, para. 288, fn. 430 *citing* **E465** Case 002/01 TJ, paras 1867-1868.

748 **F54** Appeal Brief, para. 1868.

749 **F54** Appeal Brief, para. 1868, fn. 3623 *referencing* **E3/347** UNHCHR Suspect Statement of Duch, 4-6 May 1999, pp. 2-3 (FR) ("*Khieu Samphan II était membre de plein droit du Comité central du Parti communiste du Kampuchea. Du point de vue administratif, il était à la fois chef de l'État et président du bureau du Comité central. À en croire les aveux de Chhim Sam Aok, dit Pang _ après que Pang a eu fini d'écrire ses aveux, je lui ai parlé —, parfois, quand c'était nécessaire, on invitait Khieu Samphan à la réunion (à des réunions sur...) À l'occasion de cette conversation, Pang m'a dit que Vorn Vet, même s'il n'avait pas été appelé ailleurs n'était jamais invité à leurs réunions.").* (Informal translation: "Khieu Samphan was a full member of the Kampuchea Communist Party Central Committee. Administratively, he was both head of state and President of the Central Committee Office. If we believe what Chhim Sam Aok aka Pang said, after Pang finished writing his confessions, I talked to him – sometimes, when it was necessary, we invited Khieu Samphan to meetings on [...] In the course of this conversation Pang told me that Vorn Vet, even if he was not called elsewhere, was never invited to their reunions.").

750 **F36** Case 002/01 AJ, para. 296.

214. None of the information Duch gave to the judicial bodies of the ECCC – the OCIJ and the TC – indicates Pang's information was provided while Pang was in detention. Duch's in-court testimony makes clear that his conversation with Pang about Appellant's presence during discussions about the fate of Chou Chet occurred while Pang was still operating in his official capacity.[751] His OCIJ interviews are consistent with that.[752] Those interviews also make clear that before his arrest, Pang visited S-21 in his official capacity, giving him another opportunity to convey the contested evidence to Duch.[753] Duch's accounts of how Pang came to tell him about Appellant's presence at the meeting discussing Chou Chet's fate are consistent.

215. For the reasons discussed above, the impugned uses do not violate Appellant's fair trial rights. Neither Appellant nor his criminal associates were subjected to torture or ill-treatment in order to obtain confessions or other information from them which was later used against Appellant in formal court proceedings.

Failure to demonstrate how the alleged errors impacted the verdict

216. Fourth, this ground also fails as Appellant asserts only that the alleged errors "invalidate some findings",[754] leaving it for the SCC and the opposing parties to guess which findings. If such vague reference is determined to meet appellate standards, the TC's uses were not of the type which would warrant setting aside the convictions and sentence in whole or in part. As discussed above, the evidence based on the impugned uses was not coerced from Appellant or his criminal associates and then used against him, nor was it coerced from and then used against the victims of torture or ill-treatment. So, the impugned uses do not weaken the prohibition and prevention of torture, "encouraging States to resort" to torture or ill-treatment based investigative techniques.[755] They do not "legitimise indirectly the sort of morally reprehensible conduct which the authors [of the

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751 **E1/55.1** Kaing Guek Eav, T. 28 Mar. 2012, 15.24.22-15.27.22, p. 93, lines 17-22 (Duch asked Pang about the decision to arrest Chou Chet when Pang came to give Duch some instruction in Pang's capacity as Duch's superior), 15.27.22-15.31.20, p. 94, line 15-p. 95, line 5 (Pang said Appellant invited to attend the meeting).

752 **E3/61** Kaing Guek Eav WRI, EN 00195577 (Pang said Appellant invited to attend the meeting); **E3/356** Kaing Guek Eav WRI, EN 00242901 (Pang said Appellant invited to attend the meeting); **E3/448** Kaing Guek Eav WRI, EN 00154910 (Pang said Appellant invited to attend the meeting); **E3/453** Kaing Guek Eav WRI, EN 00147584 (Pang said Appellant invited to attend the meeting).

753 **E1/55.1** Kaing Guek Eav, T. 28 Mar. 2012, 15.22.11-15.24.22, p. 93, lines 1-3 (Duch met with Pang very often); **E3/448** Kaing Guek Eav WRI, EN 00154910 (Pang and Lin would often come to S-21); **E3/356** Kaing Guek Eav WRI, EN 00242901 (Pang was the liaison between S-21 and Pol Pot).

754 **F54** Appeal Brief, para. 258.

755 **F54** Appeal Brief, para. 266.

1984 Torture Convention] sought to proscribe",[756] or "afford brutality the cloak of law".[757] So, no sweeping remedy is warranted.

217. Instead, the SCC should consider whether Appellant has demonstrated the requisite impact of the alleged errors on the verdict, that is, if they invalidated the verdict in whole or in part.[758] No such showing has been made. Appellant has not established that any conviction was entered purely on the basis of torture-tainted evidence, nor that the TC decisively relied on evidence resulting from such uses for convictions or sentence. Rather, the TC rather considered the evidence *in toto* before finding proof BRD for convictions, including the testimony of torturers and torture survivors, those who survived the torture and other documentary evidence.[759]

218. Nor does Appellant's argument regarding *in dubio pro reo* offer him relief. That principle applies where there is doubt regarding proof BRD, which is not the case here. "[T]he *in dubio pro reo* rule, which results from the presumption of innocence [...] has as its primary function to denote a default finding in the event where factual doubts are not removed by the evidence."[760] Put another way, it is mainly a principle that relates to factual proof and not legal interpretation.[761] In addition, the supermajority of the TC had no doubt that the language and object and purpose of the 1984 Torture Convention, including Article 15, allowed the impugned uses of the torture-tainted evidence, so there was no *lacunae* to be filled.

4. WITNESS AND CIVIL PARTY EVIDENCE

Ground 30: Written statements[762]

219. **Ground 30 should be dismissed as Appellant does not demonstrate that the TC erred in its assessment of written statements.**

220. The ground fails, in particular, as Appellant does not establish that the TC erred by not applying its assessment framework for written statements to: (i) the probative value

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756 **F26/12** SCC Decision on Document Lists, para. 43.

757 **F26/12** SCC Decision on Document Lists, para. 43.

758 *See* Standard of Review (Errors of Law).

759 *See e.g.* **E465** Case 002/02 TJ, paras 2080-2559, 2585-2597, 2623-2624 (S-21 – discussing evidence and findings of torture), 826-902 (TK District records), 2644-2810, 2828-2832 (KTC – discussing evidence and findings of torture), 3185-3304, 3317-3319 (Cham – discussing evidence and findings of torture), 4201-4319, 4326-4328 (discussing evidence and findings re. Appellant's criminal responsibility).

760 **E50/3/1/4** SCC Decision on KS Release Application, para. 31.

761 *Stakić* TJ, para. 416 (the *in dubio pro reo* principle "is applicable to findings of fact and not of law").

762 Ground 30: **F54** Appeal Brief, *Written statements*, paras 293-305; **F54.1.1** Appeal Brief Annex A, pp. 14-15 (EN), p. 13 (FR), p. 19 (KH).

afforded to the statements;[763] (ii) their use in relation to acts and conduct of Appellant, wherein Appellant also seems to challenge the SCC's legal conclusions on this issue in Case 002/01;[764] (iii) use of written statements in lieu of oral testimony;[765] and (iv) alleged repeated errors in Cases 002/01 and 002/02.[766]

221. Appellant's ground fails because he (i) misstates or mischaracterises facts on which the TC relied and the TC's findings; and (ii) does not articulate the alleged harm suffered to the requisite appellate standard.[767] Appellant refers to "the Reasons for the Judgment under appeal",[768] with only vague reference to which Reasons those are, much less the particularised harm allegedly suffered. In relation to issues on which this Chamber has already ruled in Case 002/01,[769] he simply disagrees with those rulings and seems to be requesting reconsideration without meeting the standard for such reconsideration.[770]

222. These grounds also fail because Appellant has not demonstrated that the TC erred in its overall approach to written evidence in lieu of in-court testimony, an approach which the SCC has not found to be erroneous.[771] The TC addressed very clearly the issues relating to out-of-court statements. For example, it listed the factors favouring admission of, and determinative of the probative value given to, written statements, and concluded that absence of an opportunity for confrontation would be a consideration which could diminish the weight to be given them.[772] It properly exercised its discretion to admit out-of-court statements after giving Appellant the opportunity to make submissions on them.[773] The TC also noted its concern about the probative value of out-of-court statements, stating it would consider the "identification, examination, bias, source and motive – or lack thereof – of the authors and sources of [out-of-court] evidence".[774]

223. The TC also afforded the parties the opportunity to challenge the evidence and, during the admissibility hearings, heard detailed submissions on the probative weight and value

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763 **F54** Appeal Brief, paras 293-295.
764 **F54** Appeal Brief, paras 296-300.
765 **F54** Appeal Brief, paras 301-302.
766 **F54** Appeal Brief, paras 303-305.
767 *See* Standard of Review (Errors of Law, Errors of Fact).
768 **F54** Appeal Brief, paras 296, 304.
769 *See e.g.* **F36** Case 002/01 AJ, paras 286-287 (use of written statements in lieu of oral testimony – no absolute right to oral testimony), 289 (use of written statements going to acts and conduct of Appellant).
770 Appellant has not shown compelling reasons to warrant reconsideration (*see* **F2/10/3** SCC Decision on NC's Reconsideration Request for Additional Evidence, p. 3, EN 01202790); *Milutinović* TC Decision on Reconsideration of Additional PMs for Witness K56, para. 2 (clear error in reasoning or interest of justice to justify such reconsideration).
771 **F36** Case 002/01 AJ, para. 299.
772 **E465** Case 002/02 TJ, para. 69. *See also* **F36** Case 002/01 AJ, para. 279.
773 **E465** Case 002/02 TJ, paras 55-56.
774 **E465** Case 002/02 TJ, para. 61. *See also* **F36** Case 002/01 AJ, para. 296.

to be assigned to the evidence.[775] The TC also noted that without the opportunity for cross examination, it would exclude statements going to proof of the acts and conduct of the Accused, except where the witness was deceased or unavailable, and that in such instances, it would not decisively base any conviction on that evidence if the probative value of such evidence was substantially outweighed by the need to ensure a fair trial.[776] Appellant has failed to demonstrate this approach was erroneous or that the TC did not adhere to it.

Probative value to be afforded written statements

224. Appellant's arguments fail in relation to the probative value the TC afforded written statements for several reasons. First, he mischaracterises the SCC's analysis of written statements on which he relies. He once again points to only one paragraph of the SCC's several paragraph analysis, which did not summarily dismiss the TC's reliance on written statements but involved a detailed analysis of the in-court testimony as well as the written statements.[777] He also ignores the SCC's findings that, for statement-specific reasons, the written statements could not prove individual killings beyond a reasonable doubt but could be used to corroborate the in-court testimony and that the TC's findings were not unreasonable.[778]

225. In relation to the murder of Heus, *actus reus* of the killing of Touch, and murder and extermination of six Vietnamese members of the protected group, a holistic analysis of the evidence upon which the TC relied establishes no error of law or fact, given: (i) the TC's correct articulation of the requirements that must be met to use out-of-court evidence (in re. Heus);[779] (ii) that the TC appropriately considered corroborative out-of-court evidence (in re. Touch);[780] and (iii) evidence of the killings was properly based on prior in-court testimony and WRI evidence (in re. the six Vietnamese).[781]

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775 **E465** Case 002/02 TJ, paras 55-56, 61. S*ee also* **F36** Case 002/01 AJ, para. 296.

776 **E465** Case 002/02 TJ, paras 71-72, *See also* **F36** Case 002/01 AJ, paras 280, 296.

777 **F54** Appeal Brief, para. 294. *See* **F36** Case 002/01 AJ, paras 426-435 (SCC holistic assessment of the issue presented).

778 **F36** Case 002/01 AJ, para. 435.

779 **F54** Appeal Brief, para. 295, fn. 444 *citing* paras 863-869. *See* **E465** Case 002/02 TJ, paras 68-73. *See also* response to Ground 131 (Murder of the prisoner named Heus).

780 **F54** Appeal Brief, para. 295, fn. 444 *citing* paras 870-873. S*ee* response to Ground 132 (Errors committed in finding that Touch was murdered with *dolus eventualis*).

781 **F54** Appeal Brief, para. 295, fn. 444 *citing* paras 842-847, 1055. S*ee* **E465** Case 002/02 TJ, para. 2926. *See also* response to Grounds 128 (killings), 130 (members of protected group).

Written statements going to acts and conduct of Appellant and use of written statements in lieu of oral testimony

226. Appellant's arguments alleging a flawed legal framework, the same framework the SCC found was not erroneous, blend these two sub-grounds, so they will be addressed together. His arguments fail as Appellant is simply attempting to resurrect issues that were unsuccessfully raised in Case 002/01.[782] In doing so, he is, in essence, asking the SCC to reconsider its prior decisions relating to the use of out-of-court statements without establishing any basis for this reconsideration.[783] His reliance on *Bemba* and articles 68 and 69 of the Rome Statute[784] are misplaced; this Chamber made clear in Case 002/01 that "the ECCC has not adopted the standard for admission of out-of-court statements" found in International Criminal Court ("ICC") Rules of Evidence and Procedure.[785] Appellant has failed to substantiate his arguments relating to the TC's use of written statements in lieu of oral testimony. As the SCC found in Case 002/01, the right to confront witnesses against Appellant is not absolute. Rather, this right may be balanced against other interests and rights, e.g. expeditious proceedings.[786]

227. Second, in the ECCC legal framework, all evidence is admissible which is conducive to ascertaining the truth, subject to any legal prohibitions and other considerations. This includes out-of-court statements, considerations relating to the use of which the TC correctly articulated. Third, as discussed in detail in the response to Ground 31,[787] Appellant fails to establish that the TC based any conviction solely on written statements absent sufficient counterbalancing factors to ensure Appellant could effectively challenge the evidence.[788] Finally, Appellant has not established any error by the TC in its use of out-of-court evidence relating to his acts and conduct.

Chamber's errors allegedly repeated in Cases 002/01 and 002/02

228. Appellant's arguments should be dismissed for lack of merit. The SCC found no error in the TC's general evidentiary framework in Case 002/01,[789] and Appellant has failed to

782 **F36** Case 002/01 AJ, paras 280-294.
783 *See* **F2/10/3** SCC Decision on NC's Reconsideration Request for Additional Evidence, p. 3, EN 01202790 (compelling reasons); *Milutinović* TC Decision on Reconsideration of Additional PMs for Witness K56, para. 2 (clear error in reasoning or interest of justice to justify such reconsideration).
784 **F54** Appeal Brief, para. 299 *citing Bemba* AC Admission Decision, paras 74-81, Rome Statute, art. 69(2).
785 **F36** Case 002/01 AJ, para. 297, fn. 718.
786 **F36** Case 002/01 AJ, paras 286-287.
787 *See* response to Ground 31 (Extrajudicial Statements/Out-of-Court Statements).
788 **F54** Appeal Brief, para. 302, fn. 461 *citing* his paras 842-847, 1055. *See* **F36** Case 002/01 AJ, para. 296.
789 **F36** Case 002/01 AJ, para. 299.

establish that the TC erred in its use of written statements or the probative value it assigned to them. So, there are no repeated errors. It is Appellant's unsuccessful arguments in Case 002/01 which are being repeated. Neither the *Prlić* nor *Katanga* case[790] is of assistance to Appellant as they are based on a common law, not inquisitorial, legal framework. At the ECCC, there is no need to protect Appellant against "evidence prepared on behalf of one party which the opponent has not been able to test or verify".[791] Rather the evidence came to this TC from the CIJs, with the opportunity for input from Appellant.

229. Appellant's examples in support of his sweeping assertion that the TC "used only written statements by witnesses and deceased civil parties to legally characterize the facts and convict [him]" do not in fact support that assertion.[792] As discussed above, reference to paragraphs 863-873 of his brief – regarding the killing of Heus and Touch – are without merit, as addressed in additional detail in other sections of this Response.[793]

230. His other references are defeated by his characteristic piecemeal approach to selectively citing to paragraphs of the TC Judgment. For example, he cites to one paragraph dealing with movement of civilian Vietnamese from Prey Veng Province in Cambodia to Vietnam.[794] The TC 's discussion of the evidence relating to this is seven paragraphs. Indeed, the discussion of the evidence in paragraph 3430 includes assessment of in-court testimony and out-of-court statements which are sufficiently detailed regarding the sources of their information – including personal observation and village civil authorities – and corroborative of the in-court testimony.[795] Similarly Appellant refers to only TC Judgment paragraph 4248, one of three paragraphs dealing with regulation of marriage, which in turn further refer to TC Judgment paragraphs 3569-3570 and 3611.[796] These paragraphs include discussion of in-court testimony and Appellant's speech as well as a corroborative interview record. Appellant cites to paragraph 4248 footnote 13864,[797] in turn cites to paragraph 3586, which is one of five paragraphs dealing with marriages of

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790 **F54** Appeal Brief, para. 305, fn. 470 *citing Prlić* TJ, para. 388 and *Katanga* TC Decision on Prosecutor's Motions, para. 42.
791 **F54** Appeal Brief, para. 305, fn. 470 *citing Katanga* TC Decision on Prosecutor's Motions, para. 42.
792 **F54** Appeal Brief, para. 304.
793 *See* response to Grounds 131 (murder of the prisoner named Heus), 132 (errors committed in finding that Touch was murdered with *dolus eventualis*).
794 **F54** Appeal Brief, para. 304, fn. 468 *citing* **E465** Case 002/02 TJ, para. 3430. *See* response to Ground 151 (Deportation of the Vietnamese from Prey Veng).
795 **E465** Case 002/02 TJ, para. 3430.
796 **E465** Case 002/02 TJ, paras 4247-4249.
797 **F54** Appeal Brief, para. 304, fn. 466.

disabled soldiers[798] and includes in-court testimony and Appellant's speeches as well as out-of-court evidence.

Ground 34: Assessment of statements[799]

231. **Ground 34 should be dismissed as Appellant fails to establish that the TC erred in law and fact in assessing and relying on the trial testimony of CPs.**

232. The ground fails as Appellant does not show that the TC relied on the testimony of CPs who were not credible or reliable to make findings of guilt.[800] First, Appellant relies on the same example as in Ground 33, which relates to the use of a CP *application* and not the trial testimony of a CP.[801] Second, Appellant contradicts his own acknowledgment that the TC is entitled to rely on CP testimony for findings of guilt[802] by asserting that Uch Sunlay's testimony had intrinsically little value and was biased simply because he was a CP.[803] As explained further below,[804] the TC properly relied on Uch Sunlay's credible, detailed testimony regarding the killing of members of his family, including his Vietnamese wife and their child.

233. Third, Appellant cites as a "perfect illustration" the testimony of "Ek Ei"[805] but refers to a section of his Appeal Brief containing arguments regarding the evidence of Ek Hen and Em Oeun.[806] No individual named Ek Ei testified in Case 002 and Ek Hen was not a CP.[807] Therefore, Appellant's flawed claims presumably relate to Em Oeun. As addressed elsewhere herein, the TC properly assessed Em Oeun's evidence.[808] Likewise, Appellant's assertions regarding the testimony of Chea Deap[809] fail to establish error, as detailed in other sections of this Response.[810]

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798 **E465** Case 002/02 TJ, paras 3586-3590.
799 Ground 34: **F54** Appeal Brief, *Assessment of statements*, paras 317-319, **F54.1.1** Appeal Brief Annex A, pp. 15-16 (EN), p. 14 (FR), p. 21 (KH).
800 **F54** Appeal Brief, para. 319.
801 **F54** Appeal Brief, para. 319, fn. 502 *citing* his paras 978-980. *See also* response to Ground 151 (deportations from Angkor Yos village).
802 **F54** Appeal Brief, paras 317-319.
803 **F54** Appeal Brief, para. 319, fn. 502 *citing* his paras 1014-1016.
804 *See* response to Ground 156 (evidence of Uch Sunlay and killings in Sector 505).
805 **F54** Appeal Brief, para. 319.
806 **F54** Appeal Brief, para. 319, fn. 503 *citing* his paras 1754-1762.
807 *See* **E1/217.1** Ek Hen, T. 3 July 2013, 09.35.10-09.52.47 p. 13, line 7-p. 15, line 3.
808 *See* response to Grounds 22, 204.
809 **F54** Appeal Brief, para. 319, fn. 504 *citing* his paras 1233-1242.
810 *See* response to Grounds 166.

Ground 33: Civil Party Applications[811]

234. **Ground 33 should be dismissed as Appellant fails to establish that the TC's use of a CPA invalidated the Judgment or occasioned a miscarriage of justice.**

235. The ground fails as the TC's reliance on a Civil Party Application ("CPA") in relation to a specific incident of deportation from a village in Prey Veng Province does not invalidate the TC's finding that deportation from Prey Veng Province took place.[812]

236. While the TC's reliance on a CPA in relation to an instance of deportation from Angkor Yos village may have been in error, the TC properly concluded that Vietnamese were deported from two other villages in Prey Veng: Anlung Trea and Pou Chentam.[813] Appellant was charged with and convicted of deportation of Vietnamese from Prey Veng Province,[814] not with separate incidents of deportation from specific villages therein. The TC thus correctly found, based on the totality of the evidence including testimony and other statements from villagers regarding Vietnamese families being sent back to Vietnam, that Vietnamese were deported from Prey Veng Province.[815] Appellant fails to establish that any error resulted in the invalidation of the Judgment, in whole or part, or occasioned a miscarriage of justice.[816]

Ground 35: Documents benefitting from presumptions[817]

237. **Ground 35 should be dismissed as Appellant fails to demonstrate that the TC erred in law or fact by applying the same legal framework regarding documents enjoying presumptions which was upheld by the SCC in Case 002/01.**

238. This ground fails as Appellant has simply resurrected unsuccessful arguments from the Case 002/01 appeal, without providing any new basis for reconsidering the conclusion in that case.[818] Moreover, Appellant's reliance on the International Residual Mechanism for Criminal Tribunals ("IRMCT") *Prlić*[819] case is misplaced.

239. Appellant completely misapprehends the Appeals Chamber's finding in *Prlić*. It must be noted that the Chamber dismissed that ground of appeal in that case. Furthermore, the

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811 Ground 33: **F54** Appeal Brief, *Civil Party Applications*, paras 314-316; **F54.1.1** Appeal Brief Annex A, p. 15 (EN), p. 14 (FR), pp. 20-21 (KH).
812 *Contra* **F54** Appeal Brief, para. 316.
813 **E465** Case 002/02 TJ, paras 3430-3431, 3433-3436, 3502-3507.
814 **E465** Case 002/02 TJ, paras 3502, 3505-3507.
815 **E465** Case 002/02 TJ, paras 3505-3507.
816 **F54** Appeal Brief, paras 314-316.
817 Ground 35: **F54** Appeal Brief, *Documents benefitting from presumptions*, paras 320-322; **F54.1.1** Appeal Brief Annex A, p. 16 (EN), p. 15 (FR), p. 21 (KH).
818 **F36** Case 002/01 AJ, paras 369-376.
819 *Prlić* AJ, para. 121.

Chamber did not "[establish] a more rigorous framework for assessing authenticity in order to ensure evidentiary standards" or "[consider] that it was not enough to admit a rebuttable presumption of authenticity that was not justified by any objective criteria".[820] Rather, the Chamber noted the criteria which the TC had found to be sufficient indicia of reliability in that case – criteria consistent with those herein[821] - without finding these criteria were required. In relation to the "S-21 Orange Logbook",[822] one of the examples cited by Appellant,[823] the TC relied in part on the testimony of the witness who stated that he had it in his custody and control at S-21.[824] The Judgment is replete with corroboration of all the documents impugned by Appellant[825] via witness and CP testimony and documentary evidence. Critically, the *Prlić* Appeal Chamber recalled that "proving authenticity is not a separate threshold requirement for the admissibility of documentary evidence".[826]

240. Appellant's sweeping assertion that the TC failed to provide reasoned response[s] to his "numerous" challenges to the authenticity of certain documents is belied by the paragraphs in his Appeal Brief on which he relies;[827] the TC gave reasoned responses for its decisions regarding the documents discussed in these paragraphs.[828]

5. EXPERT EVIDENCE

Ground 37: Experts[829]

241. **Ground 37 should be dismissed as Appellant does not demonstrate that the TC erred in law and fact in its assessment of expert evidence.**

242. While Appellant "agrees with [TC's] analysis"[830] regarding the assessment of expert

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820 **F54** Appeal Brief, para. 322.

821 *Prlić* AJ, para. 121; **E185** Case 002/02 Documents Decision, paras 25-28; **F36** Case 002/01 AJ, para. 373 (chain of custody statement and corroborative documents – *e.g.* DC-Cam Director, copies from originals, inspect originals which Appellant did not request).

822 **E3/10770** S-21 Prisoner List daily report ("S-21 Orange Logbook").

823 **F54** Appeal Brief, para. 322, fn. 509 *citing* his para. 226.

824 **E465** Case 002/02 TJ, para. 2123.

825 **F54** Appeal Brief, para. 322, fn. 509 *citing* his paras 217-225, 226.

826 *Prlić* AJ, para. 121.

827 **F54** Appeal Brief, para. 322, fn. 509 *citing* his paras 217-225, 226.

828 *In response to* **F54** Appeal Brief, paras 217 (challenging admission of documents originating from Professor Goscha), 225 (challenging the use of these documents for corroboration), *see* **E465** Case 002/02 TJ, paras 352-354. *See also* **E327/4/7** TC Goscha Documents Decision. *In response to* **F54** Appeal Brief, paras 217, 225, *see* response to Ground 11 (For the Years 1977 and 1978, Use of evidence with low probative value). *In response to* **F54** Appeal Brief, para. 226 (challenging admission of the S-21 Orange Logbook (**E3/10770**)), *see* **E465** Case 002/02 TJ, paras 136, 2123; **E443/3** TC Decision on Orange Logbook and Two S-21 Witnesses; response to Ground 12 (Admission of the S-21 Orange Logbook).

829 Ground 37: **F54** Appeal Brief, *Experts*, paras 329-330; **F54.1** Appeal Brief Annex A, pp. 16-17 (EN), p. 15 (FR), p. 22 (KH).

830 **F54** Appeal Brief, para. 330.

evidence,[831] he fails to establish that the TC did not apply this framework in assessing such evidence. Appellant's allegation that the TC failed to apply its framework for assessing expert evidence and disregarded exculpatory evidence,[832] fails as it is incorrect, ignores that the TC must analyse specific pieces of evidence against the totality of all the evidence[833] and simply asks the SCC to assess the evidence differently to the TC, without demonstrating an error in its assessment. A full review shows the TC properly assessed the evidence of these two experts based on all the evidence before it, as is also required when assessing the alleged error on appeal.[834]

243. Regarding Kasumi Nakagawa's testimony,[835] Appellant does not show the TC distorted her testimony or failed to draw necessary findings from it.[836] Appellant's inaccurate piecemeal approach is illustrated by one example where Appellant selects a partial answer of the expert. The partially quoted response was to a Defence Counsel question: "If I understand your evidence properly, your position based on your research is it that there was a possibility of refusals to marry someone *even in cases where Angkar 'ordered it'*, but that it depended very much on the local authorities? Is that correct?" The expert responded: "Yes, that's correct and that's why I said that I cannot find any evidence of centralized policy to force the people into the marriage." [837] Considering the expert's answer in the context of the question, which referred to "refusals to marry *even when Angkar ordered it"*, makes it clear that the focus of the question was on the local authorities' *implementation* of the orders from *Angkar* to marry, not on the core issue of whether a central CPK policy existed.[838]

244. Appellant's argument also fails when the expert's testimony on this issue is considered *in toto*.[839] The TC correctly referenced that testimony when it pointed out that Kasumi

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831 **F54** Appeal Brief, paras 329-330 *citing* **E465** Case 002/02 TJ, paras 66, 191-195.

832 **F54** Appeal Brief, para. 330, fn. 535 *referring* to experts Levine and Nakagawa.

833 *See Lubanga* AJ, para. 22; *Ntagerura* AJ, para. 174. *See also Ngirabatware* AJ, paras 202, 208; *Taylor* AJ, para. 55; *Martić* AJ, para. 233.

834 *See* Standard of Review (Errors of Fact); *Setako* AJ, para. 316; **F36** Case 002/01 AJ, para. 357.

835 **F54** Appeal Brief, para. 330 *citing* his paras 1209-1210 and **E465** Case 002/02 TJ, paras 3531, 3533 (Appellant's cites to paras in his Appeal Brief and to the TJ re. his conviction for forced marriage are addressed in Section VII.D. Regulation of Marriage).

836 **F54** Appeal Brief, para. 1209.

837 **E1/473.1** Kasumi Nakagawa, T. 14 Sept. 2016, 14.03.51-14.06.35, p. 73, lines 4-12 (emphasis added).

838 *Contra* **F54** Appeal Brief, para. 1210.

839 **E1/472.1** Kasumi Nakagawa, T. 14 Sept. 2016, 13.54.26-13.55.56, p. 72, lines 2-14 (re. query whether she analysed contemporaneous documents from Party Centre or statements from Khmer Rouge leaders, she stated that because she wanted the women's voices she did not take account of those policy documents that the Court may have), 15.06.10-15.06.51, p. 93, lines 14-16 ("I don't have enough evidence to say that there was a policy from the top level to organize forced marriages"), 15.11.34-15.12.32, p. 96, lines 1-5 (the Nuon Chea Defence objected on the grounds that the expert had testified that she had not studied any policy

Nakagawa could not conclude there was a top-level policy to organise forced marriage due to a lack of evidence "as it was not part of her study".[840] Similarly, Appellant's claim that the TC "wrongfully dismissed" Peg Levine's testimony[841] also fails; the TC neither dismissed nor accepted the testimony of either expert without reasoned analysis. As noted, the TC identified its reservations regarding the evidence of Peg Levine.[842]

VI. *SAISINE* & SCOPE OF TRIAL

A. INTRODUCTION, LEGAL CONTEXT AND PRINCIPLES

245. The TC acted within its *saisine* to convict Appellant of crimes charged in Case 002/02. Appellant argues in 51 grounds, **2, 38-84, 123-124** and **134** that the TC erred in law by convicting him on facts that he avers fell beyond the *saisine* of Case 002/02. Specifically, Appellant contends that the TC erred in considering itself properly seised of the following four categories of facts:

(1) Type 1: Facts which Appellant alleges the CIJs had not been seised in the Introductory Submission[843] ("IS") or one of the Supplementary Submissions[844] ("SS");[845]

(2) Type 2: Facts for which Appellant claims there was insufficient evidence for inclusion in the Closing Order (Indictment);[846]

(3) Type 3: Facts that Appellant contends fall outside the TC's *saisine* since the CIJs allegedly did not identify them in the Closing Order (Indictment) as legally characterised material facts likely to give rise to his criminal responsibility;[847] and

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documents, revolutionary documents, or contemporaneous documents, so by her own admission was not an expert as to those particular documents). *See also* response to Grounds 244, 165.

840 **E465** Case 002/02 TJ, para. 3533, fn. 11883 *citing* **E1/472.1** Kasumi Nakagawa, T. 14 Sept. 2016, p. 93.

841 **F54** Appeal Brief, para. 1209.

842 **F54** Appeal Brief, para. 330, fn. 535 *citing* **E465** Case 002/02 TJ, para. 3531 for expert Levine (TC not bound by the opinion of any expert; material available to the expert was more limited than that before the TC; opinion would be discarded as erroneous where it contradicted the preponderance of evidence), 3533 for expert Nakagawa (TC would evaluate that evidence in the context of the evidence before it).

843 **D3** IS.

844 **D83** SS Regarding the North Zone Security Centre; **D146/3** Co-Prosecutors' Response to the Forwarding Order of the CIJs and SS; **D196** Co-Prosecutors' SS Regarding Genocide of the Cham; **D146/4** Further Authorisation Further to Co-Prosecutors' 30 April 2009 Response to the Forwarding Order of the CIJs and SS; **D202** Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission.

845 Grounds 38 (law), 39-59, 123 (application): **F54** Appeal Brief, *Overstepping the Scope of the judicial investigation,* paras 334-438; **F54.1.1** Appeal Brief Annex A, pp. 18-25 (EN), pp. 16-23 (FR), pp. 22-35 (KH).

846 Grounds 61 (law), 62-64 (application): **F54** Appeal Brief, *Insufficient Charges to Bring to Judgment,* paras 439-457; **F54.1.1** Appeal Brief Annex A, pp. 25-27 (EN), pp. 23-24 (FR), pp. 35-37 (KH).

847 Grounds 60, 65-81, 124, 134 (application): **F54** Appeal Brief, *Lack of Legally Qualified Material Facts,* paras 458-530, 814-824, 884-886; **F54.1.1** Appeal Brief Annex A, pp. 27-32 (EN), pp. 24-29 (FR), pp. 37-45 (KH).

(4) Type 4: Facts which had allegedly been excluded from Case 002/02 by the TC upon the severance of Case 002.[848]

246. Appellant further argues that the TC erred in law by relying on:

(5) Evidence relating to facts allegedly outside the scope of Case 002/02.[849]

247. Appellant relies on procedural principles derived from French law, which are not defined in either ECCC Law or its IRs, and which have been inconsistently translated in the English version of his brief. To clarify any uncertainty and provide context to this response, the Co-Prosecutors set out a brief summary of the relevant terms, principles and procedural history.

B. *SAISINE* (TYPES 1-4)

248. The term *saisine* appears in the IRs three times,[850] without definition. In the ECCC context, "*la saisine*" may designate either of two interrelated aspects of the Court's procedural framework. First, it is the document by which a particular matter is referred to a competent authority to institute proceedings: the OCP seises the CIJs by the introductory or supplementary submissions,[851] and the Closing Order (Indictment) seises the TC.[852] As soon as the notice instituting proceedings is filed, the relevant judicial body is seised, and made aware of the dispute on which it must adjudicate. Second, *saisine* may also refer to the scope of the case before the CIJs or TC, defined by the relevant referring document.[853]

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848 Grounds 2, 82-84 (application): **F54** Appeal Brief, *Exclusion through Severance,* paras 531-549; **F54.1.1** Appeal Brief Annex A, pp. 33-34 (EN), p. 30 (FR), pp. 46-47 (KH).

849 Grounds 3, 180: **F54** Appeal Brief, paras 116, 120-125, 757, 1489; **F54.1.1** Appeal Brief Annex A, pp. 5, 62 (EN), pp. 5, 57 (FR), pp. 5, 89 (KH).

850 IRs 23*bis*(3), 74(3)(g), 74(4)(g). The English version reads "is seised" (IR 23*bis*(3)) and "to seise" (IRs 74(3)(g); 74(4)(g)), respectively.

851 *Vocabulaire Juridique,* p. 932 ("*Saisine*: […] Action de porter devant un organe une question sur laquelle celui-ci est appelé à statuer." Unofficial translation: "*Saisine*: The action of bringing before a [judicial] organ a question on which it is called to adjudicate."). *See also Juridictionnaire*, ("Dans le droit de la procédure, la *saisine* est une institution juridique qui permet de *saisir une juridiction*, c'est-à-dire de déférer à une autorité une question qui fait l'objet d'un différend, d'une contestation, de lui renvoyer une affaire. Dans ce mode d'introduction de l'instance, on parle de *saisine* parce que, dès lors que l'avis introductif d'instance ou la requête est déposé au greffe, la juridiction est *saisie*, autrement dit, il y a de sa part appréhension de l'objet du litige sur lequel elle est tenue de statuer. […] Formalité procédurale, la *saisine* permet à une juridiction de connaître d'un litige." Unofficial translation: "In procedural law, '*saisine*' is a legal institution which makes it possible to seise a court, that is to say, to refer to an authority a question which is the subject of a difference, a dispute; to send it a case. In this mode of initiating proceedings, we speak of '*saisine*' because, as soon as the notice of initiation of proceedings or the request is filed with the registry, the court is seised, in other words, there is on its part, the understanding of the subject of the litigation on which it is held to rule. […] A procedural formality, the referral allows a court to hear a dispute").

852 IRs 67(1), 77(13), 79(1).

853 *Vocabulaire Juridique*, p. 933 ("*Saisine*: […] Désigne aussi dans la pratique judiciaire, l'ensemble des questions dont une juridiction se trouve saisie, qui sont soumisent à sa connaissance, ou sur renvoi après

249. Where a document has not been properly referred, or where a Chamber exceeds the facts set out in the referring document, there has been a violation of the *saisine*. Appellant primarily uses this latter sense.

250. The English version of Appellant's brief often leaves the French term untranslated.[854] Alternative terms, such as "jurisdiction";[855] "scope" of the case, judicial investigation, indictment, charges or trial;[856] "referral";[857] "charges";[858] or simply that which the CIJs or TC "had been seised",[859] replace "*saisine*" throughout his brief and Annex A. The PTC and CIJs have also referred to allegations "laid before" the CIJs,[860] or simply used an anglicised form: "seisin".[861] To avoid confusion, the Co-Prosecutors will use the original French term "*saisine*" in this response.

1. JUDICIAL INVESTIGATION: INTRODUCTORY AND SUPPLEMENTARY SUBMISSIONS AND *SAISINE* OF THE CIJS (*SAISINE IN REM*) (TYPE 1)[862]

251. *Saisine in rem* is a subcategory of *saisine*, referring to the principle, codified in the IRs,[863]

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cassation, et sur lesquelles elle est tenue de répondre aux conclusions des parties. Unofficial translation: "*Saisine*: [...] It also describes in judicial practice, the collection of questions of which a court has been seised, which are submitted to it, or referred to it after an appeal, and on which the court is required to respond to the parties' submissions.").

854 *See e.g.* **F54** Appeal Brief, paras 378-379, 382, 386, 388-389, 391, 393, 395-396, 398-400, 420, 493, 504, 529, 1401-1403, 1407, 1442.

855 *See e.g.* **F54** Appeal Brief, paras 118, 351, 367-368, 423, 445, 818; **F54.1.1** Appeal Brief Annex A, pp. 18-24, 26-33 (EN), pp. 16-30 (FR).

856 *See e.g.* **F54** Appeal Brief, paras 91, 334, 352, 355, 366, 388, 391, 436, 538, 806, 1489.

857 *See e.g.* **F54** Appeal Brief, paras 446, 458, 466 (verb form), 505, 510, 513, 517-518, 521, 523 (referral in rem) 530, 549; **F54.1.1** Appeal Brief Annex A, pp. 4-5, 18-22, 24-25, 27-33, 45, 48, 61-62 (EN), pp. 4-5, 16-22, 24-30, 42, 44, 56-57 (FR).

858 *See e.g.* **F54** Appeal Brief, paras 460, 726.

859 *See e.g.* **F54** Appeal Brief, paras 449, 451, 472, 487, 1545, 1551-1552, 1563, 1575, 1576, 1584, 1589, 2141. *See also* paras 443 ("information of which they were seised"), 451 ("matters it was seised of"); **F54.1.1** Appeal Brief Annex A, pp. 20 (EN), pp. 18 (FR).

860 *See e.g.* Case 003-**D165/2/26** paras 3, 4, 29 (para. 3 (FR): "Conformément à la Règle 53, le dossier était transmis, à chaque fois, aux co-procureurs en vue de vérifier l'étendue de la *saisine* des co-juges d'instruction relative à des fait nouveaux et de déterminer la nécessité de saisir les co-juges d'instruction d'un réquisitoire supplétif." (EN): "On each occasion, the case file was forwarded to the Co-Prosecutors pursuant to Internal Rule 53 so that they could ascertain the ambit of the allegations laid before the [CIJs] as regards the new facts and determine whether to seise the [CIJs] by way of a supplementary submission."; para. 29 (FR): "Ils soutiennent que les co-juges d'instruction ne sont pas valablement saisis de ces lieux de crimes, qui n'entrent pas dans le champ de la *saisine* telle que délimitée par le Deuxième Réquisitoire introductif." (EN): "The Co-Investigating Judges, they maintain, were not duly seised as regards these crime sites, which fall out with the matters laid before them, as circumscribed by the Second Introductory Submission.").

861 *See e.g.* **D404/2/4** PTC Second Decision on CPA Admissibility Appeals, paras 29, 41; **D364/1/3** PTC Decision on CPA D22/288, para. 3.

862 Appellant argues in the following **22** grounds of appeal that the TC was in error by finding facts which went beyond the *saisine* of the investigation authorised through the Introductory and Supplementary Submission: **Grounds 39-59, 123.**

863 IR 55(2) ("the CIJs "shall only investigate the facts set out in an Introductory Submission and a Supplementary Submission"). *See also* Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, para. 36. This principle is equally codified in both Cambodia (art. 44, CCCP) and France (art. 80, FCCP).

that an investigating judge is seised by the prosecutor of, and thus may only investigate, the facts pleaded in the IS, or a SS.[864] In Case 002, this required the CIJs to investigate all facts alleged in paragraphs 37-72 of the IS,[865] together with all facts alleged in the crime base sections of the Supplementary Submissions.[866] The CIJs are not bound by any legal characterisation proposed by the Co-Prosecutors,[867] but are guided by it to define their investigation.[868] Importantly, the charged person can only be indicted for crimes based on these facts.

252. IR 53 governs introductory and supplementary submissions,[869] and sets forth two species of rule for a submission to be valid: one procedural and one substantive. In its second part, IR 53(1) prescribes several conditions as to the form of an IS.[870] In addition, the first part of IR 53(1) lays down the substantive condition for validity: that the Co-Prosecutors have "reason to believe" that crimes within the jurisdiction of the ECCC have been committed.[871]

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864 *Procédure pénale*, p. 113 ("Le juge d'instruction est en effet saisi des faits qui lui sont dénoncés par le parquet dans son réquisitoire introductif d'instance [...] On dit qu'il est saisi *in rem* et non *in personam*, c'est-à-dire des faits tels qu'ils apparaissent dans ces actes. Le juge d'instruction ne peut alors pas s'autosaisir en incluant dans sa *saisine* des faits que les autorités de poursuite n'ont peut-être pas voulu poursuivre" Unofficial translation: "The investigating judge is seised of the facts reported to him by the prosecutor in his introductory submission. [...] It is said that the judge is seised *in rem* and not *in personam*, that is to say he is seised of the facts as they appear in these acts. The investigating judge cannot seise himself of facts that the prosecuting authorities may not have wanted to prosecute."); *Vocabulaire Juridique*, p. 933. "*Saisine [...] in rem*: Règle de procédure pénale selon laquelle le juge, en particulier le juge d'instruction, ne peut s'auto-saisir mais doit examiner, mener les investigations et statuer sur tous les faits visés par l'acte de poursuite et seulement ceux-ci." Unofficial translation: "*Saisine in rem*: A rule of criminal procedure according to which the judge, in particular the investigating judge, may not seise himself but must review, conduct investigations and make a decision on all the facts set out in the [introductory submission] and only those facts.").

865 **D3** IS, paras 37-72.

866 **D83** SS Regarding the North Zone Security Centre, paras 5-9; **D146/3** Co-Prosecutors' Response to the Forwarding Order of the CIJs and SS, paras 2, 4; **D196** Co-Prosecutors' SS Regarding Genocide of the Cham, paras 3-23; **D146/4** Further Authorisation Further to Co-Prosecutors' 30 April 2009 Response to the Forwarding Order of the CIJs and SS, para. 3; **D202** Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission.

867 IR 67(1).

868 Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, para. 35.

869 The requirements for the validity of an introductory submission apply equally to supplementary submissions. *See* Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, paras 218, 222; **D250/3/3** OCIJ Combined Order on OCP and CP Requests for Investigative Action Regarding the Vietnamese and the Khmer Krom, para. 6.

870 IR 53(1) ("The submission shall contain the following information: a) a summary of the facts; b) the type of offence(s) alleged; c) the relevant provisions of the law that defines and punishes the crimes; d) the name of any person to be investigated, if applicable; and e) the date and signature of both Co-Prosecutors."); Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, para. 219.

871 **D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, para. 220 *citing* **D134/1/10** PTC Decision on Two Annulment Applications, International Judges' Opinion, para. 38 (unanimous).

Interpreting the Introductory and Supplementary Submissions

253. Appellant misconstrues the level of detail required of introductory and supplementary submissions to set out the *saisine in rem* and errs in his criticism of the TC's finding that the degree of detail required differs between the IS and the CO.[872] As unanimously held by the PTC, "the level of particularity demanded in an indictment cannot be directly imposed upon the [IS], because the OCP makes its [IS] without the benefit of a full investigation."[873] Indeed, were that not the case, the judicial investigation would be redundant.[874] "[O]nly a summary of the facts and type of offence alleged are required at the stage of the [IS]"[875] and "imprecision" as to the facts in the IS does *not* preclude judicial investigation.[876] The PTC Judges have confirmed that, in practice, this means that the Co-Prosecutors are not required to establish all of the elements of crimes or nexus between the underlying acts and the constituent *chapeau* elements of the relevant crimes.[877]

254. The CIJs had a positive duty to issue a decision in respect of *all* facts alleged in the IS or any SS,[878] including "[t]he circumstances surrounding the acts mentioned" therein,[879] such as aggravating circumstances,[880] connected facts, locations where facts occurred,

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872 **F54** Appeal Brief, paras 351-352 *citing* **E465** Case 002/02 TJ, para. 166, in turn *citing* **D97/14/15** PTC JCE Decision, para. 92.

873 **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 95 *citing* international jurisprudence. *See also* Case 004-**D345/1/6** PTC Kang Hort Dam Annulment Considerations, International Judges' Opinion, para. 39.

874 A point made by the PTC International Judges. *See* Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, para. 222.

875 **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 92.

876 Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, para. 152; Case 003-**D134/1/10** PTC Decision on Two Annulment Applications, International Judges' Opinion, para. 14.

877 Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, paras 221-222.

878 Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, paras 29, 33, 37-38, 115; **D198/1** Order Concerning the Co-Prosecutors' Request for Clarification of Charges, para. 10; Cass. Crim., 24 Mar. 1977, No. 76-91.442 ("Le juge d'instruction avait l'obligation d'instruire, puis de statuer par une ordonnance de règlement sur l'ensemble des faits" […] "Le juge est tenu de statuer par ordonnance du règlement sur tous les faits dont il a été régulièrement saisi" Unofficial translation: "The investigating judge has the obligation to investigate and then to render an order covering all the facts. […] The judge is obliged to pronounce on all the facts of which he has been regularly seised"); Cass. Crim. 4 Mar. 2004, No. 03-85.983 ("le juge d'instruction n'a pas statué, comme il en a le devoir, dans son ordonnance de renvoi, sur tous les faits dont il est saisi" Unofficial translation: "The investigating judge did not rule in his closing order, as he was obliged, on all the facts of which he was seised").

879 IR 55(3); Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, para. 35. *See further* Case 003-**D134/1/10** PTC Decision on Two Annulment Applications, International Judges' Opinion, para. 15 *citing* Cass. Crim., 10 Mar. 1977, No. 75-91.224; Case 004-**D345/1/6** PTC Kang Hort Dam Annulment Considerations, International Judges' Opinion, para. 39.

880 IR 55(3).

and facts that assist in determining legal characterisation.[881] Thus, as explained to the CIJs,[882] jurisdictional elements of the alleged crimes[883] or certain other contextual elements,[884] are within the CIJs' *saisine in rem*.

255. Moreover, the IS (or SS) must be read holistically.[885] The claim that the TC erred in holding that the CIJs' *saisine* is defined by the facts set out in the introductory (or supplementary) submission together with its accompanying footnotes and annexes,[886] is similarly without merit, and runs contrary to the approach that has been endorsed and applied by judges of the PTC:[887] "facts provided in evidence, attached to an [IS], fall

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881 Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, para. 35; Cass. Crim., 10 Mar. 1977, No. 75-91.224 ("S'il est interdit aux juges de statuer sur des faits autres que ceux qui leur sont déférés, il leur appartient de retenir tous ceux qui, bien que non expressément visés dans le titre de la poursuite, ne constituent que des circonstances du fait principal, se rattachant à lui et propre à le caractériser." Unofficial translation: "Whereas judges are barred from adjudicating facts other than those laid before them, it lies with them to draw on all of those facts, which although not expressly stated in the proceedings, constitute mere circumstances of the principal fact, to which they are connected and which they specifically characterise."); Cass. Crim., 24 Apr. 2013, No. 12-80.750, inédit ("lorsqu'une activité délictueuse consiste en une situation d'agissements identiques étroitement liés les uns aux autres qui se développent dans le temps, ces agissements forment une opération unique de sorte que le juge d'instruction est autorisé à informer sur l'ensemble de ces agissements alors même que l'acte de poursuite ne viserait que certains d'entre eux; en l'espèce, le juge d'instruction est saisi de l'ensemble des fausses écritures comptables qui sont le corollaire des faits d'abus de confiance aggravés et leur sont rattachés de manière indivisible". Unofficial translation: "where a criminal activity consists of the same closely-related conduct developed over time, such conduct forms a single operation, and it is therefore permissible for the investigating judge to investigate such conduct in its entirety even if the introductory submission concerns only part of it; in this instance, the Investigating Judge is seised of all the falsified accounting records, which relate to the aggravated breach of trust and are indivisibly linked to it"); Cass. Crim., 17 Nov. 1986, No. 85-93.444. *See also* Case 003-**D134/1/10** PTC Decision on Two Annulment Applications, International Judges' Opinion, para. 14 ("the [CIJs'] investigation is limited by the alleged criminal acts defined by the Co-Prosecutors. However, it rests with the Judge to elicit the circumstances of their commission, and the *locus in quo* in particular."); Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, paras 152, 168-169, 208.

882 **D98/I** Co-Prosecutors' Response to the Co-Investigating Judges Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submission ("The Co-Prosecutors clarify that the judicial investigation requested is not limited to the facts specified in paragraphs 37 to 72 of the Introductory Submission and paragraphs 5 to 20 of the Supplementary Submission but extends to all facts, referred to in these two Submissions, *provided* these facts assist in investigating a. The jurisdictional elements necessary to establish whether the factual situations, specified in paragraphs 37 to 72 and 5 to 20 respectively, constitute crimes within the jurisdiction of the ECCC").

883 **D365/2/17** PTC Knowledge Evidence Decision, paras 49, 60; **D273/3/5** PTC Decision on NC's 18th RIA, para. 18.

884 **D365/2/17** PTC Knowledge Evidence Decision, para. 49. *See also* **D273/3/5** PTC Decision on NC's 18th RIA, para. 18.

885 In determining the crime base, the CIJs should have regard to the remaining paragraphs of the IS (or SS). *See* Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, paras 156 (referring to Case 003 IS, paras 23, 36), 158 (referring to Case 003 IS, paras 21, 23), 177 (referring to Case 003 IS, para. 86(a)), 205 (referring to Case 003 IS, paras 6, 82, 86), 211 (referring to Case 003 IS, paras 86(b)). The 'crime base' section of the Case 003 IS is at paras 43-66.

886 **F54** Appeal Brief, paras 351-366, 382-383.

887 Case 003-**D134/1/10** PTC Decision on Two Annulment Applications, International Judges' Opinion, para. 4; Case 004-**D299/3/2** PTC Tuol Beng and Wat Angkuonh Dei Annulment Considerations, International Judges' Opinion, para. 52 and citations therein; Case 004-**D263/1/5** PTC Wat Ta Meak Annulment Considerations, Opinion of the Merit of the Application by Judges Baik and Beauvallet, paras 58 and 61 *citing, inter alia,* Case 003-**D134/1/10** PTC Decision on Two Annulment Applications, para. 42

squarely within the judicial investigation."[888] Appellant's approach is belied by a wealth of French[889] jurisprudence, including, but not limited to, that referred to by the TC itself,[890] confirming that an endorsement of the contents of one or more annexes to an IS, like that found in the Case 002 IS,[891] equates to analysis and incorporation of those annexes. In this light, Appellant creates an artificial distinction[892] between facts and evidence.[893]

256. The *saisine*, as defined by the IS and SS is, however, manifestly not confined to the crime base. The Co-Prosecutors may open an investigation "against one or more named persons or against unknown persons",[894] and where, as in Case 002,[895] they name individuals, the CIJs must investigate whether s/he is criminally responsible for the crimes alleged.[896] The PTC has also confirmed that the "limitations and parameters" of the Co-Prosecutors'

(unanimous); Case 003-**D165/2/26** PTC Decision on Nine Annulment Applications, International Judges' Opinion, para. 150 (*see also* para. 156 for application of the principle).

888 Case 004-**D299/3/2** PTC Tuol Beng and Wat Angkuonh Dei Annulment Considerations, International Judges' Opinion, para. 52. The judges referred to IR 53(2) in their reasons.

889 Though French law is not directly applicable at the ECCC, the PTC and SCC have previously confirmed that the French system has been used to assist in interpreting both Cambodian law and IRs 53 and 55. *See* Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, fns 38, 39; Case 001-**F28** *Duch* AJ, para. 31.

890 **E465** Case 002/02 TJ, para. 167 *citing* Cass. Crim., 29 Sept. 1992, No. 92-83.464, Cass. Crim., 4 Aug. 1998, No. 98-82.622 ("Lorsque la chambre d'accusation, qui analyse souverainement les pièces annexées au réquisitoire introductif, constate que la *saisine* du magistrat instructeur, quant aux faits, est déterminée par ces pièces, le réquisitoire ne peut être annulé, s'il satisfait en la forme aux conditions essentielles de son existence légale." Unofficial translation: "When the Indictment Chamber, which in its full discretion analyses the documents annexed to the introductory submission, notes that the investigating judge's *saisine*, as to the facts, is determined by these documents, the indictment cannot be canceled, if it satisfies in form the essential conditions of its legal existence"). *See also* Cass. Crim., 27 June 1991, No. 91-82.706 ("la *saisine* du magistrat instructeur, quant aux faits, est déterminée par les pièces annexées à ce réquisitoire" Unofficial translation: "the matter laid before the Investigating Judges as regards the facts is defined by the annexures to the submission"); Cass. Crim. 11 July 1972, No. 72-90.719 ("Le visa, dans le requisitoire introductif, des pièces qui y sont jointes equivaut à une analyse desdites pièces et [...] en conséquence, celles-ci determinent par les indications qu'elles contiennent, l'objet exact et l'étendue de la *saisine* du juge d'instruction" Unofficial translation: "the endorsement, in the introductory submission, of its annexes is equivalent to an analysis of those annexes, and as a result, they determine by the evidence they contain, the exact subject and extent of the *saisine* of the investigating judge".).

891 **D3** IS, fn. 572, *cited at* **E465** Case 002/02 TJ, para. 167.

892 **F54** Appeal Brief, paras 352, 354, 358-359, 363-365, fn. 573.

893 *See e.g.* Cass. Crim., 29 Sept. 1992, No. 92-83.464 ("il n'est pas contesté que les procès-verbaux d'enquête préliminaire ont été annexés au réquisitoire introductive et que le simple visa, dans ce réquisitoire, des pièces qui y étaient jointes équivaut à une analyse desdites pièces" Unofficial translation: "it is not disputed that the statements from the preliminary investigation were annexed to the introductory submission and that the simple endorsement, in this submission, of the documents which attached to them is equivalent to an analysis of the said documents").

894 IR 53(1). *See also* IR 55(4).

895 **D3** IS, paras 114-118, 122-124. *See also* paras 8, 75-113.

896 The Co-Prosecutors expressly confirmed this to the CIJs in Case 002, *see* **D98/I** Co-Prosecutors' Response to the Co-Investigating Judges Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submission; **D146/3** Co-Prosecutors' Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, para. 6.

IS and any SS includes facts bearing on the criminal responsibility and culpability of the Charged Person.[897]

257. Appellant argues in 23 grounds that the CIJs erred by investigating and deciding on facts beyond the *saisine* authorised by the IS and SS (Type 1): **Grounds 38-59, 123**.

2. SCOPE OF THE CASE: INDICTMENT AND *SAISINE* OF THE TC (TYPES 2-3)

258. The *saisine* of the TC results from the CIJs' issuance of an Indictment upon the close of an investigation, subject to the outcome of any appeal to the PTC.[898] On pain of nullity, IR 67(2) requires the CIJs to describe the material facts for which there is sufficient evidence[899] and their legal characterisation in the Indictment, including relevant criminal provisions and the nature of criminal responsibility.[900] The Indictment thus ensures the right of an accused to be informed of the nature and cause of the charges against them,[901] considering their right to prepare a defence.[902]

259. Appellant argues in three grounds that the CIJs erred in finding that there was sufficient evidence of facts for Indictment (Type 2): **Grounds 62-64.**

260. The TC must limit its findings to those facts included within the Indictment,[903] and cannot expand the *saisine* of the trial as thereby defined. At the ECCC, the TC is "seized of the case in the evidentiary condition put before it by the CIJs and PTC",[904] and motions to strike or amend the Indictment at the trial stage do not form part of the legal framework.[905] It is for the TC to determine its *saisine*, and, as already noted by the SCC, where confusion in this regard arises at trial, the confused party should ask for

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897 **D365/2/17** PTC Knowledge Evidence Decision, para. 49, *citing* IR 55(3), para. 60, fn. 126; **D274/4/5** PTC First Decision on CPA Admissibility Appeals, para. 53.

898 IR 79(1). *See also* IR 77(13)(b) which seises the TC of the case in the event an Indictment is not overturned by the PTC.

899 IR 67(3); Case 004/2-**D359/24** & **D360/33** Ao An PTC Closing Order Considerations, paras 84-85; Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, paras 61-62. The PTC has established "sufficient evidence" to mean a "probability" or "plausibility" of guilt, a standard that is less than "beyond reasonable doubt". *See also* **D427** Closing Order, para. 1323.

900 The CCCP contains a similar provision, *see* art. 247 ("If the judge considers that the facts constitute a felony, a misdemeanour or a petty offense, he shall decide to indict the charged person before the trial court. The order shall state the facts being charged and their legal qualification.").

901 ECCC Law, art. 35 new; ICCPR, art. 14(3)(a); ECHR, art. 6(3)(a); Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, paras 47, 50; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, paras 31-32; **E122** TC Statute of Limitations Decision, para. 16.

902 ECCC Law, art. 35 new; ICCPR, art. 14(3)(b); ECHR, art. 6(3)(a); *Pélissier and Sassi v. France*, para. 54; *Sipavičius v. Lithuania*, para. 28.

903 IR 98(2) ("The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced."). *See also* **E465** Case 002/02 TJ, para. 151.

904 **F36** Case 002/01 AJ, para. 252.

905 **E122** TC Statute of Limitations Decision, para. 16.

clarification.[906] This accords with the trial management directive issued by the Case 002 TC,[907] and is likewise supported by French law, which holds that trial courts are irrevocably seised of facts included in the Closing Order once it becomes final,[908] and must rule on each of those facts, even where they were included in error.[909]

261. The ECCC framework thus envisages that all pre-trial matters will, where possible, be resolved before the trial proceedings begin and are not for the TC to reopen. Where, at any time during the investigation *before* the CIJs issue the CO,[910] the parties consider any part of the proceedings null and void, they may submit an application requesting PTC review with a view to annulment.[911] The annulment procedure is particularly applicable where the parties take the view that the CIJs are investigating outside the scope of their *saisine in rem*,[912] but decidedly does not apply to alleged defects in the Closing Order itself.[913] IR 76(7) then provides unambiguous finality to the investigative phase of the proceedings. It determines that, as soon as the CIJs issue the Closing Order, "[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the [TC] or the [SCC]".[914]

262. Where defects *on the face of the Indictment*, however, render it in clear violation of IR

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906 **F36** Case 002/01 AJ, para. 237. In the same paragraph, the SCC noted Appellant's failure to raise the issue until his closing submissions. Appellant claimed that the TC had exceeded the *saisine* of the Closing Order with respect to the charges in Phase 2 of the MOP. The SCC noted that the TC had properly explained the scope of Phase 2 of the MOP and was not persuaded that Khieu Samphan had not been adequately put on notice as to the scope of these charges. *See also* **E313** Case 002/01 TJ, para. 628.

907 **E74** Trial Management Directive, p. 2, EN 00659302 ("It is clear from the Rules that the Chamber is bound by the scope of the Indictment. The Chamber refers to Rules 67(2), 76(7) and 89(1)(c) which read together result in there being no basis for the Trial Chamber to grant any amendments to the Indictment [...] Should any ambiguity in the Indictment arise at trial the Chamber will, on a case-by-case basis state its interpretation of the scope of the Indictment and will consider itself bound by this interpretation"); **E1/2.1** T. 5 Apr. 2011, 14.59.55-15.02.45, p. 97, line 16 – p. 98, line 15.

908 *JurisClasseur Procédure Pénale*, para. 99 *citing* Cass. Crim., 13 July 1949: Bull. crim. 1949, n° 243.

909 The Cour de Cassation also held that the Closing Order attributes the *saisine* irrevocably to the Cour d'Assises, even in the case where an investigative judge had rendered at the same time a partial dismissal and an Indictment, but had mistakenly included in the Closing Order the facts justifying a partial dismissal. The Cour de Cassation held that the Cour d'Assises should have also ruled on those supposedly excluded facts and not declare itself incompetent. *See* Cass. Crim., 10 Mar. 1993, No. 90-86.854.

910 IR 76(2).

911 IR 76.

912 *See e.g.* **D165/2/26** PTC Decision on Nine Annulment Applications; **D134/1/10** PTC Decision on Two Annulment Applications; Case 004-**D345/1/6** PTC Kang Hort Dam Annulment Considerations.

913 *See* Case 003-**D158/1** PTC Decision on Scope of Appeals Against Closing Order, para. 18 *citing* IR 76(2) (confirming annulment applications may not be raised, or decided upon, after the issuance of the CO: "procedurally speaking, annulment applications after the Closing Order are not prescribed by the Rules") and IR 76(4) (the PTC may not admit annulment applications that "relate to an order that is open to appeal"). The PTC noted, however, that it may review a Closing Order if allegations that the Accused's right to be informed of the charges are brought before it, *see* fn. 39.

914 *See also* CCCP, art. 256; FCCP, art. 181.

67(2) such that it is impossible for the TC to determine the content of the charges, their factual basis, and their legal characterisation, the TC will have been improperly seised.[915] In gauging whether a defect exists on the Indictment's face, the analysis should focus not on "whether particular words have been used, but whether an accused has been meaningfully 'informed of the nature of the charges' so as to be able to prepare an effective defence."[916]

3. INTERPRETING THE INDICTMENT (TYPE 3)

263. The TC did not err by "ignoring" Appellant's arguments regarding its *saisine*.[917] With reference to the conditions set out in IR 67(2), the Chamber confirmed that, as a "general point of law", it was obliged to limit its findings to the facts included in the Indictment.[918]

264. With regard to the TC's application of this principle, Appellant claims the TC's holistic reading of the CO[919] was improper, without citing any legal precedent as support.[920] Indeed, Appellant's assertion directly contradicts the consistently applied, well-established jurisprudence from every ECCC Chamber: the SCC has previously upheld the Case 002/01 TC's "complete reading of the Closing Order"[921] and the PTC has equally endorsed reading the Closing Order "as a whole".[922] This approach is buttressed by a wealth of jurisprudence from international tribunals, affirming that "in assessing an indictment, each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment."[923]

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915 **E122** TC Statute of Limitations Decision, para. 22. *Note also* the analysis contained in this section (Scope of the Case: Indictment and *Saisine* of the TC).

916 **E313** Case 002/01 TJ, para. 628. In that same paragraph, the TC noted that Khieu Samphan's challenges were not raised before the PTC, and found that, pursuant to IRs 67(2) and 76(7), "once appeals against the Closing Order are resolved, no issues concerning its form can be raised before the Trial Chamber." *See also Taylor* Indictment Decision para. 75; *Gacumbitsi* AJ, para. 165 *citing Ntakirutimana* AJ, para. 470.

917 **F54** Appeal Brief, para. 458.

918 **E465** Case 002/02 TJ, paras 150-151.

919 **E465** Case 002/02 TJ, para. 173 ("The Closing Order must be examined holistically when determining the charges and the supporting material facts"). *See also* paras 812, 1162, 3184, 3359.

920 **F54** Appeal Brief, para. 461.

921 **F36** Case 002/01 AJ, para. 235 *citing* **E313** Case 002/01 TJ, para. 652. There, the SCC rejected arguments stating that the TC went beyond the scope of its case. *See also* **E313** Case 002/01 TJ, fns 1682, 2043 *citing Seromba* AJ, para. 27, *Gacumbitsi* AJ, para. 123 ("A Chamber should consider a charging instrument as a whole in determining whether it sufficiently pleads the facts and their legal characterization.").

922 *See e.g.* **D427/5/10** PTC IS Provisional Detention Decision, para. 31.

923 *See e.g. Ngirabatware* Decision on Motion to Dismiss, para. 21; *Rutaganda* AJ, para. 30. *Ad hoc* jurisprudence further recognises that an accused might receive "clear and timely notice" of the charges against them from other paragraphs in an indictment, *see Mrkšić & Šljivančanin* AJ, para. 138 (where the Appeals Chamber found that, despite the fact that there was no express mention of A&A by omission, the indictment contained the material facts and references to A&A by omission, which provided sufficient notice); *Gacumbitsi* AJ, para. 123 (where the Appeals Chamber found the reference to A&A in the preamble considered alongside the facts alleged was sufficient in providing notice); *Taylor* JCE Pleading Decision, para. 76 (where, though the prosecution never used the phrase 'joint criminal enterprise' in the

265. Appellant argues in 20 grounds that the TC erred by making findings on facts beyond its *saisine*, as defined in the Closing Order (Type 3): **Grounds 60, 65-81, 124, and 134.**

4. SEVERANCE OF CASE 002 (TYPE 4)

266. The scope of the TC's *saisine* in Case 002/02 was further delimited by the severance of Case 002. As Appellant sets out,[924] the scope of Case 002/02 was determined by the TC in the TC's Additional Severance Decision[925] and related Annex.[926]

267. Appellant argues in four grounds that the TC erred in failure to respect the *saisine* of Case 002/02 as defined after severance: **Grounds 2, 82-84.**

C. JURISDICTION (TYPES 1-4)

268. Jurisdiction refers to the legal authority granted to a body to administer justice within a defined field of responsibility. To assess the admissibility of a challenge to jurisdiction pursuant to IR 89(1)(a) (preliminary objection against jurisdiction) before the TC or SCC, the SCC has distinguished between two types of jurisdiction: absolute and procedural.[927]

1. ABSOLUTE JURISDICTION

269. Absolute jurisdiction at the ECCC can neither be waived nor cured by the progression of a case. Drawing on, *inter alia*, French procedural law, the SCC has held that the lack of an absolute jurisdictional element is one which "deprives a *court* of its legal basis to try a crime".[928] Where a lack of jurisdiction precludes proceedings *in limine*, it is an absolute element, and its absence nullifies the proceedings.[929] Whether a matter falls within the personal, subject matter, territorial or temporal jurisdiction of the ECCC, or whether proceedings are barred by amnesty or a statute of limitation, are all matters of absolute

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indictment, the Trial Chamber nevertheless found "that the Prosecution has adequately fulfilled the pleading requirements of the alleged [JCE] in the Indictment, and that it has provided sufficient details to put the Accused on notice of the case against him.").

924 **F54** Appeal Brief, para. 536.

925 **E301/9/1** TC Additional Severance and Scope Decision.

926 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex.

927 Case 001-**F28** *Duch* AJ, para. 31. This distinction does not exist in Cambodian law, *see* CCCP, art. 344 ("*Any* objection must be raised before any defense declaration on the merits, otherwise it is inadmissible."), however, it does exist in French law, *see* FCCP, arts 171, 305-1, 385, 385-1, 585, 595, 599, 802, as well as other domestic jurisdictions, though different terms may be used, such as 'relative' and 'absolute' nullities (Canada, *see e.g. Gagné*), 'contingent' and 'absolute' jurisdiction (Sri Lanka, *see e.g. Colombo Apothecaries* Judgment), 'general' and 'special' objections (U.S.A., *see e.g. Dillard v. State*).

928 Case 001-**F28** *Duch* AJ, fn. 78 (emphasis added).

929 Case 001-**F28** *Duch* AJ, para. 31.

jurisdiction.[930] Absolute jurisdictional elements cannot be waived, nor can any defects in them be cured by the advancement of the proceedings.[931]

2. PROCEDURAL JURISDICTION (TYPES 1-4)

270. Procedural jurisdiction refers to the procedural requirements that allow a Court to exercise its power, including procedural rights of an accused.[932] Unlike challenges to absolute jurisdiction, procedural jurisdiction at the ECCC can be waived by the progression of a case, as "parties are deemed to have submitted to the jurisdiction of the court while the defect has been cured by virtue of the advancement of proceedings".[933] Domestic jurisprudence concurs: procedural safeguards, combined with the failure to promptly exercise a right, may allow the right to be waived.[934] A court's failure to acknowledge legitimate waivers of procedural rights "is to convert a privilege into an

930 Case 001-**F28** *Duch* AJ, para. 31. Other jurisdictions have also held that subject matter jurisdiction is an absolute element, *see US v. Anderson*, p. 650 ("it is elementary in criminal law that if the court is without jurisdiction of the subject matter its proceeding is a nullity.").

931 Case 001-**F28** *Duch* AJ, para. 31 *citing Colombo Apothecaries* Judgment, p. 326 *in turn citing Perera* Judgment, p. 366. The SCC considered the distinction between absolute and procedural jurisdiction, and between two types of jurisdictional defect: "lack [of] jurisdiction over the cause, or matter or over the parties" and "lack of competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court". The former is incurable, whereas acquiescence, waiver or inaction on the part of the parties can prevent them from raising the latter.

932 Case 001-**F28** *Duch* AJ, fn. 78 *citing Colombo Apothecaries* Judgment; *Perera* Judgment (distinguishing the class of cases where the "court lacks competence due to failure to comply with such procedural requirements as are necessary for the exercise of the power of the court"). *See also* para. 31.

933 Case 001-**F28** *Duch* AJ, para. 31.

934 Domestic jurisprudence suggests that each element must be considered within the context of the case to determine whether its absence violates due process, and thus, whether it may be waived. In Québec, for example, courts have distinguished between absolute' and 'relative' nullities: in *Gagné,*, the Court of Appeal considered an appellant who had been convicted on a summary offence, despite his preliminary objection against the geographical jurisdiction of the summary court, which was in a different district than where the offence had been committed. The Court of Appeal found that this, at best, amounted to a relative nullity, "which is overcome where it is not objected to at the opportune time [...] What the appellant in the present case should have done, if he suffered prejudice and if, in fact, there is in the present case a relative absence of jurisdiction [...] he was to seek a change of venue rather than seeking to have the information declared existent, null and void. As such an application for a change of venue was not brought, the summary conviction court had jurisdiction to hear the information, and the judgment that it rendered must be considered valid", *see* para. 19. In *Immeubles Port Louis Ltée,* pp. 326-328, the trial chamber refused an application for nullity of a by-law, as the complainant demonstrated a lack of diligence by waiting five years to bring his claim, despite having knowledge of the by-law on its face. The Supreme Court upheld the trial decision on appeal, holding that "apart from a case where there is a total absence of jurisdiction, a judge may refuse to grant the relief sought... the judge must take into account a number of factors, including the nature of the disputed act and the nature of the illegality committed and its consequences. He must also take into account the causes of the delay between the disputed act and the bringing of the action. The nature of the right relied on and the plaintiff's behaviour are other factors". The Court further noted that lack of jurisdiction, abuse of power, and discrimination are absolute elements, whereas "mere irregularities and formal defects" are relative. *See also US v. Sorrentino*, (right to public trial waived); *Morland v. US* (right to speedy trial waived); *Adams v. US* (right to counsel waived; right to trial by jury waived); *Diaz v. US* (right to confront a witness waived).

imperative requirement."[935]

3. APPEALING THE INDICTMENT TO THE PTC (TYPES 1-2)

271. A Closing Order is subject to appeal by all parties.[936] The Co-Prosecutors may appeal all orders of the CIJs, including all aspects of any CO,[937] however, the rights of the defence to appeal Closing Orders to the PTC are more limited. The accused may only appeal an Indictment under IR 74(3)(a), interpreted in light of IR 21, which allows appeals against orders "confirming the jurisdiction of the ECCC".[938] The PTC has thus repeatedly confirmed that it will only admit the following challenges from an accused: (i) to the ECCC's subject matter jurisdiction, which, if applied, would result in a violation of the principle of legality;[939] (ii) to the ECCC's temporal, geographic or personal jurisdiction;[940] and (iii) to the ECCC's jurisdiction based on *ne bis in idem*, amnesty and pardon.[941] In other words, "absolute jurisdictional" challenges.[942]

272. The following challenges to the Closing Order have been considered non-jurisdictional and thus inadmissible before the PTC: (i) to the specific contours of crimes and modes of responsibility[943] and their application in the Indictment;[944] (ii) to defects in the form

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935 *Patton v. US*, p. 298. There, the Supreme Court found that certain legislative provisions confer rights on an accused, which the accused may choose to waive. The Court opined that, where a right can be legitimately waived, it would be unreasonable to leave the court powerless to give effect to a waiver, *see* p. 299, "the court has a authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case". Citing an earlier case before a state Supreme Court, the Supreme Court noted that "A defendant is supposed to understand his rights, and may be aided, if he so desires, by counsel to advise him. There are many legal provisions for his security and benefit which he may dispense with absolutely", *see* p. 311.

936 IRs 67(5), 73(a), 74(2) (Co-Prosecutors), 74(3) (Accused), 74(4) (CPs may appeal a Dismissal Order where the Co-Prosecutors have appealed).

937 IR 74(2).

938 **D427/4/15** PTC KS Closing Order Appeal Decision, para. 14; **D427/1/30** PTC Second IS Closing Order Decision, paras 44-45; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, paras 59-60; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, paras 19, 21; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 135.

939 **D427/1/30** PTC Second IS Closing Order Decision, paras 45-46; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, paras 60-61; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, paras 23-24; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 137-138.

940 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 135; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 22

941 **D427/1/30** PTC Second IS Closing Order Decision, paras 62-63, 66-67.

942 *See* Section VI.C. Jurisdiction (Types 1-4).

943 **D427/1/30** PTC Second IS Closing Order Decision, paras 45-46; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, paras 60, 62; Case 003-**D158/1** PTC Decision on Scope of Appeals Against Closing Order, para. 16; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 139.

944 **D427/1/30** PTC Second IS Closing Order Decision, paras 45-46; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, paras 60, 62; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 23; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 139.

of the Indictment,[945] including (iii) challenges based on allegations that facts adjudicated by the CIJs did not fall within the CIJs' *saisine in rem*.[946] In Case 002, the PTC forwarded these issues to the TC for consideration on the merits.[947]

D. APPLICATION TO GROUNDS

1. TYPE 1: GROUNDS RELATING TO FACTS ALLEGEDLY NOT CONTAINED IN THE INTRODUCTORY OR SUPPLEMENTARY SUBMISSIONS AND THUS OUTSIDE THE *SAISINE* OF THE CIJS.[948]

Ground 38: Overstepping the scope of the judicial investigation[949]

273. **Ground 38 should be dismissed as Appellant fails to establish that the TC erred in law by considering that his allegations that the TC had been improperly seised of facts in the Closing Order which allegedly fell outside the judicial investigation ("IS Objections") were time-barred under IR 89(1).[950]**

274. This ground must fail since Appellant's attempt to avoid characterisation of the IS Objections as late preliminary objections misinterprets the IRs and overlooks SCC jurisprudence. Moreover, he fails to provide any justifiable basis for admissibility at the point he raised the IS Objections for the first time in his 2 May 2017 Closing Brief. Indeed, he did not even raise the issues when the TC confirmed that Case 002/02[951] included the sections of the Closing Order Appellant now challenges.[952]

275. Appellant's contention that the IS Objections are not late preliminary objections because

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945 **D427/1/30** PTC Second IS Closing Order Decision, para. 47; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, para. 63; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 139.

946 **D427/1/30** PTC Second IS Closing Order Decision, para. 51; Case 003-**D158/1** PTC Decision on Scope of Appeals Against Closing Order, para. 19.

947 **D427/1/30** PTC Second IS Closing Order Decision, para. 47; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, para. 63. *See also* Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, para. 139.

948 Grounds 38 (law), 39-59, 123 (application): **F54** Appeal Brief, paras 334-438; **F54.1.1** Appeal Brief Annex A, pp. 18-25 (EN), pp. 16-23 (FR), pp. 22-35 (KH). Ground 123 features in Appellant's Appeal Brief outside the paragraphs dedicated to *saisine*. The Co-Prosecutors therefore respond accordingly in the context of their response to Ground 123 only.

949 Ground 38: **F54** Appeal Brief, *Overstepping the scope of the judicial investigation,* paras 334-350 (admissibility), 117, 351-366 (scope); **F54.1.1** Appeal Brief Annex A, p. 18 (EN), p. 16 (FR), pp. 22-23 (KH).

950 **E465** Case 002/02 TJ, paras 158-165.

951 *See* **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex. As examples, the Co-Prosecutors note, non-exhaustively, that the TC confirmed the scope of Case 002/02 to includes facts (i) characterised as OIA (enforced disappearances) at TTD (paras 3(iii), 5(ii)(b)(14)); (ii) characterised as persecution on religious and political grounds, and OIA (enforced disappearances) at 1JD (paras 3(iv), 5(ii)(b)(7), 5(ii)(b)(8), 5(ii)(b)(14)); (iii) characterised as enslavement and torture at KTC (paras 3(vii), 5(ii)(b)(3), 5(ii)(b)(6)); (iv) persecution on racial grounds at AuKg (paras 3(viii), 5(ii)(b)(9)); (iv) relating to Buddhists in TK (paras 3(x), 5(ii)(b)(8)).

952 *See* **F54** Appeal Brief, paras 386-387, 393-396, 408-411, 426.

IR 89(1)(a) "does not apply to jurisdiction with respect to *facts*, but rather to the *legal* (or adjudicative) jurisdiction of the ECCC",[953] is unsound for two primary reasons.

276. First, when read in its context, the term "jurisdiction" in IR 89(1)(a) is not limited to "legal" jurisdiction, and, contrary to Appellant's assertion,[954] should not be interpreted in the same manner as in IR 74(3)(a) and IR 98.[955] Rather, the drafters of the IRs made a conscious distinction between the "jurisdiction *of the ECCC*" in IR 74(3)(a) and IR 98 and the broader "jurisdiction *of the Chamber*" in IR 89(1)(a). SCC jurisprudence supports this inclusive interpretation. In Case 001, the SCC held that "the concept of a preliminary objection to jurisdiction [under IR 89(1)(a)] must be understood in relation to the nature of the jurisdictional defect being challenged", and encompasses both "absolute" and "procedural" jurisdictional elements.[956] Since the IS Objections challenge the *saisine* of the TC (and before them, the CIJs) based on alleged defects in the CO, and not the jurisdiction of the ECCC itself, these are clearly "procedural jurisdictional" challenges.

277. Second, Appellant errs in his assertion that the 30-day time limit in IR 89(1)(a) applies only to "legal" ("absolute") jurisdictional challenges.[957] The TC correctly adopted the plain and mandatory meaning of IR 89(1): a preliminary objection "*shall* be raised" no later than 30 days after the Closing Order becomes final, "*failing which it shall be inadmissible*."[958] SCC jurisprudence directly contradicts Appellant's position, holding that the 30-day deadline does *not* apply to absolute jurisdictional challenges, as parties cannot, by waiver, confer on the ECCC jurisdiction it does not possess.[959] However, it *does* apply to procedural jurisdictional elements, which must be raised within the IR 89(1) time limit, and are otherwise cured by the progression of proceedings.[960]

278. Interpreting IR 89(1) to preclude challenges like the IS Objections after the 30-day deadline is consistent with the purpose of preliminary objections articulated by the TC and SCC: to clarify the *saisine* before the trial starts and ensure an orderly and efficient process.[961] As previously noted,[962] the ECCC framework envisages that all pre-trial matters will, where possible, be resolved before the trial proceedings begin and are not

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953 **F54** Appeal Brief, para. 336.
954 **F54** Appeal Brief, paras 337-338.
955 IR 74(3)(a), 98(3), 98(7).
956 *See* Section VI. C. Jurisdiction (Types 1-4).
957 **F54** Appeal Brief, para. 336.
958 **E465** Case 002/02 TJ, para. 161.
959 Case 001-**F28** *Duch* AJ, paras 31, 33-35, fn. 78.
960 Case 001-**F28** *Duch* AJ, para. 31.
961 **E465** Case 002/02 TJ, para. 161; Case 001-**F28** *Duch* AJ, para. 28.
962 *See* Section VI. B. 2. Scope of the Case: Indictment and *Saisine* of the TC.

for the TC to consider again. This includes finalisation of the Closing Order that defines the TC's *saisine*.[963] Whilst the PTC has limited the grounds on which the accused can challenge a CO,[964] and referred challenges like the IS Objections to the TC,[965] this does not remove the imperative that the Closing Order be final before the commencement of trial. Domestic jurisprudence, likewise, suggests that mere challenges against the form of the indictment, or challenges seeking more information from an indictment, must be raised prior to pleading to the merits, failing which, the right to object on these grounds will be deemed to have been waived.[966]

279. Moreover, Appellant fails to explain how pre-trial matters raised outside the preliminary objection framework are admissible before the TC when raised for the first time after the close of trial. He points to no procedural rule or jurisprudence supporting admissibility, instead relying upon a misrepresentation of the TC's characterisation of the procedurally identical Deportation Application,[967] which, contrary to his assertion,[968] the TC has consistently referred to as a "preliminary objection".[969] Appellant's failure to raise these claims in a timely fashion reflects his lack of due diligence.[970] Legal systems are "replete

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963 IR 79(1); CCCP, art. 348.

964 *See* Section VI. C. 3. Appealing the Indictment to the PTC.

965 **D427/1/30** PTC Second IS Closing Order Decision, para. 51.

966 *JurisClasseur Procédure Pénale* para. 99 *citing* Cass. Crim., 13 July 1949: Bull. crim. 1949, n° 243. *See also* Cass. Crim., 19 Oct. 1995, No. 94-81.397, which affirms that the nullity of an introductory submission must be raised as a preliminary objection; CCCP, art. 323. Domestic jurisprudence echoes the SCC in distinguishing between absolute and procedural elements. In *Lanier v. State*, the appellant was convicted of a felony, and argued on appeal that the indictment had not set forth sufficient facts so as to allow him to know the charges against him. The Appeal Court distinguished between "special" and "general" challenges to the indictment, noting that the special challenge "objects merely to its form or seeks more information and must be raised before pleading to the indictment [...and] will be waived if not raised before pleading to the merits of the indictment", holding that, to the extent an alleged error objects to the sufficiency of the form of the indictment, it will be deemed waived. *See also Dillard v. State,* para. 2. This distinction was further articulated in *US v. Anderson*, where the accused was charged with the refusal to submit to induction into the US military. The accused challenged his indictment on two grounds: its failure to state facts sufficient to constitute a crime; and that the court lacked jurisdiction of the subject matter of the action. The court refused to hear arguments relating to the sufficiency of facts in the indictment, finding that it was clear on its face, but considered the absolute jurisdictional arguments by analysing the powers conferred by the Act under which the complainant had been indicted, finding that the Act specifically set the jurisdiction of courts involved in these types of violations to the specific district where a civilian had received the order to submit to induction.

967 **E58** Ieng Sary's Motion to Strike Portions of the Closing Order due to Defects, para. 11.

968 **F54** Appeal Brief, para. 346.

969 *See* **E306/5** TC Deportation Scope Decision (on Defence *Preliminary Objection* regarding Jurisdiction, emphasis added). This characterisation was repeated in **E465** Case 002/02 TJ, paras 163-164. Appellant's claim (**F54** Appeal Brief, para. 346) that the TC characterised it as an application "requesting that portions of the Closing Order be struck out due to defects" is based on a different TC decision, **E122** TC Statute of Limitations Decision, para. 2, relating to a *different* challenge by Ieng Sary in a *different* part of **E58** Ieng Sary's Motion to Strike Portions of the Closing Order Due to Defects, relating to national crimes.

970 **E116** TC Decision on Fairness of Investigation, para. 23. There, the TC noted that a two-year period between receiving access to relevant information and raising an allegation regarding that information reflected a lack of due diligence.

with rules requiring that certain matters be raised at particular times."[971] Other international tribunals have found that, even where a motion alleges acts as serious as contempt of court, it may be dismissed as untimely where a party fails to bring it before the Chamber within a reasonable time without a satisfactory explanation for the delay.[972]

280. Equally without merit is Appellant's claim that the TC's failure to address IS Objections in the Judgment violated his right to have adequate notice of the nature and cause of the charges against him.[973] As soon as he gained access to Case File 002 on 19 November 2007,[974] Appellant was able to monitor the scope of the investigation to assess whether the CIJs were investigating within their *saisine in rem*. Yet, he made no application for annulment under IR 76(2) of any part of that investigation before the Closing Order was issued on 15 September 2010. Then, faced with an unambiguous and IR 67(2)-compliant Closing Order providing full notice of the precise case against him, and with the benefit of decisions issued in 2014 from both the TC and SCC on the severance and scope of the case, as well as the Severance Annex, which specifically listed paragraphs and portions of the Closing Order relevant to Case 002/02,[975] Appellant still failed to raise the IS Objections designed to change that *saisine* until 2 May 2017, after two Case 002 trials had been completed and without any justification.

Grounds 39-59

281. **Each of Grounds 39-59 fail, as the TC was correct in finding them time-barred pursuant to IR 89(1). Assuming, *arguendo*, the TC erred in this finding, the grounds nevertheless fail as they are premised on erroneous readings of the IS. A review of the IS demonstrates that the CIJs were properly seised of each set of facts raised by Appellant. He was thus properly charged on these bases, and the TC was open to consider these facts in establishing the relevant crimes.**

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971 *Henderson v. Shinseki*, p. 434. *See also* CCCP, art. 323; Cass. Crim., 6 July 1993, No. 93-82.133; *Immeubles Port Louis Ltée*, p. 328 ("the direct action in nullity must be brought within a reasonable time"); *Colombo Apothecaries* Judgment, *cited* in Case 001-**F28** *Duch* AJ, fn. 78 ("acquiescence, waiver or inaction on the part of the person may estop [a party]").

972 *Taylor* Decision on Contempt Request, paras 24, 26.

973 **F54** Appeal Brief, para. 349.

974 **E465** Case 002/02 TJ, para. 33 *citing* **D42** Written Record of Initial Appearance of Khieu Samphan, 19 Nov. 2007.

975 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex; **E301/9/1** TC Additional Severance and Scope Decision; **E301/9/1/1/3** SCC Additional Severance and Scope Decision.

Ground 39: The geographic scope of the charges is limited to the eight communes in TK District[976]

282. The IS referred to "conditions in Tram Kok *District*"[977] and cited contemporaneous evidence of the acts mentioned in paragraph 43 of the IS that occurred within the district but outside the eight communes explicitly named.[978] Further, attached to the IS was a document ("Conditions in Tram Kok *District*"), which summarises documentary evidence of acts occurring in TK District but outside the eight communes.[979]

Ground 40: Absence of saisine for deaths other than those caused by starvation[980]

283. The IS described a "systemic plan" to mistreat the DK population that included imposing "inhumane conditions" in cooperatives and worksites.[981] It further mentioned that Appellant's enforcement of CPK policies "resulted in the death of [...] people",[982] and provided evidence of forced labour, overwork, inadequate food and medical care, and disease.[983] It provided a summary of "the conditions at the communes" in the TK Cooperatives,[984] thereby seising the CIJs to investigate the causes and consequences of the conditions as part of the circumstances surrounding them.

Ground 41: Deportation[985]

284. The IS seised the CIJs with a policy that initially focused on removal of the Vietnamese before evolving into destruction.[986] Appellant ignores the documents supporting the IS,[987] including a witness statement describing Pol Pot's May 1975 speech "to expel the

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976 Ground 39: **F54** Appeal Brief, *The geographic scope of the charges is limited to the eight communes in TK District*, paras 367-369; **F54.1.1** Appeal Brief Annex A, p. 18 (EN), p. 16 (FR), pp. 23-24 (KH). For the number of communes in the district, *see e.g.* **E465** Case 002/02 TJ, para. 936.

977 **D3** IS, fn. 153 (emphasis added).

978 **D3** IS, fn. 153 *citing* e.g. **E3/2049** Report entitled *List of Kampuchea Krom People Who Reside in Ang Ta Som, Tramkok*, 30 Apr. 1977, EN 00290262; **E3/2052** Report to the Tram Kak Branch of the CPK, 12 June 1977, EN 00276590-92; **E3/2050** Report to Angkar of Tram Kak District, 6 May 1977, EN 00276576-77; **E3/2044** Report on Peou Phal to the Re-Education Office of TK District, 9 Jan. 1977, EN 00290261.

979 **D3** IS, fn. 153 *citing*, *inter alia*, **D3/I** Introductory Submission Schedules 1-105, Schedule 59, EN 00146130-33 (referring to Ang Ta Saom, Khporp Trabaek, as well as TK District in its entirety as a model district "despite the fact that thousands of people were starving").

980 Ground 40: **F54** Appeal Brief, *Absence of saisine for deaths other than those caused by starvation*, paras 378-379; **F54.1.1** Appeal Brief Annex A, pp. 18-19 (EN), pp. 16-17 (FR), p. 24 (KH).

981 **D3** IS, paras 9, 14.

982 **D3** IS, para. 16.

983 **D3** IS, paras 14, 16.

984 **D3** IS, para. 43.

985 Ground 41: **F54** Appeal Brief, *Deportation*, paras 380-385; **F54.1.1** Appeal Brief Annex A, p. 19 (EN), p. 17 (FR), pp. 24-25 (KH).

986 **D3** IS, para. 12(f) (noting a policy of "discriminating against" and "purging" the Vietnamese before it "evolved into one of eliminating").

987 **F54** Appeal Brief, para. 381. *See* **E465** Case 002/02 TJ, para. 168.

entire Vietnamese minority population" which demonstrated "[d]iscriminatory intent".[988] The IS was further supported by a report stating that "[i]f [the Yuon] have no forces on the inside, they will be unable to attack us",[989] and a list of families that were exchanged with Vietnam.[990] Further, Appellant invalidly states[991] that the CIJs erred by relying on the express request in the IS to investigate "facts specified in paragraphs 37 to 72 in relation to [...] Deportation".[992] Appellant's claim that the OCP only sought an investigation into deportation through three phases of forcible transfer is illogical,[993] as forcible transfer does not require crossing a national border while deportation does.[994]

Grounds 42 and 47: Saisine for OIA of enforced disappearances at TTD and 1JD[995]

285. In setting out particulars of the investigation for TTD,[996] the IS specifically states "several thousand of the forced labourers died", including "at least several hundred people [who] were executed at a nearby security office".[997] Among the documents supporting the IS, two witnesses, including a former district chief, refer explicitly to disappearances from TTD.[998] The sheer number of individuals working onsite, the known occurrence of executions, and the nearby operation of a security centre, each provided sufficient notice that the CIJs would investigate enforced disappearances arising out of operations at TTD.

286. In setting out particulars of the investigation for 1JD,[999] the IS notes the sheer number of people believed to have died at the site, including by execution, as well as the presence of mass graves surrounding the site, both of which suggest individuals disappeared from the site.[1000] Further, among the documents supporting the IS, three witness statements

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988 **D3/IV** Annex C: Other Evidentiary Material.

989 **E3/807** Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 1 Mar. 1977, EN 00933834.

990 **D3** IS, fns 153, 243 *citing* **E3/4082** Ang Ta Saom Commune Exchanged Prisoners List, EN 00290199-201.

991 **F54** Appeal Brief, para. 384.

992 **E465** Case 002/02 TJ, para. 168 *citing* **D3** IS, para. 122(c).

993 **F54** Appeal Brief, para. 384.

994 *See* **E465** Case 002/02 TJ, paras 671-686.

995 Ground 42: **F54** Appeal Brief, *Trapeang Thma Dam OIA enforced disappearances*, paras 386-387; **F54.1.1** Appeal Brief Annex A, p. 19 (EN), p. 17 (FR), p. 25 (KH); Ground 47: **F54** Appeal Brief, *Absence of saisine for acts pertaining to disappearance,* para. 396; **F54.1.1** Appeal Brief Annex A, p. 21 (EN), p. 19 (FR), p. 28 (KH).

996 Responding specifically to Ground 42.

997 **D3** IS, para. 46.

998 **D3** IS, para. 46, fn. 169 *citing* **E3/5657** Im Chem DC-Cam Interview, 4 Mar. 2007, EN 00089778 ("my forces were called to be educated in Phnom Penh, but they disappeared. I felt regretful for the disappearances."). *See also* fn. 165 *citing* **E3/5271** Chhum Ruom WRI, EN 0289928 ("Later, they were arrested, tied up and threw into the truck like a pig and taken away for killing.").

999 Responding specifically to Ground 47.

1000 **D3** IS, para. 45.

describe the disappearances from 1JD in detail.[1001]

287. Moreover, the IS noted that: the CPK eliminated targeted groups;[1002] operated in secrecy;[1003] and members of the SC could order summary executions at will,[1004] while operating without a functioning judicial system.[1005] It further explicitly stated that Appellant had authority to send individuals to "secret police".[1006] The stated lack of transparency, the process of arresting and killing 'enemies', and the policy to destroy anything perceived to threaten CPK ideology[1007] sufficiently provided notice that the CIJs were seised to investigate enforced disappearances in the context of the other specific crimes charged to the sites.

288. At both TTD and 1JD, the CIJs were thus seised with the investigation of events of enforced disappearance, consistent with the Co-Prosecutors' suggested characterisation of facts as OIA.[1008]

Ground 43: Lack of saisine for executions at Wat Baray Choan Dek[1009]

289. The IS specifically mentions Wat Baray Choan Dek in relation to 1JD.[1010] The IS does not, as Appellant incorrectly claims, seise the judges to investigate only those deaths that occurred "on the site".[1011] The IS rather seises the judges to investigate deaths which occurred "as a direct result" of being at the site, explicitly stating that individuals were executed, and that some of the bodies were believed to be "buried in mass graves in and around Wat Baray Choan Daek."[1012] Upon a plain reading of the IS, it is patently clear that the CIJs were seised to investigate the executions of individuals who laboured at 1JD, as well as the circumstances surrounding the bodies in the mass graves near Wat Baray Choan Dek. Further, among the documents supporting the IS, an OCP Report

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1001 **D3** IS, para. 45, fns 159, 161 *citing* **E3/8303** Ut Seng OCP Statement, EN 00531220 ("If [the Khmer Rouge] checked and saw anyone being lazy, they would call that person from the work site saying they were being taken for study. As for those taken for study, they were never seen to return, that is, they were taken away and killed […] they were taken away every single day […] they were never seen to return to the work site"). *See also* **D3** IS, para. 45, fns 161, 163 *citing* **E3/8303** Van Theng OCP Statement, EN 00096747 ("people disappeared and have never been seen again"); **D3** IS, para. 45, fns 160, 161, 163 *citing* **E3/8303** Ao Ho OCP Statement, EN 00096749 ("I also saw people disappearing every day").

1002 *See* e.g. **D3** IS, paras 12(a), (b-g), 15.

1003 **D3** IS, para. 23.

1004 **D3** IS, para. 25.

1005 **D3** IS, para. 13.

1006 **D3** IS, para. 93.

1007 **D3** IS, para. 6.

1008 **D3** IS, para. 122(c).

1009 Ground 43: **F54** Appeal Brief, *Lack of saisine for executions at Wat Baray Choan Dek*, paras 388-390; **F54.1.1** Appeal Brief Annex A, p. 19-20 (EN), p. 17 (FR), pp. 25-26 (KH).

1010 **D3** IS, para. 45.

1011 **F54** Appeal Brief, para. 389 (stating that the IS "simply evokes the fact of deaths 'on this site'").

1012 **D3** IS, para. 45.

states that "[n]earby the dam there was a killing field which was situated inside the compound of a pagoda where a witness stated that around 20,000 [...] people [...] were killed."[1013] A witness statement clarified: "Wat Baray Cheoung Daek was the execution site."[1014]

Ground 44: Absence of saisine for accidental deaths[1015]

290. The CIJs were specifically seised with the investigation into deaths at 1JD directly resulting from "overwork" due to the inhumane working and living conditions at the site,[1016] as well as Appellant's actions leading to deaths from "overwork."[1017] The CIJs' discovery that conditions of overwork led to accidents causing deaths falls squarely within the broader category of facts relating to "deaths due to overwork" as stated in the IS, and as such, the CIJs properly referred these facts to the TC.[1018]

Ground 45: Absence of saisine for facts pertaining to "discrimination" against NP on political grounds[1019]

291. The CIJs were seised of all circumstances of the alleged facts at 1JD which assist in their characterisation as persecution of NP on political grounds proposed by the Co-Prosecutors.[1020] Moreover, reading the IS holistically, it is clear that the CIJs were seised with the fact that "[t]he CPK employed systematic discrimination" against NP by "actively promot[ing] the idea that the "old" or "base" people were superior to the new people".[1021] The "systematic discrimination" resulted in crimes "at cooperatives and worksites",[1022] including 1JD.[1023] Further, the IS was supported by CPK magazines describing the widespread discrimination of NP throughout the cooperatives and worksites,[1024] as well as a witness statement indicating that the distinction between NP

1013 **D3** IS, fns 161, 162 *citing* **E3/8303** OCP Report on investigation in Stoeung Chinit, Kompong Thom, EN 0096744.
1014 **D3** IS, fn. 161 *citing* **E3/8303** Chhoeun Sokhan OCP Statement, EN 0096746.
1015 Ground 44: **F54** Appeal Brief, *Absence of saisine for accidental deaths*, paras 391-392; **F54.1.1** Appeal Brief Annex A, p. 20 (EN), p. 17 (FR), p. 26 (KH).
1016 **D3** IS, para. 45.
1017 **D3** IS, para. 16.
1018 **D427** Closing Order, paras 363, 1381-83, 1387.
1019 Ground 45: **F54** Appeal Brief, *Absence of saisine for facts pertaining to "discrimination" against NP on political grounds*, paras 393-394; **F54.1.1** Appeal Brief Annex A, p. 20 (EN), p. 18 (FR), pp. 26-27 (KH).
1020 **D3** IS, para. 122(c).
1021 **D3** IS, para. 12(c).
1022 **D3** IS, para. 15.
1023 **D3** IS, para. 45.
1024 *See e.g.* **D3/I** Introductory Submission Schedules 1-105, Schedules 94, 97, EN 001462006, 00146210 *citing* **E3/729** *Revolutionary Youth* Oct. 1975, EN 00357903 ("more than two million new people have just gone down to live in the countryside and enemy agents and various other bad elements are still chaotically

and Base People ("BP") was relevant to conditions at 1JD.[1025]

Ground 46: Absence of saisine for facts pertaining to "discrimination" on religious grounds[1026]

292. The CIJs were seised of all circumstances of the alleged facts at 1JD which assist in their characterisation as persecution of the Cham on religious grounds proposed by the Co-Prosecutors.[1027] The IS seised the CIJs with 1JD as well as the circumstances surrounding the bodies in the mass graves near Wat Baray Choan Dek.[1028] Supporting the IS was a DC-Cam Report stating that the victims who were killed at Wat Baray Choan Dek included "Islamic" people.[1029] An analytical report noting that "Moslems [were] particularly persecuted" during the DK was also attached to the IS.[1030] The IS further stated that "[t]he CPK employed systematic discrimination" against the Cham by, *inter alia*, "[forbidding] them to partake in any Islamic activity or ceremony and [banning] them from possessing Islamic texts".[1031]

Ground 48: Enslavement[1032]

293. The SS specifically referred to evidence describing possible instances of forced labour at K-17 and Phnom Kraol ("PK") Prison. For example, the statements of witnesses Uong Dos and Net Savat support of the fact that "Phnom Kraol Prison [...was] a building with no walls and a thatched roof",[1033] both referring to being subjected to forced labour connected to PK prison and K-17. Uong Dos, a prisoner in PK prison, stated that "in the morning they had us go out to work but our hands were still tied",[1034] and Neth Savat,

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mixed in"); **D3/I** Schedule 99, EN 00146213 *citing* **E3/725** *Revolutionary Flag,* Dec. 1977-Jan. 1978, EN 00184320 (stressing vigilance against bad elements in cooperatives and districts).

1025 **D3** IS, fns 160, 161, 163 *citing* **E3/8303** Ao Ho OCP Statement, EN 00096749 (stating he "belonged to the 'base people', so in early 1977 [he] was asked by the KR to become the chief of a group [...] at the Stoeung Chinit dam site.").

1026 Ground 46: **F54** Appeal Brief, *Absence of saisine for facts pertaining to "discrimination" on religious grounds*, para. 395; **F54.1.1** Appeal Brief Annex A, pp. 20-21 (EN), pp. 18-19 (FR), pp. 27-28 (KH).

1027 **D3** IS, para. 122(c).

1028 **D3** IS, para. 45.

1029 **D3/IV** Annex C: Other Evidentiary Material, EN 00141600 *citing* **E3/8295** DC-Cam Mapping Report, Srok Baray, Wat Baray Choan Dek, 1997, p. 2, EN 0089367-68.

1030 **D3/I** Introductory Submission Schedules 1-105, Schedule 81, EN 00146181.

1031 **D3** IS, para. 12(e).

1032 Ground 48: **F54** Appeal Brief, *Enslavement,* paras 397-398, **F54.1.1** Appeal Brief Annex A, p. 21 (EN), p. 19 (FR), pp. 28-29 (KH).

1033 **D202** Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, para. 8.

1034 *See e.g.* **D202** Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, fns 20, 21 *citing* **E3/7703** Uong Dos WRI, EN 00242171.

who was detained at K-17, describes being transported to a worksite at Nang Khilik.[1035]

Ground 49: OIA through attacks on human dignity[1036]

294. The SS states that, in late 1977, more than 80 people connected to former Sector Deputy Secretary Kham Phoun were rounded up, arrested and detained at the K-11 and PK security offices, and some were later executed.[1037] This is supported by a witness statement noting that detainees at PK faced "interrogations about Ta Kham Phoun", accompanied by "serious threats and bullying."[1038] The CIJs were thus seised with the interrogations at PK as they relate to the circumstances surrounding the acts mentioned in the SS.

Ground 50: OIA through enforced disappearances[1039]

295. Appellant claims "no other disappearances were mentioned in the Supplementary Submission regarding K-11 or Phnom Kraol"[1040], yet his Closing Brief noted that "the Supplementary Submission describes other instances of disappearances at 'K-11' or 'Phnom Kraol.'"[1041] Indeed, the Supplementary Submissions do refer to disappearances at these sites.[1042] It is thus clear that the CIJs, and subsequently the TC, were properly seised of these facts.

Grounds 51, 52, 53, 54, 55: Saisine for facts occurring at KTC[1043]

296. The IS specifically authorised the opening of an investigation into, *inter alia*, murder, torture, imprisonment, persecution, and OIA as CAH at Kraing Ta Chan ("KTC")

1035 *See e.g.* **D202** Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, fns 22, 23 *citing* **E3/7695** Net Savat WRI, EN 00239487.

1036 Ground 49: **F54** Appeal Brief, *OIA through attacks on human dignity,* paras 399-400; **F54.1.1** Appeal Brief Annex A, p. 22 (EN), pp. 19-20 (FR), p. 29 (KH).

1037 **D202** Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, para. 10.

1038 **E3/7694** Chan Tauch WRI, EN 00242143.

1039 Ground 50: **F54** Appeal Brief, *OIA through enforced disappearances*, paras 401-403, **F54.1** Appeal Brief Annex A p. 22 (EN), pp. 19-20 (FR), p. 29 (KH).

1040 **F54** Appeal Brief, paras 401- 403.

1041 **E457/6/4/1** KS Case 002/02 Closing Brief, para. 1398.

1042 **D202** Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, paras 8-11.

1043 Ground 51: **F54** Appeal Brief, *Absence of saisine for deaths resulting from detention conditions,* paras 404-407; **F54.1.1** Appeal Brief Annex A, p. 22 (EN), p. 20 (FR), pp. 29-30 (KH); Ground 52: **F54** Appeal Brief, *Absence of saisine for acts of enslavement,* paras 408-409; **F54.1.1** Appeal Brief Annex A, p. 22-23 (EN), p. 20 (FR), p. 30 (KH); Ground 53: **F54** Appeal Brief, *Absence of saisine for acts of torture,* paras 410-411; **F54.1.1** Appeal Brief Annex A, p. 23 (EN), p. 20 (FR), p. 31 (KH); Ground 54: **F54** Appeal Brief, *Lack of Seisin for Acts of Ill-Treatment* paras 412-413; **F54.1.1** Appeal Brief Annex A, p. 23 (EN), p. 21 (FR), pp. 31-32 (KH); Ground 55: **F54** Appeal Brief, *Lack of Seisin for Acts of Disappearance* para. 414-415; **F54.1.1** Appeal Brief Annex A, p. 23-24 (EN), p. 21 (FR), p. 32 (KH).

security centre.[1044] The IS specifically seised the CIJs with KTC,[1045] and Appellant overlooks the fact that it also states that "Unlawful detention, forced labour, inadequate food, mass starvation, and arbitrary arrests occurred in cooperatives located in the communes of Kus".[1046] KTC is located in Kus Commune, and thus, to properly determine the *saisine* of the CIJs in relation to KTC, the facts relevant to KTC should be read with the facts relevant to Kus.[1047]

297. With respect to deaths resulting from detention conditions,[1048] the IS explicitly states that NP were killed at KTC,[1049] as acknowledged by Appellant.[1050] The IS further states that unlawful detention occurred "in the communes of Kus", detailing the conditions that allowed thousands of people to "starve[] to death".[1051] The IS notes that exhumations at KTC discovered the remains of approximately 2,000 people,[1052] that the remains of a further 10,000 people may have been present at the site,[1053] and cites reports from the head of KTC to the Party noting the people who "died from illness" at KTC each month.[1054]

298. With respect to enslavement,[1055] the IS authorised the CIJs to investigate the crime of enslavement and included facts to support its requisite elements, namely, the indicia of ownership, control of physical environment, threat and subjection to cruel treatment and abuse, and, contrary to Appellant's claim, forced labour at KTC.[1056] The IS states that "unlawful detention", "arbitrary arrests" and "forced labour" occurred in Kus,[1057] and relies on evidence establishing that bodies were buried in pits and "mass graves".[1058] The IS further established that the CPK exerted complete ownership over detainees at KTC

1044 **D3** IS, para. 122.
1045 **D3** IS, paras 43, 60.
1046 **D3** IS, para. 43.
1047 In fact, the TC used this approach when interpreting the scope of the Closing Order in relation to KTC, *see* **E465** Case 002/02 TJ, para. 812.
1048 Responding specifically to Ground 51.
1049 **D3** IS, para. 43.
1050 **F54** Appeal Brief, para. 405.
1051 **D3** IS, para. 43.
1052 **D3** IS, para. 60.
1053 **D3** IS, para. 60.
1054 *See e.g.* **D3** IS, para. 60, fn. 243 *citing* **E3/2109** Report on prisoners by late November 1977, Nov. 1977, EN 00276555-56; **E3/4086** Report to Uncle Kit, Srok Tramkok and Prisoner List, July 1977, EN 00276557-58.
1055 Responding specifically to Ground 52.
1056 Case 001-**F28** *Duch* AJ, paras 152-154; Case 001-**E188** *Duch* TJ, para. 342; Case 002-**D427** Closing Order, para. 1392; *Kunarac* AJ, paras 116-117; *Sesay* TJ, paras 197-199; Rome Statute, art. 7(2)(c); ICC Elements Crimes, art. 7(1)(c), Element 1.
1057 **D3** IS, para. 43.
1058 **D3** IS, para. 60, fn. 249 *citing e.g.* **E3/2063** DC-Cam Report, *Mapping the Killing Fields of Cambodia*, EN 00095665. It is reasonable to assume these pits were dug by prisoners in a regime of forced labour.

through the use of torture and the threat of disappearances.[1059]

299. With respect to torture,[1060] the IS specifically requested an investigation into, *inter alia*, torture and OIA as CAH at KTC.[1061] The IS explicitly states that detainees at KTC were "shackled at all times"[1062] and is supported by witness testimony stating that "prisoners were shackled and arranged to sleep in 2 rows with the feet of the first row touching the fees of the second row".[1063] Appellant overlooks additional evidence supporting the IS, including DK reports from the District Secretary to the head of KTC, ordering prisoners to be "interrogate[d] harshly"[1064] and "then smash[ed]",[1065] as well as a witness statement detailing severe acts of torture endured at KTC.[1066] Further evidence includes witness statements describing people "screaming for help and crying terribly",[1067] and people being beaten and thrown against a tree.[1068]

300. With respect to ill-treatment,[1069] the IS alleges that "OIA" were committed on the basis of paragraphs 37-72.[1070] Appellant ignores relevant evidence relied on in the IS,[1071] including the above-noted evidence of torture and ill-treatment at KTC. Further in reference to KTC, the IS explicitly states that detainees were clubbed to death,[1072] and that interrogators and guards "executed up to 12,000 people" with executions occurring on a regular basis.[1073] The IS further details the acts occurring throughout Kus Commune.[1074]

301. With respect to disappearances,[1075] the IS states that unlawful detention and arbitrary

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1059 *See* the paragraphs above and below in this response to Grounds 51, 52, 53,54, 55 (saisine for facts occurring at KTC).
1060 Responding specifically to Ground 53.
1061 **D3** IS, para. 122.
1062 **D3** IS, para. 60.
1063 **D3** IS, para. 60, fn. 247 *citing* **E3/2063** DC-Cam Report entitled *Mapping the Killing Fields of Cambodia*, EN 00095663.
1064 **D3** IS, para. 60, fn. 243 *citing* **E3/2052** Report to the Tram Kak Branch of the CPK, 12 June 1977, EN 00276591.
1065 **D3** IS, para. 60, fn. 243 *citing* **E3/2012** Report to Ann from Kit, EN 00276596.
1066 **D3/IV** Annex C: Other Evidentiary Material, EN 00141614 *citing* **E3/7483** Mann Seng WRI, EN 00342741 ("they interrogated me once every 3 days, and I was beaten up and fell unconscious twice during each interrogation").
1067 **D3** IS, para. 60, fn. 247 *citing* **E3/2063** DC-Cam Report, *Mapping the Killing Fields of Cambodia*, EN 00095663.
1068 **D3** IS, para. 60, fn. 46 *citing* **E3/2063** DC-Cam Report, *Mapping the Killing Fields of Cambodia*, EN 00095664-65.
1069 Responding specifically to Ground 54.
1070 **D3** IS, para. 122(c).
1071 *See e.g.* **D3/IV** Annex C: Other Evidentiary Material, EN 00141614 *citing* **E3/7483** Mann Seng WRI, EN 00342741.
1072 **D3** IS, para. 60.
1073 **D3** IS, para. 60.
1074 **D3** IS, para. 43 ("unlawful detention, forced labour, inadequate food, mass starvation").
1075 Responding specifically to Ground 55.

arrests occurred in Kus, and that enemies were arrested and executed, including many NP who were sent to KTC.[1076] The IS states that exhumations at KTC discovered the remains of approximately 2,000 detainees, with the possibility of a "further 10,000 people" in "mass graves".[1077] The IS was further supported by evidence of a number of witnesses who stated that people would be invited to "eat noodle soup" and never return, leaving their family without any information of where they had been taken.[1078]

Ground 56: Persecution on racial grounds[1079]

302. The CIJs were seised of all circumstances of the alleged facts at AuKg which assist in their characterisation as persecution of Vietnamese on racial grounds proposed by the Co-Prosecutors.[1080] Appellant acknowledges that the CIJs was seised to investigate executions at AuKg, and discovered Vietnamese were among those killed.[1081] Moreover, the IS referred the CIJs to, *inter alia*, facts that "[t]he CPK employed systematic discrimination against targeted groups including: [...] the Vietnamese religious and ethnic minority" and "[t]he CPK pursued a policy of discriminating against and killing ethnic Vietnamese".[1082] Appellant now erroneously claims that a supplementary submission was necessary for the CIJs to consider persecution.[1083]

Ground 57: OIA through attacks on human dignity[1084]

303. The IS states that between 1975 and 1979, as many as 2,000 people were killed at AuKg, some by starvation and some by execution.[1085] The IS is supported by a DC-Cam Report which cites a former prisoner who stated that prisoners were provided with little food, forced to sleep naked while shackled to a long wooden bar, if they arrived late to indoctrination meetings were "treated with serious torture such as being struck with a

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1076 **D3** IS, para. 43.
1077 **D3** IS, para. 60.
1078 **D3** IS, para. 43, fn. 154 *citing* **D3/I** Introductory Submission Schedules 1-105, Schedule 60, EN 00146134 *citing* **E3/7507** Interview of Poul Sokhom by Craig Etcheson, EN 00080561-62; **E3/7536** Interview of Ta Tham by Craig Etcheson, EN 00080586-87; **E3/7557** Interview of Chhoeung Phon by Craig Etcheson, EN 00080554.
1079 Ground 56: **F54** Appeal Brief, *Persecution on racial grounds*, paras 416-417; **F54.1.1** Appeal Brief Annex A, p. 24 (EN), p. 21 (FR), pp. 32-33 (KH).
1080 **D3** IS, para. 122(c).
1081 **F54** Appeal Brief, para. 417.
1082 **D3** IS, para. 12(f).
1083 **F54** Appeal Brief, para. 417.
1084 Ground 57: **F54** Appeal Brief, *OIA through attacks against human dignity,* paras 418-419; **F54.1.1** Appeal Brief Annex A, p. 24 (EN), pp. 21-22 (FR), p. 33 (KH).
1085 **D3** IS, para. 67.

rifle butt".[1086] The Report further states, crucially, that sick prisoners who could not work were tied up and taken to be killed,[1087] thus indicating that no medical treatment was provided.

Ground 58: Purges[1088]

304. Contrary to Appellant's claim,[1089] the CIJs were not limited to consideration of only two courses of purges. The IS plainly states that Appellant "ordered, incited and encouraged the widespread purges and executions across Democratic Kampuchea", a process which "swept the entire country from 1975 onwards".[1090] The IS contains multiple references to internal purges or purge-like actions,[1091] and is supported by documentation referring to purges between 1975 and 1979 throughout the country.[1092] There is a distinct link between the purges and the widespread use of torture and physical violence at security centres, as part of the CPK system of executions which "resulted in a destructive cycle of killings."[1093] It is clear that the CIJs were seised to investigate widespread purges based on the IS and its supporting documents, and to refer these facts to the TC.[1094]

Ground 59: Absence of saisine for facts against Buddhists in TK[1095]

305. The SCC has already confirmed the TC's *saisine* with regard to the treatment of

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1086 **D3** IS, fns 279, 280 *citing* **E3/2628** DC-Cam Report, *Mapping Project of Ratanik Kiri*, EN 00078145.

1087 **D3** IS, fns 279, 280 *citing* **E3/2628** DC-Cam Report, *Mapping Project of Ratanik Kiri*, EN 00078145-00078146.

1088 Ground 58: **F54** Appeal Brief, *Purges,* paras 420-422; **F54.1.1** Appeal Brief Annex A, p. 24 (EN), p. 22 (FR), pp. 33-34 (KH).

1089 **F54** Appeal Brief, paras 420-422. The TC considered and rejected this claim, *see* **E465** Case 002/02 TJ, para. 165, fn. 362.

1090 **D3** IS, para. 97(d).

1091 *See* **D3** IS, paras 36 (delivering "enemies" to S-21), 64 (people perceived to be traitors arrested and killed at PK between 1977 and 1979), 97(d)(i) (Office 870 had the authority to purge itself, sub-offices and the population in general), 97(d)(ii) (describing other high-ranking, influential CPK cadres who were purged throughout the regime).

1092 *See e.g.* **D3** IS, para. 79, fns 455 (referring to purges occurring in the East Zone and in autonomous sector 505), 458 (noting that purges of Office 870 began in Oct. 1977 and continued throughout Feb. or Mar. 1978); para. 71, fn. 295 *citing* **D3/I** Introductory Submission Schedules 1-105, Schedule 78, EN 00146174-57 (describing purges occurring in 1977); fn. 342 (specifically noting that, in July 1977, the reorganisation of Sector 103 was announced, thus establishing the North Zone and launching the simultaneous purge of district and sector leadership).

1093 **D3** IS, para. 15.

1094 As the TC was properly seised of these facts, Appellant's assertion that the TC erred in ruling on the scope of the purges (following his urgent request to clarify *saisine*, *see* **F54** Appeal Brief, para. 422) is inconsequential and does not warrant SCC intervention. Further, Appellant's subsequent claims (*see* **F54** Appeal Brief, paras 423-425) are based entirely on his erroneous suggestion that the TC was improperly seised. Where Appellant substantiates errors regarding his knowledge of the purges, the claims are nevertheless meritless, *see* response to Grounds 216, 217, 235 (intent to commit crimes during internal purges and at security centres and execution sites) (specifically Grounds 216, 217).

1095 Ground 59: **F54** Appeal Brief, *Absence of saisine for facts against Buddhists in TK*, paras 426-434; **F54.1.1** Appeal Brief Annex A, p. 25 (EN), p. 22 (FR), p. 34 (KH).

Buddhists in the TK Cooperatives.[1096] Further, Appellant overlooks the IS referral to "conditions in Tram Kok District including [...] mistreatment",[1097] and Schedule 59 ("Conditions in Tram Kok District"), which included the statement of a former Buddhist monk noting the prohibition to practice Buddhism and the disrobing of Buddhist monks in the district.[1098] It is thus irrelevant that the TK Cooperatives were not expressly mentioned in paragraph 72 of the IS discussing the nationwide CPK policy to eliminate, *inter alia*, Buddhism.[1099] If anything, the above facts demonstrate that the IS provided an open list, and not a closed "representative sample",[1100] of locations when it stated the policy was implemented "throughout Democratic Kampuchea, *including* [...]".[1101]

2. TYPE 2: GROUNDS RELATING TO FACTS ALLEGEDLY NOT SUPPORTED BY SUFFICIENT EVIDENCE FOR INCLUSION IN THE INDICTMENT.[1102]

Ground 61: Insufficient charges to bring to Judgment[1103]

306. Ground 61 should be dismissed as Appellant fails to establish that the TC unjustifiably "ignored" his arguments that the TC was not seised of certain facts since the standard of proof for indictment had not been met in the Closing Order.[1104]

307. As a preliminary matter, the Co-Prosecutors note that the TC may have misunderstood the arguments presented in Appellant's Closing Brief, as a result of inaccuracies in the English translation of "charges suffisantes"[1105] in the sense of IR 67(3). In his Closing

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1096 **E301/9/1/1/3** SCC Additional Severance and Scope Decision, paras 9, 91. *See also* **E301/9/1** TC Additional Severance and Scope Decision, para. 38; **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex.

1097 **D3** IS, fn. 153.

1098 **D3** IS, fn. 153 *citing*, *inter alia*, **D3/I** Introductory Submission Schedules 1-105, Schedule 59, EN 00146130-33, *referring to* **E3/7557** Chhoeung Phon OCP Statement, EN 00080551.

1099 *Contra* **F54** Appeal Brief, paras 427-428.

1100 **F54** Appeal Brief, para. 429.

1101 Emphasis added. *Contra* **F54** Appeal Brief, paras 429-433.

1102 Grounds 61 (law) and 62-64 (application): **F54** Appeal Brief, *Insufficient Charges to bring to Judgment,* paras 439-457; **F54.1.1** Appeal Brief Annex A, pp. 25-27 (EN), pp. 23-24 (FR), pp. 35-37 (KH).

1103 Ground 61: **F54** Appeal Brief, *Insufficient charges to bring to Judgment – The law*, paras 440-444; **F54.1.1** Appeal Brief Annex A, p. 25 (EN), p. 23 (FR), p. 35 (KH).

1104 **F54** Appeal Brief, paras 440-444, *referring to* **E457/6/4/1** KS Case 002/02 Closing Brief, paras 924-931, 942-948, 968-969 (TK Cooperatives), 1022-1028 (TTD), 1096-1105 (KCA), 1254-1271 (KTC), 2264-2267, 2283-2287, 2288-2298, 2306 (ex-KR).

1105 Multiple terms in French and ECCC procedural law are translated as "charges" in English. The CIJs have previously noted this ambiguity in the wording of the English version of the IRs (Case 001-**D198/1** OCIJ Case 001 Clarification of Charges, para. 8), noting that "the notions of 'faits reprochés' [charges], (IRs 67(2), 89*bis*) 'charges suffisantes' [sufficient evidence], (IR 67(3)) and 'mise en examen' [charging] (*see in particular,* IRs 55(4), 57) are difficult to translate into English due to the lack of equivalent notions at Common Law." Moreover, the counts listed in the "Dispositive" of the Closing Order (**D427** Closing Order, para. 1613. *See also* **D427** Closing Order, paras 1525, 1540 (JCE), 1545 (Planning), 1548 (Instigating), 1551 (A&A), 1554 (Ordering), 1559 (Superior Responsibility)). setting out the crimes for which Appellant is responsible. It is in this sense that the Judgment sets out its "Summary of the Charges Against the Accused" (**E465** Case 002/02 TJ, paras 14-16. In the French version of the Judgment, this is

Brief, Appellant challenged the existence of "charges suffisantes" (sufficient evidence), in respect of certain facts.[1106] However, the English version of his brief referred consistently to the insufficiency of the "charges" as opposed to the evidence of facts. In its Judgment, the TC summarised Appellant's submissions as a challenge to "charges" for which the CIJs had failed to "gather facts capable of supporting" and a request to "nullify the parts of the Closing Order concerning the charges insufficiently proved".[1107] It dismissed Appellant's requests on the basis that it was "unclear to precisely which deficient charges" Appellant referred.[1108]

308. In any event, the ground fails with regard to the alleged legal errors for two main reasons. First, Appellant again challenges the TC's jurisdiction to adjudicate facts based on alleged underlying deficiencies in an unambiguous and IR 67(2)-compliant CO. Although these alleged errors were apparent to Appellant when the Closing Order was issued on 15 November 2010, he has provided no justifiable reason for failing to raise them within the 30-day deadline in IR 89(1). As such, they were time-barred upon expiry of that deadline.[1109]

309. Moreover, the TC reviewed those submissions with respect to every instance of alleged insufficiency of evidence.[1110] In each case, the TC tested whether the fact had been proven "BRD" in accordance with IR 87(1) and not merely whether there was "sufficient evidence of the charges" as required for indictment under IR 67(3).[1111] In two instances,

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termed a "Résumé des accusations contre les Accués".) The SCC has previously explained the distinction between "charges" and facts: **E301/9/1/1/3** SCC Additional Severance and Scope Decision, para. 18.

1106 **E457/6/4/1** KS Case 002/02 Closing Brief, paras 294-299.

1107 **E465** Case 002/02 TJ, para. 179.

1108 **E465** Case 002/02 TJ, para. 180.

1109 *See* response to Ground 38.

1110 **TK** (i) **E457/6/4/1** KS Case 002/02 Closing Brief, paras 924-931 are addressed in **E465** Case 002/02 TJ, paras 811, 1139; (ii) **E457/6/4/1** KS Case 002/02 Closing Brief, paras 942-948 are addressed in **E465** Case 002/02 TJ, paras 813, 1169-1171; (iii) **E457/6/4/1** KS Case 002/02 Closing Brief, paras 968-969 are rendered moot by **E465** Case 002/02 TJ, paras 1139-1140, 1146; **TTD** (i) **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1022-1028 (*referencing* paras 1009-1016) are addressed in **E465** Case 002/02 TJ, paras 1352, 1405; **KCA** (i) **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1096-1105 are rendered moot by **E465** Case 002/02 TJ, paras 1794-1798; **KTC** (i) **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1254-1271 are addressed in **E465** Case 002/02 TJ, paras 2834-2843; **ex-KR** (i) **E457/6/4/1** KS Case 002/02 Closing Brief, paras 2283-2287 (*incorporating* paras 2264-2267) are addressed at **E465** Case 002/02 TJ, paras 812, 1169-1172; (ii) the salient parts of **E457/6/4/1** KS Case 002/02 Closing Brief, paras 2288-2298, 2306 are addressed at **E465** Case 002/02 TJ, paras 812, 1172.

1111 Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, paras 84-85; Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, paras 61-62. The PTC has established "sufficient evidence" to mean a "probability" or "plausibility" of guilt, a standard that is less than "beyond reasonable doubt"; **D427** Closing Order, para. 1323. The Co-Prosecutors note that at the pre-trial stage, as on appeal before the SCC, alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue. *See e.g.* **D427/1/30** PTC Second IS Closing Order Appeal, para. 113.

the TC's review of the evidence available at trial resulted in acquittal, rendering Appellant's appeal moot in respect of those challenges.[1112]

Grounds 62-64

310. **The TC was not required to address Grounds 62-64 as they were time-barred pursuant to IR 89(1). Assuming, *arguendo*, the SCC addresses their merits, a review of the Closing Order demonstrates that the CIJs met the requisite standard of proof for indictments under IR 67(2)-(3). As such, the TC was properly seised to consider these facts in establishing the relevant crimes.**

Ground 62: Absence of saisine for the deaths from starvation in TK communes [1113]

311. Appellant's claim is premised on an improper reading of the CO.[1114] Despite the fact that the CIJs were seised to investigate facts in the entire TK District,[1115] Appellant ignores evidence from within the District but *outside* Samraong and Ta Phem Communes,[1116] which described "many deaths [...] from starvation".[1117] Contrary to Appellant's claim,[1118] this evidence, together with additional evidence on the scale of deaths from starvation in Samraong and Ta Phem Communes[1119] and the fact that "[n]early all witnesses describ[ed] a lack of food in the cooperatives" in TK District,[1120] demonstrates that deaths from starvation occurred to the requisite standard of proof for indictments under IR 67(3).

1112 **TK Cooperatives**: **E457/6/4/1** KS Case 002/02 Closing Brief, paras 968-969 regarding killings of Vietnamese in the TK Cooperatives. *See* **E465** Case 002/02 TJ, paras 1139-1140, 1146; **KCA**: **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1096-1105 dealing with executions at the airfield or at nearby sites. *See* **E465** Case 002/02 TJ, paras 1794-1798.

1113 Ground 62: **F54** Appeal Brief, *Absence of saisine for the deaths from starvation in TK communes*, paras 445-447; **F54.1.1** Appeal Brief Annex A, p. 26 (EN), p. 23 (FR), pp. 35-36 (KH).

1114 **F54** Appeal Brief, paras 445-447 and *reiterated* at para. 672.

1115 *See* response to Ground 39.

1116 **D427** Closing Order, fn. 1283 *citing* **E3/5835** Sok Soth WRI, EN 00223504-05, 08 – witness was present in Sre Kruo (Cheang Tong Commune), KTC (Kus Commune), Angk Roka (Cheang Tong or Trapeang Thum North Commune), and Angk Baksei (Cheang Tong Commune). For identification of these communes, *see* **E465** Case 002/02 TJ, paras 946, 2683, 807; **E3/2434** Report from An to Educational Office of District 105, 20 Aug. 1977, EN 00276603. For Cheang Tong Commune, *see* response to Ground 39.

1117 **D427** Closing Order, fn. 1283 *citing* **E3/5835** Sok Soth WRI, EN 00223508-09.

1118 **F54** Appeal Brief, para. 446.

1119 **D427** Closing Order, fn. 1283 *citing, inter alia*, **E3/7980** Sim Chheang WRI, EN 00231694 ("This commune chief did not care for his people. He let them die of starvation"), **E3/5519** (D232/67) Sok Sim WRI, A43 ("Q: Do you know anyone who died of starvation? A: Yes, I do. They are: Ta Bin, Ta Mak, Yeay Tang *and so on*.") (emphasis added).

1120 **D427** Closing Order, para. 312, fn. 1282 *citing* 11 different WRIs.

Ground 63: Absence of saisine for "discriminatory treatment" regarding NP [1121]

312. Appellant erroneously believes that the only discriminatory treatment alleged in the Closing Order regarding the NP in the TK Cooperatives is a suppression of their political rights, based on their inability to act as unit chiefs.[1122] Contrary to this claim, the CIJs found that NP were subordinate to Base People, placed in designated work units, suffered health problems, and subjected to reeducation and surveillance.[1123] Appellant overlooks additional evidence underlying specific factual findings relevant to the discriminatory treatment of NP at the TK Cooperatives: pursuant to a national CPK policy, people were divided into categories that "determined the degree of their involvement" in the "functioning" of the cooperatives;[1124] NP were categorised as "depositee" and were "controlled" by BP, who were categorised as "full-rights" or "candidate".[1125] A combined reading of these findings demonstrates that if NP were controlled by BP, there was no opportunity for them to hold a position superior to BP, including the position of unit chief. As such, political persecution against NP occurred to the requisite standard of proof for indictments under IR 67(3).

Ground 64: Absence of saisine for facts of surveillance and disappearances of ex-Khmer Republic soldiers [1126]

313. Appellant's claim is premised on an improper reading of the CO,[1127] which ignores that the CIJs were seised to investigate facts throughout the entire TK District.[1128] Appellant agrees that the allegation of disappearances was confirmed by one witness,[1129] yet disagrees with its probative value, claiming that the witness does not allege ex-KR

1121 Ground 63: **F54** Appeal Brief, *Absence of saisine for "discriminatory treatment" regarding New People*, paras 448-450; **F54.1.1** Appeal Brief Annex A, p. 26 (EN), pp. 23-24 (FR), p. 36 (KH).

1122 **F54** Appeal Brief, para. 449.

1123 **E465** Case 002/02 TJ, paras 813, 1170-1171 *citing, inter alia*, **D427** Closing Order, paras 305-306, 313, 315, 319, 1418, 1424. If Appellant intended to incorporate arguments from elsewhere in his Brief, he failed to indicate his intention in **F54** Appeal Brief, paras 448-450 with a cross-reference. In any event, *see* response to Grounds 67, 71, 73, 74: Saisine for Facts of "Discrimination."

1124 **D427** Closing Order, para. 305 *citing e.g.* **E3/742** *Revolutionary Flag*, Apr. 1977, EN 00478505 ("It is imperative to clearly distinguish the elements in the cooperatives […]: -Full-rights members […] -Candidate members […] -Depositee members"). *See also* EN 00478506: "Only by making these distinctions can political views be clear. By so doing, organizational views will be clear; the view of managing forces and gathering forces will be clear […]. Then selection of the cooperative committees will follow the Party's organizational line and class line."

1125 **D427** Closing Order, para. 306 *citing* **E3/5515** Phneou Yav WRI, EN 00410248.

1126 Ground 64: **F54** Appeal Brief, *Absence of saisine for facts of surveillance and disappearances of ex-Khmer Republic soldiers,* paras 451-457; **F54.1.1** Appeal Brief Annex A, p. 26 (EN), p. 24 (FR), pp. 36-37 (KH).

1127 **F54** Appeal Brief, paras 451-456.

1128 *See* response to Ground 39.

1129 **F54** Appeal Brief, para. 454.

soldiers *actually* disappeared, just that they *would* disappear if their identity was discovered.[1130] Additional witnesses supported the finding of disappearances in TK,[1131] and KTC prisoner lists supporting the Closing Order further demonstrate that almost 50% of prisoners had worked for the Khmer Republic.[1132] Appellant's disagreements with the probative value of evidence[1133] ignores contextual and corroborative evidence. Further, whether such evidence is viewed as proof of actual disappearances or likelihood of disappearances is a determination within the discretion of the TC. It is clear, however, that disappearances occurred to the requisite standard of proof under IR 67(3).

314. As to the sufficiency of the evidence that ex-KR officials and soldiers were under surveillance,[1134] Appellant again ignores underlying evidence. He acknowledges the Closing Order was supported by lists of former Lon Nol officers arriving in communes and being sent to TK district,[1135] but ignores, for example, a Kus Commune Report informing *Angkar* of the presence of 7 former Lon Nol soldiers, which was answered with an instruction to arrest this group.[1136] A separate report identifies 25 ex-KR soldiers and their ranks.[1137] Appellant fails to demonstrate that the totality of the supporting evidence could not reasonably meet the standard of proof required under IR 67(3).

1130 **D427** Closing Order, fn. 2156 *citing* **E3/4627** Iep Duch WRI, EN 00223476 (Q: Were the 17 April group arrested by the militia and sent to Kraing Ta Chan? A: I don't know what level decided the plan. When they arrived there, they had them make biographies, and anyone whose biography said they had been a soldier *would* disappear). Appellant relied on the French version of **E3/4627** which translated to "they *had to* disappear", instead of "they *would* disappear" as translated in the English version.

1131 **D427** Closing Order, para. 498. *See e.g.* **E3/5518** Sao Hean WRI, EN 00413899 (Q: Immediately when those people arrived, did they make biographies, or were their biographies screened? A22: Yes, they did that. They went around researching to discover who had been teachers or soldiers or workers. Those discovered to have been soldiers or teachers were arrested and taken away and never reappeared.); **E3/4626** Pech Chim WRI, 27 Aug. 2009, EN 00380134 (Q: After 17 April 1975 did the number of prisoners at the Kraing Ta Chan Security Centre increase? A: I did not see them with my own eyes, but I could know that the number of the prisoners clearly increased because I saw the demand for rice to be taken from [the District] to supply to the Security Centre increasing.); **E3/5524** Phan Chhen WRI, 9 Dec. 2009, EN 00426304 (Q: I want to ask you about when you visited Kraing Ta Chan in late 1975. At that time how had Kraing Ta Chan changed? A44: The site had not expanded, but there were more prisoners than before).

1132 **E457/6/1** Co-Prosecutors' Closing Brief in Case 002/02, para. 793; **E457/6/1.2.17** Annex G.2, Figure 1.5, *Former Occupations of KTC Prisoners*; **E457/6/1.2.16** Annex G.1, KTC Security Centre Prisoner List.

1133 **F54** Appeal Brief, para. 455.

1134 **F54** Appeal Brief, para. 453.

1135 **F54** Appeal Brief, paras 452-453.

1136 **D427** Closing Order, fn. 2160 *citing* **E3/2441** Kus Commune Report, 9 Sept. 1977, EN 00369480 (report informs *Angkar* of 7 former Lon Nol soldiers who were first or 2nd lieutenants or captains), 00369481 (district prison chief Ann directs "Kus commune to arrest this [illegible] group.")

1137 **E3/2438** Kus Commune Report, 29 Apr. 77, EN 00366665-75 (identifies 35 Khmer Krom families totalling 149 people and includes 25 ex-KR soldiers and lists the ranks they held (lieutenant, cadet, warrant officer)).

3. TYPE 3: FACTS THAT APPELLANT CONTENDS FALL OUTSIDE THE TC'S *SAISINE* DUE TO THE CIJS' ALLEGED FAILURE TO IDENTIFY THEM IN THE CLOSING ORDER AS LEGALLY CHARACTERISED MATERIAL FACTS LIKELY TO GIVE RISE TO HIS CRIMINAL RESPONSIBILITY[1138]

Grounds 60, 65-81, 124 and 134

315. **Grounds 60, 65-81, 124, and 134 should be dismissed. Appellant disagrees with the TC's interpretation of the CO, but fails to explain how the TC erred by undertaking a holistic, as opposed to piecemeal, reading of the CO. The Closing Order set out a sufficiently precise description of the material facts and their legal characterisation, giving Appellant adequate notice of the TC's *saisine* in Case 002.**

Ground 60: Vietnamese[1139]

316. In essence, Appellant contends[1140] that the TC misinterpreted the Closing Order when it determined that it was seised of killings of Vietnamese nationwide, i.e. outside Prey Veng and Svay Rieng provinces.[1141] Yet Appellant fails to demonstrate that this interpretation was unreasonable, nor does he explain why he failed to seek clarification of the TC's *saisine* before filing his Closing Brief in May 2017.

317. In determining its geographic *saisine*, the TC properly referred to and interpreted the Closing Order, which, as Appellant concedes,[1142] extensively details facts of killings outside Prey Veng and Svay Rieng.[1143] In the section entitled "Killings of Vietnamese Civilians outside of Prey Veng and Svay Rieng",[1144] the Closing Order found that that the "killing of Vietnamese civilians was not limited to Prey Veng and Svay Rieng Provinces"[1145] with Vietnamese having been killed at, *inter alia*, Wat Khsach, Prey Damrei Srot, and Sector 505, as well as crime sites within the scope of Case 002/02, such as KTC, S-21 and AuKg.[1146] Relevant portions of the Closing Order also state that "mass targeted killings of Vietnamese civilians occurred throughout Prey Veng and Svay Rieng

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1138 Grounds 60, 65-81, 124, 134 (application): **F54** Appeal Brief, paras 458-530; **F54.1.1** Appeal Brief Annex A, pp. 27-32, 45-46, 48 (EN), pp. 24-29, 41-42, 44 (FR), pp. 37-45, 64-65, 68 (KH).

1139 Ground 60: **F54** Appeal Brief, *Vietnamese*, paras 435-438; **F54.1.1** Appeal Brief Annex A, p. 25 (EN), pp. 22-23 (FR), pp. 34-35 (KH).

1140 **F54** Appeal Brief, paras 435, 437. Even though Appellant listed Ground 60 as a Type 1 ground, for the reasons explained below, those arguments are secondary to his contention that the TC misinterpreted the Closing Order in setting out its *saisine*.

1141 **E465** Case 002/02 TJ, paras 3358, 3360.

1142 **F54** Appeal Brief, paras 435-436, 438.

1143 **E465** Case 002/02 TJ, paras 3356, 3358 *citing* **D427** Closing Order, paras 213-215, 802-803. See also **D427** Closing Order, paras 814-831 containing details of killings of Vietnamese throughout Cambodia.

1144 **D427** Closing Order, paras 802-804.

1145 **D427** Closing Order, para. 802.

1146 **D427** Closing Order, paras 802-804.

in the East Zone. There is also evidence that Vietnamese civilians were targeted and killed throughout Cambodia [...] in particular for the Northeast Zone and the North Zone",[1147] and that the targeted killings of Vietnamese based on the theory of matrilineal descent "seems to have been applied throughout Prey Veng and Svay Rieng as well as in other parts of the country".[1148]

318. The Closing Order also found "a direct call to kill *all members of the Vietnamese community remaining in Cambodia*";[1149] that cadres "were required to find and kill *all Vietnamese people throughout Cambodia*";[1150] and that "*wherever there were Vietnamese*, 'everyone had to be careful and to find them and to 'sweep them up'".[1151]

319. In disputing the legal characterisation of facts outside Prey Veng and Svay Rieng, Appellant ignores the specific sections characterising "Genocide by Killing: Vietnamese",[1152] "Murder",[1153] and "Extermination".[1154] As the TC explained,[1155] when characterising the facts of killings, the CIJs did *not* limit the charge exclusively to killings occurring in these two provinces.[1156] Indeed, these sections reiterate that: "in addition to the East Zone *the killings occurred across numerous other zones* during the same temporal period;[1157] "the killing of Vietnamese [...] *became widespread* beginning in 1977",[1158] and "execution of [Vietnamese] increased progressively until it reached such a scale as to qualify as extermination."[1159]

320. Moreover, Appellant was on notice - before and during the Case 002/02 trial - that the TC considered itself seised of killings of Vietnamese nationwide. This was set out in the Severance Annex, which defined the scope of the genocide, murder and extermination charges by reference to "the treatment of the Vietnamese" as a whole, without

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1147 **D427** Closing Order, para. 214.
1148 **D427** Closing Order, para. 215.
1149 **D427** Closing Order, para. 814 (emphasis added).
1150 **D427** Closing Order, para. 815 (emphasis added).
1151 **D427** Closing Order, para. 817 (emphasis added).
1152 **D427** Closing Order, paras 1335, 1343-1349.
1153 **D427** Closing Order, paras 1373-1380. *See* especially para. 1373 finding murder established by facts concerning "treatment of [...] Vietnamese".
1154 **D427** Closing Order, paras 1381-1390. *See* especially para. 1381 finding extermination established by facts concerning "treatment of Vietnamese".
1155 **E465** Case 002/02 TJ, para. 3356, fn. 11317 *citing* **D427** Closing Order, paras 1335, 1350, 1373, 1381, and explaining that "the legal findings of genocide as well as murder and extermination as [CAH] in the Closing Order contain no geographical limitation and directly refer to the factual findings."
1156 As was the case with the deportation charges, *see* **D427** Closing Order, para. 1397 ("The legal elements of the crime against humanity of deportation have been established in **Prey Veng** and **Svay Rieng** as well as at the **Tram Kok Cooperatives**").
1157 With respect to genocide, *see* **D427** Closing Order, para. 1347 (emphasis added).
1158 With respect to CAH of murder, *see* **D427** Closing Order, para. 1378 (emphasis added).
1159 With respect to CAH of extermination, *see* **D427** Closing Order, para. 1386.

limitation.[1160] The Annex included within the scope of Case 002/02 all paragraphs of the Closing Order relevant to the genocide, murder and extermination of Vietnamese, including *all* the sections in which the CIJs established killings outside Prey Veng and Svay Rieng.[1161] The TC made further pronouncements to that effect during the course of the trial.[1162] Despite receiving such notice, Appellant failed to seek clarification[1163] before he filed his Closing Brief,[1164] to which the TC responded by way of *further* clarification in the Judgment.[1165]

321. As discussed previously, to the extent Appellant takes issue with the scope of the CIJs' *saisine in rem*, the TC correctly considered them time-barred pursuant to IR 89(1).[1166]

Ground 65: Absence of saisine for deaths from health problems and living conditions [1167]

322. The Closing Order seised the TC with factual findings relating to a CPK policy[1168] and its implementation at worksites across the DK, pursuant to a JCE.[1169] Consequently, "in general terms",[1170] the CIJs found that deaths occurred (i) *en masse* at all worksites with

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1160 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, paras 5(i)(b) (Genocide), 5(ii)(b)(1) (Murder), 5(ii)(b)(2) (Extermination). Compare, e.g. **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, para. 5(ii)(b)(4) (limiting the deportation charge to "the treatment of the Vietnamese in Prey Veng and Svay Rieng").

1161 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, pp. 1-3 *citing*, **D427** Closing Order, paras 205-207, 213-215 ("Factual Findings of Joint Criminal Enterprise"), 791-831 ("Factual Findings of Crimes"), 1335, 1343-1349, 1373-1380, 1381-1390 ("Legal findings" of genocide, CAH of murder, and CAH of extermination, respectively). Where sections of the Closing Order regarding the treatment of the Vietnamese were excluded from the scope of Case 002/02 through severance, this was expressly noted.

1162 **E380/2** TC Decision on Vietnamese Additional Witnesses and WRIs, paras 21 (*citing* **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, paras 5(i)(b) (Genocide), 5(ii)(b)(1) (Murder), 5(ii)(b)(2) (Extermination)), 27. Contrary to Appellant's claim (**F54** Appeal Brief, para. 437), the TC did not state, at para. 27 of this decision, that it was seised of killings against Vietnamese uniquely within Prey Veng and Svay Rieng, but rather recalled that "the crimes charged in Case 002/02 relating to the treatment of the Vietnamese are based *to a large extent* on underlying crimes alleged to have been committed in Svey Rieng and Prey Veng provinces".

1163 **F36** Case 002/01 AJ, para. 237. As raised by Appellant (**F54** Appeal Brief, para. 436), the Co-Prosecutors acknowledge their own confusion at trial with regard to the killings of Vietnamese outside Prey Veng and Svay Rieng, and admittedly, could have asked for clarification as to the *saisine*, but did not.

1164 **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1880-1888, 1894-1896.

1165 **E465** Case 002/02 TJ, para. 3360.

1166 **E465** Case 002/02 TJ, fn. 11317. *See* response to Ground 38. The Co-Prosecutors further note the CIJs' rejection of a request to consider new evidence of alleged crimes committed against Vietnamese in Kampong Chhnang (**F54** Appeal Brief, para. 436, fn. 757 *citing* **D250/3/3** OCIJ Combined Order on OCP and CP Requests for Investigative Action Regarding the Vietnamese and the Khmer Krom, paras 7-9) but remind Appellant that, had the Closing Order and the impugned Order created a "contradiction", as he suggests (**F54** Appeal Brief, para. 436), he should have availed of his right to file a preliminary objection against the Closing Order under IR 89(1).

1167 Ground 65: **F54** Appeal Brief, *Absence of saisine for deaths from health problems and living conditions*, paras 465-468; **F54.1.1** Appeal Brief Annex A, p. 27 (EN), pp. 24-25 (FR), pp. 37-38 (KH).

1168 **D427** Closing Order, paras 168-177. *See particularly* paras 168-169, 172-173, 175.

1169 **D427** Closing Order, paras 302-413. *See particularly* paras 310-314, 334-345, 358-363, 376-379, 389-392, 403-410.

1170 *See* **E465** Case 002/02 TJ, para. 1138.

which they were seised[1171] and (ii) through the creation of conditions that were calculated to bring about the destruction of part of the population.[1172] These "overall conditions"[1173] apply to each worksite listed in the Closing Order, including the TK Cooperatives.[1174]

323. Appellant specifically alleges that the TC incorrectly summarised his argument that it was not seised of deaths from health issues,[1175] but fails to demonstrate how this invalidates the TC finding itself seised of deaths other than starvation in the TK Cooperatives. Appellant incorrectly cites one sentence of the CO,[1176] ignoring that, in the very same paragraph, the CIJs stated that people experienced health problems and inadequate medical treatment.[1177] That sick people died as a result of inadequate medical treatment is further consistent with the WRI supporting the paragraph.[1178]

Ground 66: Absence of saisine for the deaths due to starvation outside of Samraong and Ta Phem[1179]

324. Appellant merely repeats his unsuccessful arguments from trial[1180] without demonstrating that the TC's rejection of them constituted an error warranting the SCC's intervention.[1181] His claim that the TC was only seised with deaths from starvation at Samraong and Ta Phem[1182] further fails, as it is based on a fragmented reading of the CO. The CIJs noted that "nearly all witnesses describ[ed] a lack of food in the cooperatives" at TK, while some explicitly "recall[ed] people dying of starvation".[1183] Appellant ignores the CIJs' referral to not only explicit evidence of starvation in Samraong and Ta Phem Communes, but also to a witness who lived in TK District *outside* the impugned

1171 **D427** Closing Order, para. 1381.
1172 **D427** Closing Order, para. 1382.
1173 **D427** Closing Order, para. 1387. Conditions include *e.g.* starvation, medical care, and forced labour.
1174 *See* **E465** Case 002/02 TJ, para. 1141.
1175 **F54** Appeal Brief, para. 467, fn. 829 *citing* **E465** Case 002/02 TJ, para. 1139. *Contra* **E465** Case 002/02 TJ, para. 811.
1176 **F54** Appeal Brief, para. 468.
1177 **D427** Closing Order, para. 313. *See also* **E465** Case 002/02 TJ, fn. 3879.
1178 **D427** Closing Order, fn. 1292 *citing* **E3/5135** Pil Kheang WRI, EN 00233133.
1179 Ground 66: **F54** Appeal Brief, *Absence of saisine for the deaths due to starvation outside of Samraong and Ta Phem*, paras 471-473; **F54.1.1** Appeal Brief Annex A, p. 27 (EN), p. 25 (FR), p. 38 (KH).
1180 **F54** Appeal Brief, fns 777, 837, both *citing* **E457/6/4/1** KS Case 002/02 Closing Brief, 2 May 2017 and amended 2 Oct. 2017, paras 924-931.
1181 **F54** Appeal Brief, para. 472.
1182 **F54** Appeal Brief, para. 473.
1183 **D427** Closing Order, para. 312, fn. 1283.s

communes,[1184] who stated "There were many deaths [...] from starvation".[1185] As such, the TC was properly seised to consider deaths from starvation throughout the entire TK District.[1186]

Grounds 67, 71, 73, 74: Saisine for facts of "discrimination"[1187]

325. Appellant erroneously claims that he was not charged with discrimination against NP at TK[1188] or KTC, or against ex-KR officials and soldiers at 1JD and KTC, as he alleges the Closing Order did not include facts of "discrimination", and because multiple groups faced similar treatment.[1189] The acknowledgement that many groups endured difficult conditions at does not detract from the discriminatory nature of the treatment, as, logically, multiple groups may be simultaneously discriminated against.[1190] Appellant further ignores the CO's conclusion that political persecution occurred at "*nearly all* the sites within the scope of the investigation" including each of the above-noted sites,[1191] as well as the findings that NP suffered *de facto* discrimination nationwide,[1192] and that a nationwide policy targeting ex-KR officials existed throughout the DK.[1193] Appellant simply repeats an unsuccessful argument from trial based on his erroneous reading of the

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1184 **D427** Closing Order, para. 312, fn. 1283 *citing* **E3/5835** Sok Soth WRI, EN 00223504-05, 08 – witness was present in Sre Kruo (Cheang Tong Commune), KTC (Kus Commune), Angk Roka (Cheang Tong or Trapeang Thum North Commune), and Angk Baksei (Cheang Tong Commune). For identification of these communes, *see* **E465** Case 002/02 TJ, paras 946, 2683, 807; **E3/2434** Report from An to Educational Office of District 105, 20 Aug. 1977, EN 00276603. For Cheang Tong Commune, *see* response to Ground 39. *Contra* **F54** Appeal Brief, fn. 839.

1185 **D427** Closing Order, fn. 1283 *citing* **E3/5835** Sok Soth WRI, EN 00223508-09.

1186 **E465** Case 002/02 TJ, paras 811, 1138.

1187 Ground 67: **F54** Appeal Brief, *Absence of saisine for facts of "discrimination" against the New People other than the limitation of certain "political rights"*, paras 475-480; **F54.1.1** Appeal Brief Annex A, p. 28 (EN), p. 25 (FR), pp. 38-39 (KH); Ground 71: **F54** Appeal Brief, *Lack of jurisdiction for "discrimination" against former Khmer Republic soldiers,* paras 490-492; **F54.1.1** Appeal Brief Annex A, p. 29 (EN), p. 26 (FR), pp. 40-41 (KH); Ground 73: **F54** Appeal Brief, *Absence of saisine for facts of "discrimination" targeting New People,* para. 495-499; **F54.1.1** Appeal Brief Annex A, p. 30 (EN), p. 27 (FR), p. 41 (KH); Ground 74: **F54** Appeal Brief, *Absence of Saisine for facts of "discrimination" targeting ex-KR soldiers and officials,* paras 500-504; **F54.1.1** Appeal Brief Annex A, p. 30 (EN), p. 27 (FR), p. 42 (KH).

1188 Appellant claims that the discrimination charged at TK is limited to "certain political rights", *see* **F54** Appeal Brief, para. 477.

1189 **F54** Appeal Brief, paras 478, 490, 497, 502.

1190 Arrests at 1JD and KTC were not, contrary to Appellant's claims, "indiscriminate"; the Closing Order rather states that disappeared people belonged to a number of groups, *see e.g.* **D427** Closing Order, para. 366. *Contra* **F54** Appeal Brief, 491, 498, 502.

1191 **D427** Closing Order, para. 1416 (emphasis added).

1192 *See e.g.* **D427** Closing Order, paras 1363, *cited* at **E465** Case 002/02 TJ, fn. 372 (NP were a group of the general DK population who were "considered to be more politically unreliable"); 1417, 1424, *cited* at **E465** Case 002/02 TJ, fn. 372 (the CPK's "enemy" groups included NP, who were "treated differently" and "subjected to harsher treatment than the old people, with a view to reeducating them or identifying 'enemies' amongst them").

1193 **D427** Closing Order, paras 208-209.

CO.[1194] The TC rightly dismissed this argument, noting Appellant's reading raised "nothing of substance"; the Closing Order implied that targeted groups were at particular risk of being "re-educated or disposed of" as they were arrested *en masse*.[1195]

326. With respect to discrimination against NP at KTC and TK, the Closing Order clearly states that NP were closely monitored and would be arrested for speaking against the CPK at TK,[1196] and that NP were specifically arrested, brought to KTC to be detained, and killed at KTC.[1197] Upon the arrival of NP in TK District, the districts and commune secretaries attended a meeting "at which they were advised that there would be a purge of the evacuees" from Phnom Penh.[1198] Appellant himself acknowledges that the Closing Order cites a witness who stated biographies were recorded in TK District to allow for the CPK to purge NP and send them to KTC,[1199] while ignoring evidence clarifying that NP were considered "[s]erious offense prisoners" and treated worse than "light" offenders.[1200]

327. With respect to discrimination against former ex-KR officials and soldiers, Appellant ignores the CIJs' findings that many of the people who disappeared from 1JD had perceived links to the ex-KR regime,[1201] and that former ex-KR officials and soldiers disappeared on arrival in TK District and were sent to KTC.[1202] The Closing Order further infers that those who were arrested and sent to security centres, such as KTC, faced discrimination before being arrested, reeducated and eliminated, and that such acts continued by virtue of these further acts being committed against them at KTC.[1203]

1194 **F54** Appeal Brief, paras 490, 496, 497, 501, 502. This argument is based on para. 1418 of the CO, which states that enemies of the CPK were subject to harsher treatment at cooperatives and worksites, but excludes language that enemies were subject to harsher treatment when they were arrested *en masse* for reeducation and elimination at security centres.

1195 **E465** Case 002/02 TJ, para. 2835.

1196 *See e.g.* **D427** Closing Order, para. 319.

1197 *See e.g.* **D427** Closing Order, para. 500, fn. 2167 *citing* **E3/7901** Sieng Soeun WRI, EN 00223463 ("Q: Where did the prisoners come from? A: Many came in from the fall of Phnom Penh. From the bases too. After the fall of Phnom Penh they brought them to the bases. They called them the 17 group, and they sent them out to be killed"); **E3/4627** Iep Duch WRI, EN 00223476 ("Q: Where did those prisoners come from? Why were they detained there? A: Probably the majority were the brothers and sisters who had been evacuated from the cities, those called the 17 April group."); **E3/5214** Say Sen WRI, EN 00225509 ("Question: When were most prisoners killed at Kraing Ta Chan? Answer: In 1975. The majority of the prisoners brought in were not shackled. They put them in the prison, and then they called them back out and killed them one at a time. The majority of the prisoners were 17 April people.").

1198 **D427** Closing Order, para. 498.

1199 **F54** Appeal Brief, para. 497 *citing* **D427** Closing Order, para. 498.

1200 **D427** Closing Order, para. 500, fn. 2167 *citing* **E3/5214** Say Sen WRI, EN 00225510.

1201 **D427** Closing Order, para. 366.

1202 **D427** Closing Order, para. 498, fn. 2159.

1203 **D427** Closing Order, para. 1418.

Grounds 68, 72, 75, 76, 77, 124, 134: Saisine for persecution on political grounds: three groups[1204]

328. Appellant's contention that the TC was not seised to consider "real or perceived enemies" as a persecuted group[1205] is based on an erroneous reading of the Closing Order and is unsupported by law. This Chamber has previously found "real or perceived enemies of the CPK" to constitute a sufficiently discernible group,[1206] even when the group "may include *various* categories of persons"[1207] who are not a single homogenous polity.[1208] The CAH of persecution has been "understood as encompassing situations where the perpetrator designated targeted groups in broad strokes,"[1209] and further allows for persecuted groups to be defined in a negative sense (i.e., non-Khmer), or in a cumulative fashion (i.e., groups opposed to the ideology),[1210] in such a way that it "might target aggregated groups without any common identity or agenda."[1211] This approach is further supported by reasoning from post-WWII jurisprudence, wherein persecution was established against a broad group of individuals targeted as "enemies" by the Nazis.[1212]

1204 Ground 68: **F54** Appeal Brief, *Trapeang Thma Dam: Persecution on Political Grounds,* paras 482-483; **F54.1.1** Appeal Brief Annex A, p. 28 (EN), p. 25 (FR), p. 39 (KH); Ground 72: **F54** Appeal Brief, *Saisine restricted to the three groups define in the legal characterisation set out in the CO,* paras 493-494; **F54.1.1** Appeal Brief Annex A, p. 29 (EN), p. 26-27 (FR), p. 41 (KH); Ground 75: **F54** Appeal Brief, *Saisine restricted to the three groups define in the legal characterisation set out in the CO,* paras 505-510; **F54.1.1** Appeal Brief Annex A, p. 30 (EN), pp. 27-28 (FR), p. 42 (KH); Ground 76: **F54** Appeal Brief, *Jurisdiction limited to 3 groups defined in the legal characterisation of the Closing Order,* paras 511-513, **F54.1.1** Appeal Brief Annex A, p. 31 (EN), p. 28 (FR), p. 43 (KH); Ground 77: **F54** Appeal Brief, *Persecution on political grounds*, paras 514-516, Annex A p. 31 (EN), p. 28 (FR), p. 43 (KH); Ground 124: **F54.1.1** Appeal Brief Annex A, 45-46 (EN), pp. 41-42 (FR), pp. 64-65 (KH); Ground 134: **F54** Appeal Brief, *Persecution on political grounds,* paras 884-886, **F54.1.1** Appeal Brief Annex A, p. 48 (EN), p. 44 (FR), p. 68 (KH).

1205 **F54** Appeal Brief, paras 482-483, 493-494, 505-510, 511-513, 514-516, 884-886.

1206 Case 001-**F28** *Duch* AJ, paras 273, 282; **F36** Case 002/01 AJ, para. 669. To determine if a group is sufficiently discernible for the purposes of persecution the guiding factor is *how the perpetrator* defined the group, *see* Case 001-**F28** *Duch* AJ, paras 272-273. The SCC has further clarified that "as long as political enemies were defined pursuant to a policy employing some kind of general criteria, while other members of the population enjoyed a degree of freedom, there are grounds to find persecution on political grounds", *see* Case 001-**F28** *Duch* AJ, para. 282, and that perpetrators of persecution might target aggregated groups without any common identity or agenda, *see* **F36** Case 002/01 AJ, para. 678.

1207 Case 001-**F28** *Duch* AJ, para. 272 (emphasis added); **F36** Case 002/01 AJ, para. 669.

1208 **F36** Case 002/01 AJ, para. 678.

1209 **F36** Case 002/01 AJ, para. 677.

1210 **F36** Case 002/01 AJ, para. 678, *citing Tadić* TJ, paras 714-718, *Ministries* Judgment, p. 604, *Kupreškić* TJ, para. 602.

1211 **F36** Case 002/01 AJ, para. 678.

1212 *Ministries* Judgment, p. 547. Concerning the establishment of concentration camps, the Tribunal found that the camps were used broadly to imprison those who disagreed with Nazi policy or those who became the objects of Nazi persecution, which "included those persecuted for religious beliefs, such as Catholic priests, Protestant pastors, as well as political opponents, Jews, and foreigners who rebelled against their lot or who transgressed against the cruel conditions under which they were compelled to work". Likewise, the Tribunal considered that the way in which the courts and judiciary were manipulated by the Nazis to broadly deprive "Jews and other enemies and opponents of national socialism" the right to a fair trial, constituted persecution, *see* pp. 602-604 (quote on p. 604).

329. Contrary to Appellant's assertions, the TC's *saisine* was not limited to ex-Khmer Republic officials and soldiers, NP and Cambodians returning from abroad.[1213] A proper reading of the Closing Order led the TC to rightly conclude that the three aforementioned groups were referred to in non-exhaustive language as examples within the broader category of real or perceived enemies.[1214] The TC was thus seised to consider persecution against this group, which consisted of "anyone who disagreed with the CPK ideology".[1215]

330. The Closing Order specifies that one of the five core policies of the CPK was "to implement and defend the CPK socialist revolution through… the killing of 'enemies'".[1216] The CIJs found that the CPK considered as 'enemies' anyone who disagreed with CPK ideology,[1217] including, *inter alia*, those suspected of being Central Intelligence Agency of the United States of America ("CIA"), KGB or Vietnamese ("Yuon") agents,[1218] individuals engaging in "immoral" activities associated with the old regime,[1219] individuals who did not agree to forced marriage,[1220] and individuals who did not finish assigned labour in time.[1221] The CIJs further found that the CPK called for its "enemies" to be arrested, interrogated and smashed.[1222] Through these factual findings, the CIJs held that "CPK authorities identified several groups as 'enemies' based on their real or perceived political beliefs or political opposition to those wielding power within the CPK. […] The categories of so-called 'enemies' continued to expand over time. Moreover, the identification of people as targets for persecution, on the basis that anyone who disagreed with CPK ideology was excluded, amounts to persecution on political grounds."[1223]

331. With respect to TTD,[1224] Appellant selectively ignores the clear findings of the CIJs,

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1213 **F54** Appeal Brief, paras 482, 494, 507, 510, 512, 515, 886.

1214 **E465** Case 002/02 TJ, para. 170 (referring to the CIJs' use of "such as" when describing to the aforementioned groups). *See also* **D427** Closing Order, paras 1363-1364, 1416-1418, 1424 (where the groups are referred to as examples falling within the broader category of real or perceived enemies).

1215 **E465** Case 002/02 TJ, para. 718.

1216 **D427** Closing Order, paras 178-179, 1416-1418 (throughout DK, "in cooperatives and worksites […] real or perceived enemies of the CPK were subjected to harsher treatment and living conditions than the rest of the population […and] arrested *en masse* for reeducation and elimination at security centres and execution sites" including at TTD, KCA, KTC, AuKg, PK).

1217 **D427** Closing Order, para. 1417.

1218 *See e.g.* **D427** Closing Order, paras 180, 190.

1219 *See e.g.* **D427** Closing Order, para. 191.

1220 *See e.g.* **D427** Closing Order, para. 220.

1221 *See e.g.* **D427** Closing Order, para. 311.

1222 *See e.g.* **D427** Closing Order, paras 183, 186, 188-190, 191, 202.

1223 **D427** Closing Order, para. 1417.

1224 Responding specifically to Ground 68.

wherein CPK soldiers and cadres were known to collect biographies of workers "in order to identify those to be later arrested or killed."[1225] The CIJs found that Special Case units were created at TTD for people considered to "hav[e] an 'ideological disease'",[1226] and specified that "[i]nformants would be placed amongst the units to enquire about biographies and backgrounds of the workers and identify individuals for arrest [...] They would be accused of 'being American CIA agent' or linked to 'Yuon'".[1227]

332. With respect to KCA,[1228] the Closing Order detailed that workers were sent to the site "for tempering or refashioning because of their perceived bad biographies or supposed links with traitorous networks",[1229] and listed numerous groups considered to be "enemies" at KCA, including 'bad elements' from Division 502, associates of certain RAK units, and soldiers from the East Zone.[1230] The Closing Order further stated that enemies, including 5,000 soldiers who were purged from the East Zone,[1231] were sent for "reeducation" or to be killed at KCA,[1232] and that living and working conditions on site depended on "how much of a 'traitor' the worker was perceived to be".[1233]

333. With respect to KTC,[1234] the Closing Order clearly stated that arrests occurred based on enemy biographies,[1235] and that prisoners were interrogated, accused of being enemies,

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1225 **D427** Closing Order, para. 343. The CIJs referred to witnesses who indicated that the CPK "studied those people background to see whether they had ever done anything wrong", *see* fn. 1433 *citing* **E3/5281** Peng Bunthara WRI, EN 00322936; and that "If [the CPK] wanted to arrest us [...] they asked about our parents'/relatives' backgrounds, title, class or official rank"; **E3/7323** Heng Samuot WRI, EN 00289999.

1226 **D427** Closing Order, para. 336. The CIJs continued: "The "Special Case Unit" had the highest work quotas and those whom it was considered could not be reeducated in the Unit would disappear and never be seen again."

1227 **D427** Closing Order, para. 346.

1228 Responding specifically to Ground 72. *Note*: Appellant repeats this claim as a separate appeal ground (Ground 124). He does not, however, include arguments to support Ground 124 at any point in his brief, and as Appellant himself has noted that "Annex A contains no additional allegations [...] All the arguments that the Prosecution must respond to are contained in the 750 pages of the Appeal Brief," the Co-Prosecutors consider this a sufficient response to both Grounds 72 and 124, *see* **F55/1** Response to Khieu Samphan's Defence to the Prosecution's Request for Additional Pages, paras 4-5.

1229 **D427** Closing Order, paras 389-392.

1230 **D427** Closing Order, paras 387, 389.

1231 **D427** Closing Order, para. 290 *citing e.g.* **E3/5273** Kev Kin WRI, EN 00290500 ("Q: Did you know why they took people from the East Zone to build the airport? Why did they tie up these people and transport them in trucks to Phnom Penh? A: I heard them say that these people were KGB and CIA spies. They took them to be tempered because they were accused of betraying *Angkar*. I didn't know the reason that they arrested them, but I witnessed this twice: they pointed guns and pushed the people into a truck").

1232 **D427** Closing Order, paras 201, 1377.

1233 **D427** Closing Order, para. 390. The broad groups of enemies were subjected to the harshest conditions and targeted for killing, *see* **D427** Closing Order, paras 390-392 *citing e.g.* **E3/5530** Kaot Rin WRI, EN 00423585; **E3/5280** Sem Hoeun WRI, EN 00290515-16; **E3/7877** Witness Tes Trech WRI, EN 00346980; **E3/467** Keo Loeur WRI, EN 00205074; **E3/369** Koy Mon WRI, EN 00272717; **E3/471** Prak Yoeun WRI, EN 00223337; **E3/5276** Sin Sot WRI, EN 00287356; **E3/5277** Pel Kan WRI, EN 00292835; **E3/3961** Soum Chea WRI, EN 00223348; **E3/5263** Sreng Thi WRI, EN 00282225.

1234 Responding specifically to Ground 75.

1235 **D427** Closing Order, paras 497, 498, 500.

and told to identify their "traitor leaders".[1236] Those detained included NP, "former Khmer Republic soldiers, CPK cadre, Chinese, Vietnamese, and Cham".[1237] The Closing Order describes a former detainee who was asked "whether he was American or Yuon CIA", and notes that people may have been questioned about links to FUNK.[1238]

334. With respect to AuKg,[1239] the CIJs detailed that AuKg was established to screen, reeducate, and purge "no-good" "counter-revolutionary elements".[1240] The Closing Order notes that prisoners were arrested for being "critical" of the Party,[1241] and questioned about "their networks and activities".[1242] The CIJs found the detainee population included union workers, the Jarai minority, Division 801 cadres, intellectuals, and Yuon.[1243]

335. With respect to PK,[1244] the CIJs plainly stated that prisoners at PK were "arrested on suspicion of being traitors to the revolution" and that, upon arrest, prisoners had to write their biographies.[1245] The CIJs noted that prisoners were forced to attend meetings where they were accused of being CIA,[1246] and that, during interrogations, they were questioned about their links to the CIA and/or Vietnamese networks.[1247]

336. It is thus clear that the CIJs did not limit their findings on political persecution at TTD, KCA, KTC, AuKg, and PK uniquely to the three groups Appellant cites. Based on these factual findings, the TC was unequivocally seised to consider the persecution of "real or perceived enemies" at each site, and to determine the individuals encompassed within that group based on the facts of Case 002/02.

337. Being properly seised of these unambiguous factual and legal findings, the TC examined whether the targeted group of 'real or perceived enemies of the CPK' was sufficiently discernible at TTD, KCA, KTC, AuKg, and PK so as to allow it to consider whether the requisite elements for the CAH of persecution had been established.[1248] Due to the

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1236 **D427** Closing Order, para. 509. *See also* para. 506.
1237 **D427** Closing Order, para. 500.
1238 **D427** Closing Order, para. 506.
1239 Responding specifically to Ground 76.
1240 **D427** Closing Order, paras 591, 605.
1241 **D427** Closing Order, paras 600-601.
1242 **D427** Closing Order, para. 613.
1243 **D427** Closing Order, paras 599, 601, 603, 614, 617.
1244 Responding specifically to Ground 77.
1245 **D427** Closing Order, para. 634.
1246 **D427** Closing Order, para. 634.
1247 **D427** Closing Order, para. 640.
1248 For TTD, *see* **E465** Case 002/02 TJ, para. 1407. In that same paragraph, the TC noted that the "discernibility of this group may be assessed by examining whether the victims belonged to a category of the group as identified by the Party leadership." For KCA, *see* **E465** Case 002/02 TJ, para. 1821; for KTC, *see* **E465** Case 002/02 TJ, para. 2838; for AuKg, *see* **E465** Case 002/02 TJ, para. 2983; for PK, *see* **E465**

overwhelming evidence of differential treatment suffered by individuals identified as having a 'bad background', the TC was satisfied that "real or perceived enemies of the CPK" was a clearly discernible group at each site.[1249] As such, the TC was properly seised to consider whether the CAH of persecution had been established against "real or perceived enemies of the CPK" at TTD, KCA, KTC, AuKg, and PK.

Ground 69: Saisine for deaths in villages and health clinics outside 1JD [1250]

338. Appellant incorrectly claims,[1251] without any support, that the Closing Order limited the TC to only consider deaths that physically occurred at 1JD. Contrary to this claim, the TC correctly stated that the Closing Order charged Appellant with extermination[1252] on the basis that many people died "as a result of the conditions imposed" at 1JD, including the "deprivation of food, accommodation, medical care and hygiene as well as exhaustion".[1253] The CIJs expressly stated that conditions "resulted in many people becoming sick with various diseases", "most hospitals were a long distance away, [and] medics were not [...] always stationed at the worksite", [1254] citing multiple witness statements which indicated that people who became very ill were sent off the worksite.[1255] The Closing Order further clearly stated that people "died from diseases".[1256]

Case 002/02 TJ, para. 3139. *Note*: Appellant repeats this claim as another appeal ground for PK, *see* Ground 134. He does not, however, substantiate this ground, and simply refers back to Ground 77. As such, the Co-Prosecutors consider this a sufficient response to Grounds 77 and 134.

1249 **E465** Case 002/02 TJ, paras 1407 (individuals identified as NP, former Lon Nol soldiers, 'Yuon', CIA agents, students, intellectuals, and those considered to have engaged in activities against *Angkar*, were each targeted for arrest at TTD); 1821 (soldiers sent to work at KCA were identified as enemies due to their real or perceived political beliefs or opposition to the CPK); 2838, 2983, 3139 (the CPK considered as enemies "counter-revolutionaries, detractors and traitors of the revolution, feudalists and those engaging in feudalistic practices, the Vietnamese, foreign agents and collaborators of the foregoing categories").

1250 Ground 69: **F54** Appeal Brief, *Absence of saisine for deaths that occurred outside of the 1st January dam*, paras 484-486; **F54.1.1** Appeal Brief Annex A, p. 28 (EN), pp. 25-26 (FR), pp. 39-40 (KH).

1251 **F54** Appeal Brief, para. 485.

1252 Recharacterised as murder with *dolus eventualis, see* **E465** Case 002/02 TJ, paras 1668, 1672.

1253 **E465** Case 002/02 TJ para. 1668 *citing* **D427** Closing Order, paras 359 (noting insufficient food, inadequate accommodation, and lack of supplies including mosquito nets), 363 (stating that some people died from diseases), 1381, 1387, 1389.

1254 **D427** Closing Order, para. 360.

1255 **D427** Closing Order, para. 360, fn. 1541 *citing e.g.* **E3/5267** Ut Seng WRI, EN 00282357, **E3/7775** Kang Ut WRI, EN 00233534 ("when someone was seriously ill they would be sent to the far-away hospital"); **E3/5255** Au Hau WRI, EN 00250046-47 ("those who were seriously ill were sent to the District Hospital or Sector Hospital").

1256 **D427** Closing Order, para. 363.

Ground 70: Absence of saisine for deaths that occurred outside of the 1st January dam [1257]

339. As Appellant admits,[1258] the Closing Order indicated that "relevant evidence set out *infra*",[1259] would be taken into account for the legal characterisation of the crime at each of the sites where extermination was established. The Closing Order explicitly held that the legal elements of extermination were established with regard to the facts concerning "people who were killed or died en masse at […] 1st January Dam"[1260] "as a result of the conditions imposed", including "hard labour."[1261] The description of material facts at 1JD is unambiguously clear: "Accidents such as collapsing stones or soil killed [people]",[1262] and the underlying evidence indicates that the accidents occurred due to the imposition of hard labour conditions,[1263] thus falling squarely within the legal characterisation.

Ground 78: Absence of saisine for executions that took place at Trea Village [1264]

340. The Closing Order extensively detailed facts regarding the killing of Cham at Trea Village,[1265] and charged Appellant with the CAH of extermination of the Cham, finding the crime "was perpetrated, *notably*, in the security centres of Trea Village and Wat Au Trakuon".[1266] Appellant's claim regarding the CAH of murder at Trea Village,[1267] is inconsequential, as he was not convicted of murder – the deaths at Trea Village were rather subsumed by the CAH of extermination,[1268] the *saisine* of which Appellant does not dispute.

1257 Ground 70: **F54** Appeal Brief, *Absence of saisine for accidental deaths*, paras 487-89; **F54.1.1** Appeal Brief Annex A, p. 29 (EN), p. 26 (FR), p. 40 (KH).

1258 **F54** Appeal Brief, para. 488.

1259 **D427** Closing Order, para. 1383.

1260 **D427** Closing Order, para. 1381.

1261 **D427** Closing Order, para. 1387.

1262 **D427** Closing Order, para. 363.

1263 *See e.g.* **D427** Closing Order, fn. 1561 *citing* **E3/5255** Au Hau WRI, EN 00250046 ("there were cases of soil collapsing and crushing people because they were overworked and had leaned on the soil causing it to collapse and kill people").

1264 Ground 78: **F54** Appeal Brief, *Absence of saisine for executions that took place at Trea Village*, paras 517-518; **F54.1.1** Appeal Brief Annex A, p. 31 (EN), p. 28 (FR), pp. 43-44 (KH).

1265 *See e.g.* **D427** Closing Order, paras 784-790.

1266 **D427** Closing Order, para. 1386 (emphasis added).

1267 **F54** Appeal Brief, para. 518.

1268 **E465** Case 002/02 TJ, paras 4337, 4341(i).

Ground 79: Absence of saisine for facts of persecution on political grounds through a JCE[1269]

341. The Closing Order explicitly stated that CPK leaders, including Appellant, implemented, through a JCE, the CAH of persecution on political grounds through the MOP,[1270] and that the Cham were targeted in the MOP.[1271] The Additional Severance Decision also plainly stated that political persecution against the Cham was to fall within the *saisine* of Case 002/02.[1272]

Ground 80: Vietnamese[1273]

342. Appellant merely reiterates his claim, dismissed by the TC,[1274] that these facts were not included in the IS,[1275] and claims, without any support, that the facts with which the CIJs were seised were geographically circumscribed to exclude the DK's territorial waters.[1276] Appellant fails to demonstrate any error in finding that the Closing Order seised the TC of these facts.[1277] As the TC correctly noted, the Closing Order expressly cited a contemporaneous record of the capture and killing of Vietnamese at sea when setting out the evidence of implementation of the CPK policy against the Vietnamese.[1278]

Ground 81: Ex-Khmer Republic soldiers and officials [1279]

343. Appellants claim that the Closing Order does not mention ex-KR soldiers and officials as a specific group, and thus, they were not within the TC's *saisine*,[1280] misrepresents the CO.[1281] Though ex-KR soldiers were not identified as a group under the "Treatment of

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1269 Ground 79: **F54** Appeal Brief, *Absence of saisine for facts of persecution on political grounds through a JCE*, para. 519; **F54.1.1** Appeal Brief Annex A, pp. 31-32 (EN), p. 29 (FR), p. 44 (KH).
1270 **D427** Closing Order, para. 1525(i)(b).
1271 **D427** Closing Order, paras 266, 268, 281.
1272 **E301/9/1** TC Additional Severance and Scope Decision, para. 43; **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex paras 2(i), 3(i), 5(ii)(b)(7), 6(i).
1273 Ground 80: **F54** Appeal Brief, *Vietnamese*, paras 520-521; **F54.1.1** Appeal Brief Annex A, p. 32 (EN), p. 29 (FR), pp. 44-45 (KH).
1274 **E380/2** TC Decision on Vietnamese Additional Witnesses and WRIs, para. 21.
1275 **F54** Appeal Brief, paras 520-521. *See* **E1/371.1** Thang Phal, T. 6 Jan. 2016, 09.32.11-09.34.53, p. 13, lines 14-24.
1276 **F54** Appeal Brief, para. 520.
1277 **F54** Appeal Brief, paras 520-521.
1278 **E465** Case 002/02 TJ, para. 3357, fn. 11321.
1279 Ground 81: **F54** Appeal Brief, *Ex-Khmer Republic soldiers and officials,* paras 522-530; **F54.1.1** Appeal Brief Annex A, p. 32 (EN), p. 29 (FR), p. 45 (KH).
1280 **F54** Appeal Brief, para. 524, fn. 936 *citing* **D427** Closing Order, paras 740-840.
1281 **F54** Appeal Brief, para. 524, fn. 937, *citing* **D427** Closing Order, paras 740-840. In the same paragraph, Appellant appears to dispute the *saisine* of the CIJs, erroneously claiming that they were "never instructed to investigate the existence of a policy potentially underpinning the commission of the crimes at the sites at issue in Case 002/02", however, the IS explicitly seises the CIJs to investigate "systematic discrimination" against the ex-KR officials, and requested an investigation into "Persecutions on political

Targeted Groups" section, the Closing Order is replete with references to their treatment, stating that the targeting of ex-KR as "enemies" was a key CPK policy.[1282] Further contrary to his inaccurate claim that the TC was seised with treatment of ex-KR officials *only* "during the movement of the population from Phnom Penh",[1283] the Closing Order identifies the temporal scope of the policy, from before 1975 to at least 6 Jan. 1979,[1284] and specifies its contents, which began with public declarations of intent to execute senior Khmer Republic figures in 1975, followed by a secret decision to kill its elite members after 17 April 1975.[1285]

344. Based on his misunderstanding of the CO, Appellant claims the TC arbitrarily established, and thus were not seised with, a policy against ex-KR.[1286] He invalidly argues that, as certain paragraphs of the Closing Order demonstrating the treatment of ex-KR soldiers and officials also include evidence of discrimination against other groups, there is no discrimination against ex-KR soldiers and officials.[1287] This logical fallacy, that discrimination against multiple groups demonstrates an absence of discrimination, is without merit. The Closing Order stated that ex-KR officials were closely monitored or disappeared,[1288] thus seising the TC with an overall targeting pattern against ex-KR soldiers and officials.

345. Appellant further does not substantiate the claim that the TC made a discernible error in exercising its discretion to admit evidence regarding the treatment of ex-KR soldiers and officials at TTD, merely repeating that the Closing Order did not include a policy targeting ex-KR.[1289]

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racial and religious grounds of former officials of the Khmer Republic", at each site relevant to Case 002/02, *see* **D3** IS, paras 12(a), 122(c).

1282 **D427** Closing Order, paras 156-158, 205-206, 208-209, 1417. *See also* **E465** Case 002/02 TJ, para. 3520, fn. 11836.

1283 **F54** Appeal Brief, paras 526-527.

1284 **E465** Case 002/02 TJ, para. 3520, fn. 11837 *citing* **D427** Closing Order, paras 158, 208.

1285 **E465** Case 002/02 TJ, para. 3520, fn. 11838 *citing* **D427** Closing Order, para. 208.

1286 **F54** Appeal Brief, paras 525-527, fns 937, 938 *citing* **E301/9/1** TC Additional Severance and Scope Decision, para. 44, fn. 95.

1287 **F54** Appeal Brief, para. 526.

1288 **D427** Closing Order, paras 319, 366, 432.

1289 **F54** Appeal Brief, para. 528-529, fn. 939 *citing* **E362** TC KS Defence Clarification Email.

4. TYPE 4: GROUNDS RELATING TO FACTS ALLEGEDLY EXCLUDED FROM CASE 002/02 UPON THE TC'S SEVERANCE OF CASE 002[1290]

Grounds 2 and 82-84

346. **Grounds 2, 82-84 should be dismissed. Appellant has not demonstrated that the TC erred in interpreting the Additional Severance Decision or the Severance Annex, which articulated sufficient descriptions of the material facts and their legal characterisation, giving Appellant adequate notice of the Case 002/02 TC's *saisine*.**

Ground 2: An ill-defined marathon trial [1291]

347. Appellant's misplaced claim relies on a translation error.[1292] The parenthetical statement, stating that charges of deportation were limited to Prey Veng and Svay Rieng,[1293] appears *only* in the French version of the Case 002/02 Severance Annex. As the TC noted,[1294] the English and Khmer versions of the Annex indicate that charges of deportation at TK are within the *saisine* of Case 002/02. Contrary to Appellant's claim,[1295] the TC previously confirmed that the English and Khmer versions of the Annex are originals, while the French version is a translation.[1296] Second, *all* language versions refer to the paragraph confirming charges of deportation at TK,[1297] as well as the underlying factual findings.[1298]

348. Moreover, Appellant fails to establish that the translation error was critical to the verdict

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1290 Grounds 2, 82-84 (application): **F54** Appeal Brief, paras 115, 531-549; **F54.1.1** Appeal Brief Annex A, pp. 4, 33-34 (EN), pp. 4, 30 (FR), pp. 4, 46-47 (KH). *Note*: for the response to Ground 83, *see* response to Ground 150.

1291 Ground 2: **F54** Appeal Brief, *An ill-defined marathon trial*, para. 115; **F54.1.1** Appeal Brief Annex A, p. 4 (EN), p. 4 (FR), p. 4 (KH). Appellant raises a number of disparate issues in the context of this Ground, which are dealt with in the context of the issues to which they pertain. *See* responses to Grounds 3 (Crimes committed by the RAK on Vietnamese territory), 83 & 150 (Breach of the principle of Res Judicata), Ground 180 (Existence of the Policy of MOP; The Objective of the Cooperatives).

1292 **F54** Appeal Brief, para. 115 *citing* **E465** Case 002/02 TJ, para. 169.

1293 **F54** Appeal Brief, para. 115 *citing* **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, p. 4 (FR) *i.e.* para. 5(ii)(b) ("Déportation (par. 1397 à 1401) (l'examen sera limité aux mesures ayant visé les Vietnamiens à Prey Veng et à Svay Rieng)").

1294 **E465** Case 002/02 TJ, para. 115 *citing* **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, p. 3 (EN) ("Deportation (1397-1401) (limited to TK Cooperatives and treatment of Vietnamese in Prey Veng and Svay Rieng)"), p. 5 (KH).

1295 **F54** Appeal Brief, para. 115.

1296 **E301/9/1.1/2** TC Response to KS Request to Modify Case 002/02 Severance Annex, ("The Chamber confirms that the English and the Khmer versions are accurate"). Both in Zylab and the Case File Notification Email dated 4 Dec. 2014, the French version is marked as a "Translation".

1297 **D427** Closing Order, para. 1397 ("The legal elements of the [CAH] of deportation have been established in Prey Veng and Svay Rieng as well as the Tram Kok Cooperatives.").

1298 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, para. 3(ii) ("Tram Kok Cooperatives (302-321)." The factual findings regarding deportation from Tram Kak are at para. 320.).

reached, so as to occasion an actual miscarriage of justice.[1299] As the TC noted,[1300] and Appellant concedes,[1301] he could have raised this discrepancy at any time since the TC released the Annex in April 2014. Appellant compared the English and Khmer versions of the Annex with the French translation and notified other discrepancies as early as Aug. 2014.[1302] In any event, he enjoyed his right to be heard regarding deportations both generally and at TK. In his Trial Brief, with respect to *all* deportation charges, he submitted that the TC "was improperly seised of the factual allegations of deportation as set forth at paragraphs 1397 to 1401 of the Closing Order."[1303] During Closing Arguments, after noting the translation error, he failed to make further submissions regarding deportations specifically from TK.[1304]

Ground 82: Absence of saisine for facts of persecution on political grounds and OIA of forcible transfer of populations[1305]

349. Appellant's claims are based on an inaccurate reading of the TC's Additional Severance Decision.[1306] In that Decision, the TC's reference to religious persecution in relation to the forced transfer of the Cham during the Second Population Movement is neither exclusive nor exclusionary,[1307] and did not confine the TC's *saisine* to facts that could be legally characterised as religious persecution. Further, the TC expressly included in the

1299 *See* Standard of Review (Errors of fact).
1300 **E465** Case 002/02 TJ, para. 169.
1301 **F54** Appeal Brief, para. 115 ("While the Defence could have realised this discrepancy earlier"); **E1/525.1** T. 20 June 2017, 10.43.02-10.44.38, p. 44, lines 22-25 ("we only looked at the annex of the severance in French […] So, mea culpa").
1302 **E301/9/1.1/1** Requête de la Défense de M. Khieu Samphân aux fins de clarification et de correction de l'annexe de la décision de disjonction délimitant l'étendue du procès 002/02, para. 3 ("Le 29 juillet 2014, la Défense […] travaillant en français plus qu'en khmer – a par hasard découvert l'existence d'information contenues dans les versions anglaise et khmère de l'annexe ne figurant pas dans la version française de cette annexe." Unofficial translation: "On 29 July 2014, the Defence – who work in French more than Khmer – discovered by chance that there is information contained in the English and Khmer versions of the Annex which do not appear in the French version of this Annex.").
1303 **E457/6/4/1** KS Case 002/02 Closing Brief, paras 219-275 (quote at para. 275). *See* response to Ground 41.
1304 *See* **E1/525.1** T. 20 June 2017, 10.43.02-10.44.38, p. 44, line 25 – p. 45, line 12 (explaining that the error does not change the "overall problem", being Appellant's primary argument that deportation did not fall within the *saisine* of the judicial investigation.).
1305 Ground 82: **F54** Appeal Brief, *Absence of saisine for facts of persecution on political grounds and OIA of forcible transfer of populations*, paras 538-543; **F54.1.1** Appeal Brief Annex A, p. 33 (EN), p. 30 (FR), p. 46 (KH).
1306 **F54** Appeal Brief, paras 539-540 *citing* **E301/9/1** TC Additional Severance and Scope Decision, para. 43.
1307 **E301/9/1** TC Additional Severance and Scope Decision, para. 43 ("The Chamber notes that movement of the Cham minority forms the basis of religious persecution charges, *as well as a means of implementing policies concerning movement of population (phase two) and treatment of targeted groups.* The Chamber excluded the *charges* based on the policy concerning the treatment of the Cham, *including* charges of religious persecution, from the scope Case 002/01. However, treatment of the Cham *and* charges of religious persecution, including in the course of population movement (phase two), have been included within the scope of Case 002/02." (emphasis added; internal references omitted)).

Severance Annex: (i) charges of political persecution of the Cham and OIA through forced transfer during the Second Population Movement,[1308] and (ii) the Closing Order's underlying factual findings applicable to all three charges without limitation.[1309]

Ground 84: Vietnamese[1310]

350. Appellant misinterprets both the TC's Judgment findings and its earlier Severance Annex defining the *saisine* of Case 002/02. Contrary to his assertion, the TC did not find that "Vietnamese have been excluded from consideration of the facts constituting OIA of enforced disappearances because of the severance."[1311] It rather found that this legal characterisation had either been excluded through severance,[1312] or may never have been charged,[1313] with respect to facts included in "*the treatment of Vietnamese*" segment. With respect to all victims, including Vietnamese, in the TK Cooperatives, the TC correctly recognised[1314] that, according to the express terms of the Severance Annex, the *saisine* of Case 002/02 included "Tram Kok Cooperatives (302-321)",[1315] and the potential legal characterisation included the OIA of enforced disappearance.[1316] Appellant's attempt to carve out facts pertaining to Vietnamese victims at TK in the CO[1317] is thus contradicted by a plain reading of the Severance Annex.

1308 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, paras 5(ii)(b)(7) ("Persecution on Political Grounds [...] (limited to movement of population (phase two) (limited to treatment of the Cham)"), 5(ii)(b)(13) ("Other Inhumane Acts through Forced Transfer [...] (movement of population (phase two) (limited to treatment of the Cham))").

1309 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, para. 3(i) ("Movement of the Population [...] Phase Two (266, 268, 281) (limited to the treatment of the Cham)").

1310 Ground 84: **F54** Appeal Brief, *Vietnamese*, paras 547-549; **F54.1.1** Appeal Brief Annex A, pp. 33-34 (EN), p. 30 (FR), p. 47 (KH).

1311 **F54** Appeal Brief, para. 547 *citing* **E465** Case 002/02 TJ, para. 3352.

1312 **E465** Case 002/02 TJ, para. 3352 *citing* **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex para. 5(ii)(b).

1313 **E465** Case 002/02 TJ, fn. 11305.

1314 Reading **F54** Appeal Brief, para. 547 and **F54.1.1** Appeal Brief Annex A, pp. 33-34 (EN), p. 30 (FR), Appellant appears to have misinterpreted the TC's statement at **E465** Case 002/02 TJ, para. 3352 that enforced disappearances in the TK Cooperatives "may concern Vietnamese victims among others, *even if these last have not been particularised as such*" (emphasis added). Whilst the French version "même si cela n'a pas été spécifiquement précisé" may have introduced a small degree of ambiguity, it is clear from the context and English version that the TC was referring to Vietnamese victims who had not been expressly identified as Vietnamese. The TC was not conceding that it included Vietnamese victims of enforced disappearances at TK without legal authority from the Closing Order and Severance Annex to do so.

1315 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, para. 3(ii) *referring to* **D427** Closing Order, paras 302-321. *Contra* **F54** Appeal Brief, para. 547.

1316 **E465** Case 002/02 TJ, para. 3352 *citing* **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, para. 5(ii)(b). *See* in particular, para. 5(ii)(b)(14).

1317 **F54** Appeal Brief, paras 548-549.

E. EVIDENCE PERTAINING TO FACTS ALLEGEDLY OUTSIDE THE SCOPE OF CASE 002/02

Ground 3: Out of scope but relevant evidence[1318]

351. **Ground 3 should be dismissed as Appellant fails to establish that the TC erred in law by relying on evidence pertaining to facts outside the Case 002/02 scope for illegitimate purposes.**

Evidence of acts outside the temporal or geographic scope of the Closing Order

352. This sub-ground must fail since it unsubstantiated and should be summarily dismissed.[1319] Nowhere in his Appeal Brief does Appellant provide justification for his claim that the TC erred in law in finding it may rely on evidence outside the temporal or geographic scope of the Closing Order in three circumstances: (i) to clarify a given context; (ii) to establish by inference the elements, in particular the *mens rea*, of criminal conduct occurring during the material period; (iii) to demonstrate a deliberate pattern of conduct.[1320] Appellant merely cross-refers in a generic manner to his Closing Brief,[1321] which is equally devoid of reasoned protest on this point.[1322] Quite to the contrary, before the TC issued its Judgment, Appellant described it as a "well-known" principle, "widely applied", including at the ECCC.[1323]

353. Indeed, this principle has been accepted at the ICTY,[1324] International Criminal Tribunal for Rwanda ("ICTR"),[1325] Special Court for Sierra Leone ("SCSL")[1326] and ICC.[1327] As an ICC Trial Chamber stated: "[t]he fact that something occurred outside the temporal

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1318 Ground 3: **F54** Appeal Brief, *Out of scope but relevant evidence*, paras 116, 120-125, 757; **F54.1.1** Appeal Brief Annex A, p. 5 (EN), p. 5 (FR), p. 5 (KH). Appellant *cites* **E465** Case 002/02 TJ, paras 60, 177-178, 181-185, 186-188, 189-190. The Co-Prosecutors' responses regarding **E465** Case 002/02 TJ, paras 186-188 (rape outside forced marriage) are dealt with in the relevant implementation sections below.

1319 The SCC has held that "it will not consider arguments that merely claim that a given decision or finding of the [TC] was erroneous, without actually substantiating why the decision or finding was in error." *See* **F36** Case 002/01 AJ, para. 102.

1320 **E465** Case 002/02 TJ, para. 60. *See also* **D300** Order on Requests D153, D172, D173, D174, D178 & D284, paras 9-10.

1321 **F54** Appeal Brief, paras 120-125, fn. 136 *citing* **E457/6/4/1** KS Case 002/02 Closing Brief, paras 59-299.

1322 Likewise, Appellant's claim that the TC made gratuitous findings which were *obiter dicta* resulting in undue delay (*see* **F54** Appeal Brief, para. 126) is unsubstantiated, as he points to a mere three passages without demonstrating how the TC's consideration of potentially exculpatory evidence caused him any prejudice.

1323 **E457/6/4/1** KS Case 002/02 Closing Brief, paras 52-53 *quoting* verbatim the three exceptions, and *citing* *Nahimana* AJ, para. 315.

1324 *See e.g. Prlić* Decision on JCE Time Frame, p. 9.

1325 *See e.g. Nahimana* AJ, para. 315.

1326 *See e.g. Taylor* TJ, paras 101 (with respect to temporal scope), 110 (with respect to geographic scope).

1327 *See e.g. Lubanga* TJ, paras 1022-1024, 1027, 1352; *Bemba* TC Admission Decision, paras 12, 19-20.

scope [...] does not make it automatically irrelevant for the charged crimes.[1328]

Buddhists

354. This sub-ground alleging a legal error in the TC's use of evidence of the treatment of Buddhists outside the TK Cooperatives[1329] must fail since the TC's factual findings (and supporting evidence) fall squarely within the scope of Case 002/02 as defined by the Additional Severance Decision and Severance Annex.[1330] Following severance, the factual scope of Case 002/02 included: (i) in the crime base, the treatment of Buddhists in the TK Cooperatives, *as well as* (ii) factual findings on the treatment of Buddhists nationwide to establish a CPK policy.[1331] Through the Severance Decision, as well as declarations of the TC during trial,[1332] Appellant received adequate notice of this scope and the TC's intended use of evidence of the treatment of Buddhists at sites outside the TK Cooperatives. The TC did not overstep its *saisine*, entering a conviction for religious persecution committed against Buddhists in the TK Cooperatives *only*,[1333] and relying on evidence of their treatment nationwide to establish CPK policy.[1334]

Khmer Krom

355. This sub-ground alleging a legal error in the TC's use of evidence concerning the Khmer Krom[1335] must fail, as it misinterprets the Judgment, and confuses *facts* falling outside the scope of Case 002/02 with *evidence* used to prove facts within that scope.

1328 *Ongwen* TC Evidence Submission Decision, para. 7.

1329 **F54** Appeal Brief, paras 116, 120-125 *citing* **E465** Case 002/02 TJ, paras 177-178.

1330 **E301/9/1** TC Additional Severance and Scope Decision; **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex.

1331 **E301/9/1** TC Additional Severance and Scope Decision, para. 38 ("The Expanded OCP Proposal encompasses the treatment of Buddhists through the inclusion of the Tram Kok Cooperatives site (with crimes against humanity charged in relation to that site including the religious persecution of Buddhists), *as well as the general allegations in the Closing Order relating to treatment of Buddhists*."); **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, para. 2(iv)(c) ("Factual Findings of Joint Criminal Enterprise [...] c. Buddhists (205-207, 210) (*implementation* limited to Tram Kok Cooperatives)" (emphasis added)), para. 3(x) (Factual Findings of Crimes [...] (x) "Treatment of Buddhists (740-743) (limited to Tram Kak Cooperatives)").

1332 **E1/301.1** T. 19 May 2015, 15.53.57-15.58.20, p. 94, line 17-p. 95, line 21 (In response to question put to the Judges by Khieu Samphan's own counsel "Well, maybe just to clarify things, there is or it was alleged there was, a state-wide policy that targeted a certain number of groups throughout Cambodia, including Buddhists, so therefore it is of course worthy to potentially determine what this policy entailed.").

1333 **E465** Case 002/02 TJ, paras 178, 1087 (communication of Centre policy to TK), 1094-1109 (treatment of Buddhists in TK), 1180-1187 (establishing the CAH of persecution on religious grounds in the TK Cooperatives), 3169, 4018.

1334 **E465** Case 002/02 TJ, paras 178, 4013. *See* paras 257-264 (Buddhism in Cambodia before 1975, including treatment of Buddhists by the Khmer Rouge in "liberated" areas), 1084-1093 (CPK policy against Buddhists), 3850 (Classification of monks as "enemies"), 4015-4022 (CPK policy to abolish Buddhist practices and forbid the practice of Buddhism in DK through persecution on religious grounds).

1335 **F54** Appeal Brief, paras 120-125, 757 *citing* **E465** Case 002/02 TJ, paras 181-185, 816.

356. Appellant misquotes the TC when he asserts that "according to its own finding it was not properly seised of facts concerning the [Khmer Krom]."[1336] Repeating the consistent holdings of the TC throughout Case 002/02,[1337] what the TC actually found was much more specific, namely that it was not properly seised of the targeting of Khmer Krom either as a specific group or as a sub-group of the Vietnamese.[1338]

357. This finding does not prevent the TC from relying on evidence concerning the Khmer Krom to prove facts that are within the Case 002/02 scope, including the existence of Khmer Krom victims at Case 002/02 crime sites. Indeed, as the TC noted, the Closing Order itself refers to Khmer Krom on multiple occasions.[1339] Appellant has regularly and correctly[1340] emphasised that the TC is seised of facts, not evidence.[1341] Evidence may relate to more than one fact, and as such, evidence that could *also* relate to the facts *outside* the scope may legitimately be used to prove facts *within* the scope.[1342] Appellant has been regularly notified of this proposed use of evidence concerning treatment of the Khmer Krom.[1343]

Crimes committed by the RAK on Vietnamese territory

358. This sub-ground alleging a legal error in the TC's use of evidence pertaining to crimes committed in Vietnam[1344] must fail since the TC's factual findings (and supporting evidence) fall squarely within the scope of Case 002/02 as defined by the Additional Severance Decision and Severance Annex.[1345] Moreover, to the extent Appellant's complaints concern the charge of unlawful deportation of civilians to S-21,[1346] they are

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1336 **F54** Appeal Brief, para. 757 *citing* **E465** Case 002/02 TJ, para. 816.

1337 *See e.g.* **E1/304.1** T. 25 May 2015, 13.34.42-13.36.39, p. 63, lines 2-4 ("Case 002/02 does not include charges relating to the targeting of the Khmer Krom as a specific group – that is, persecution as a crime against humanity or genocide of the Khmer Krom").

1338 **E465** Case 002/02 TJ, paras 185, 816.

1339 **E465** Case 002/02 TJ, paras 182, 816 *citing* **D427** Closing Order, paras 111, 265, 320, 818, 1468, 1586.

1340 IR 67(2), 98(2)-(3).

1341 *See e.g.* **F54** Appeal Brief, paras 121, 352-353; **E457/6/4/1** KS Case 002/02 Closing Brief, 66, 73, 76, 84, 87-89, 99.

1342 **F36** Case 002/01 AJ, paras 227, 236. *See also* IR 66*bis* (5), 89*quater*.

1343 **E1/304.1** T. 25 May 2015, 13.36.39-13.38.52, p. 63, line 17 – p. 64, line 1 ("Evidence pertaining to the Khmer Krom may, nonetheless, be relevant to other issues in Case 002/02, such as the historical and political context of the case or to other crimes which are charged, and certain of the victims happen to be Khmer Krom, as such may be admissible. […] the Chamber will not exclude witness or civil party testimony which touches upon the fact that an individual is Khmer Krom insofar as it is relevant to other issues within the scope of Case 002/02"); **E319/52/4** TC Decision on 87(3) and 87(4) Documents Admission), para. 18; **E319/47/3** TC Decision on 87(3) and 87(4) WRI Admission, para. 25.

1344 **F54** Appeal Brief, paras 116, 120-125 *citing* **E465** Case 002/02 TJ, paras 189-190, 778.

1345 **E301/9/1** TC Additional Severance and Scope Decision; **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex.

1346 **F54** Appeal Brief, para. 116 *citing* **E465** Case 002/02 TJ, paras 774-778.

rendered moot by the TC's acquittal on that charge.[1347]

359. Aside from facts pertaining to the unlawful deportation charges, the scope of Case 002/02 did not include facts amounting to crimes committed by RAK forces on Vietnamese territory following severance,[1348] but did include facts establishing the existence of an armed conflict between DK and Vietnam,[1349] required to establish the *chapeau* elements of the GB charges against Appellant.[1350] In the Judgment, the TC did not overstep this legitimate scope, entering no convictions for crimes committed on the territory of Vietnam,[1351] and using evidence pertaining to incursions of DK forces into Vietnam only to establish the existence of an international armed conflict.[1352]

VII. CRIMES

A. INTRODUCTION

360. The TC correctly found that crimes of genocide, CAH and GB, for which Appellant was convicted, were committed during the DK regime as a means to achieve the CPK's primary objective of rapidly implementing socialist revolution in Cambodia through a "great leap forward" that was designed to build the country, defend it from enemies, and radically transform the population into an atheistic homogenous Khmer society of worker-peasants.[1353] The TC also correctly found that these crimes were committed pursuant to five policies that were intrinsically linked to the common purpose that was shared by Appellant and other members of the JCE.

361. The crimes committed pursuant to three of the five policies are discussed in the Section below: (i) movement of the population (limited to Cham, MOP Phase 2); (ii) the targeting of specific groups, namely, the Buddhists, ex-KR, Cham, and Vietnamese; and (iii) the CPK's regulation of marriage. This Section also discusses crimes that occurred outside of the JCE due to the imposition of inhumane conditions at cooperatives, worksites, and security centres, which Appellant aided and abetted.

362. The crimes committed pursuant to the remaining two policies are discussed in the Section

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1347 **E465** Case 002/02 TJ, para. 2633.
1348 **E301/9/1** TC Additional Severance and Scope Decision, para. 32, Disposition; **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, paras 2-3, *in particular* paras 2(iv)(b), 3(xii).
1349 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, paras 1(vi) ("Factual Findings […] (vi) Armed Conflict (150-155)").
1350 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, paras 5(iii)(a) ("Grave Breaches of the Geneva Conventions 1949 (1479) (a) *Chapeau elements* (1480-1490)").
1351 **E465** Case 002/02 TJ, paras 189-190.
1352 **E465** Case 002/02 TJ, paras 281-294, 336.
1353 **E465** Case 002/02 TJ, para. 4068; *See* response to Ground 178.

entitled JCE: Common Purpose in response to Appellant's grounds relating to (i) the establishment and operation of cooperatives and worksites, and (ii) the reeducation of "bad elements" and killing of "enemies" at security centres and execution sites.

363. As detailed below, Appellant fails to demonstrate that the TC erred in fact or law in finding these crimes and policies existed and that these crimes were committed pursuant to these policies.

B. MURDER, PERSECUTION AND OIA

Ground 86: Applicable Law: non-Inclusion of dolus eventualis in mens rea[1354]

364. **Ground 86 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *mens rea* for the CAH of murder included *dolus eventualis*.**[1355]

365. The ground must fail since Appellant repeats arguments that were previously rejected by the TC after a full review of his submissions in Case 002/02[1356] and by the SCC in Case 002/01.[1357] Appellant misunderstands the principles applicable to the formation of ICL, as well as the law and jurisprudence demonstrating the correct *mens rea*.

Customary international law 1975-1979

366. Appellant fails to demonstrate that the TC and SCC erred when they held that pre-1975 international jurisprudence shows that, during the DK period, the *mens rea* of murder as a CAH included *dolus eventualis*.[1358] Appellant's assertions[1359] that CIL in 1975 required "direct intent to kill"[1360] are wholly undermined by his failure to cite *any* authority, and particularly *no* examples of acquittals entered for want of direct intent.

367. Contrary to Appellant's arguments,[1361] neither the TC,[1362] nor this Chamber before it,[1363] misinterpreted the *Medical* Judgment. The fact that it contains no explicit definition of

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1354 Ground 86: **F54** Appeal Brief, *Applicable Law: Non-Inclusion of* dolus eventualis *in* mens rea, paras 575-636; **F54.1.1** Appeal Brief Annex A, p. 34 (EN), p. 31 (FR), p. 48 (KH).
1355 **F54** Appeal Brief, paras 575-636.
1356 **E465** Case 002/02 TJ, paras 631-651, *rejecting* **E457/6/4/1** KS Case 002/02 Closing Brief, paras 394-429.
1357 **F36** Case 002/01 AJ, paras 387-410, *rejecting* **F17** Case 002/01 Appeal Brief, paras 59-62.
1358 **E465** Case 002/02 TJ, paras 636-638, 650; **F36** Case 002/01 AJ, para. 410.
1359 **F54** Appeal Brief, paras 581, 586, 590, 594-595, 599-600. *See also* **E457/6/4/1** KS Case 002/02 Closing Brief, paras 395, 404-405, 425.
1360 Appellant defines direct intent as "the person means to cause that consequence or is aware that it will occur in the ordinary course of events". *See* **F54** Appeal Brief, para. 594 *citing* Rome Statute, art. 30(2)(b).
1361 **F54** Appeal Brief, paras 581-586; **E457/6/4/1** KS Case 002/02 Closing Brief, paras 397-420.
1362 **E465** Case 002/02 TJ, para. 363.
1363 **F36** Case 002/01 AJ, para. 395 *citing Medical* Judgment, pp. 189-207, 235-241, 253-263, 271, 290.

the *mens rea* is irrelevant to its authoritative value;[1364] the US Military Tribunal's finding of murder in the absence of direct intent to kill is clear from its reasoning. Appellant's assertions about the supposed "functioning of the Nazi camps"[1365] are unsubstantiated and his contention that the defendants can only have possessed direct intent because "[p]eople detained in these camps [...] were destined for certain death" is belied by the *Medical* Judgment itself. As Appellant recognises,[1366] murder was not even charged with respect to four of the Experiments,[1367] and where it was, the Tribunal recited evidence of a significant number of survivors in all[1368] but one.[1369] The Judges were clear that death was only one possible outcome,[1370] and the perpetrators knew only that the murder victims "might die".[1371] Whilst the methods employed were indefensible, the purpose of these experiments was to find *successful* treatments for lethal conditions, not to kill the participants.[1372]

1364 *Contra* **F54** Appeal Brief, para. 584; **E457/6/4/1** KS Case 002/02 Closing Brief, para. 405.

1365 **F54** Appeal Brief, para. 585.

1366 **F54** Appeal Brief, para. 585.

1367 Experiments F, G, I and L. *See Medical* Judgment, pp. 176-177 *reciting* the Indictment.

1368 *Medical* Judgment, pp. 236-237, 255 (**Experiment A (High-Altitude):** Several rounds of experiments were conducted on around 180 to 200 Dachau inmates, 70 to 80 of whom died), 200-201 (**Experiment B (Freezing):** "some deaths had resulted"), 264-265 (**Experiment C (Malaria):** "During the course of the experiments probably as many as 1,000 inmates of the concentration camp were used as subjects [...] [I]t is established that approximately 30 of the experimental subjects died as a direct result of the experiments and that many more succumbed from causes directly following the experiments"), 194 (**Experiment D (Lost (Mustard) Gas)**: "[O]ver 200 concentration camp inmates [...] were used as experimental subjects. At least 50 of these subjects [...] died as a direct or indirect result of the treatment received."), 213 ("[A] great many concentration camp inmates [...] were experimented on with gas, at least 50 of whom died."), 193 (**Experiment E (Sulfanilamide)**: "It was stated that 75 persons had been experimented upon [...]. It was also stated that three of the subjects died"), 177 (**Experiment H (Epidemic Jaundice)**: "Experimental subjects were deliberately infected [...], some of whom died as a result, and others were caused great pain and suffering"), 220, 242-244 (The court detailed the results of different rounds of experiments testing different vaccines for **Experiments J (Typhus)**. It found that "no less than 729 concentration camp inmates were experimented on with typhus, at least 154 of whom died.").

1369 In **Experiment K (Poison Experiments)**, the accused subjected prisoners condemned to death to the fatal effects of poisons and poisoned weapons. In this case, contrasted with all the others, it appears that the accused possessed direct intent to kill their victims. *See e.g. Medical* Judgment, pp. 178, 245-247.

1370 *Medical* Judgment, p. 183 ("very little, if any, precautions were taken to protect [...] subjects from the *possibilities* of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in *most* of them they suffered permanent injury, mutilation, *or* death" (emphasis added)).

1371 *Medical* Judgment, p. 244 ("these victims were not informed that [...] they *might die* [...] One does not ordinarily consent to be the special object of a *murder*" (emphasis added)).

1372 *See e.g. Medical* Judgment, pp. 236 (**Experiment A (High-Altitude)** was conducted "to determine the limits of human endurance and existence at extremely high altitudes"), 200-201 (**Experiment B (Freezing)** was conducted to solve "one of the most important problems to the army"), 264 (**Experiment C (Malaria)** was conducted "for the purpose of discovering a method of establishing immunity against malaria."), 195, 237-238 (**Experiment D (Lost (Mustard) Gas)** was conducted "to ascertain the efficacy of the different treatment of wounds inflicted by Lost gas [...] Various methods of treatment were applied in order to ascertain the most effective one"), 193 (In **Experiment E (Sulfanilamide)** "the subjects had been deliberately infected, and [...] different drugs had been used in treating the infections to determine their respective efficacy"), 194 (**Experiment H (Epidemic Jaundice)** was conducted "for the purpose of

368. Moreover, the *Medical* Judgment was not the lone post-WWII jurisprudence to support a *dolus eventualis* standard.[1373] The German Supreme Court for the British Zone held twice in 1948 that *dolus eventualis* fulfils the *mens rea* of a CAH, including murder.[1374]

369. Contrary to Appellant's assertion,[1375] the TC was permitted to confirm its assessment of CIL by seeking *additional* "guidance"[1376] from the jurisprudence of the *ad hoc* tribunals,[1377] whose conclusions[1378] were based on, *inter alia*, their own survey of the *mens rea* of murder in the pre-1979 era.[1379] Appellant's reference to a requirement for premeditation in some ICTR jurisprudence is misleading.[1380] As the SCC noted, the Chambers who used it were not purporting to find CIL,[1381] and it was not followed by the ICTY or some ICTR Appeals Chambers.[1382] Moreover, the SCC dealt with Appellant's identical submission in Case 002/01 and found premeditation inapplicable in the pre-1975 period.[1383]

Valid reliance on a general principle of law

370. Appellant misapprehends the purpose of the TC's reliance on domestic law[1384] to support

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discovering an effective vaccine to bring about immunity from epidemic jaundice"), 202, 218-219, 221 (**Experiment J (Typhus)** was conducted "to determine the effect of various typhus vaccines").

1373 *See* **E465** Case 002/02 TJ, para. 636.

1374 *L. and others*, pp. 229-234. ("Der stumme Zuschauer eines Unmenschlichkeitsverbrechens ist nur strafbar, wenn er mitursächlich geworden ist und mindestens Eventualvorsatz der Mitursächlichkeit hatte." Unofficial translation: "the silent spectator of a [CAH] is only punishable if he has become partly responsible and had at least conditional intent."); *T. and K.*, pp. 198-202 (Recalling the conditions for CAH, the court considered them fulfilled in respect of both defendants for their part in the burning down of *both* the targeted synagogue *and* neighbouring houses which the defendants had recklessly set ablaze.)

1375 **F54** Appeal Brief, para. 587.

1376 **E465** Case 002/02 TJ, paras 634-635.

1377 **E465** Case 002/02 TJ, para. 635. *See also Kordić & Čerkez* AJ, para. 113, upholding as "undisputed" *Kordić & Čerkez* TJ, paras 235-236; *Taylor* TJ, para. 412.

1378 *Blaškić* TJ, para. 217 *finding* that the *mens rea* of murder included "the intent [...] to cause grievous bodily harm in the reasonable knowledge that the attack was likely to result in death" and *citing* Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, UN Doc. A/51/10, p. 96 ("murder [...] is clearly understood and well defined in the national law of every State."). *See also Akayesu* TJ, paras 587, 589.

1379 *See e.g. Čelebići* TJ, paras 420-439 (analysing, *inter alia*, the 1949 GCs, 1977 Additional Protocol I and commentaries [...] to conclude that "the necessary [...] *mens rea*, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life."). The elements of wilful killing as a grave breach and murder as a war crime or CAH are the same. *See e.g.* Case 001-**E188** *Duch* TJ, para. 431; *Brđanin* TJ, para. 380, fn. 903.

1380 **F54** Appeal Brief, para. 587.

1381 **F36** Case 002/01 AJ, para. 392 *citing Kayishema & Ruzindana* TJ, para. 138.

1382 **F36** Case 002/01 AJ, para. 392; *Đorđević* AJ, paras 551-552. For ICTR Appeal Chamber decisions upholding convictions for murder that did not require premeditation, *see e.g. Musema* AJ, Disposition. At the trial stage, the Chamber had found that "[CIL] dictates that the offence of 'Murder', and not 'Assassinat', constitutes a [CAH]." (*Musema* TJ, para. 214).

1383 **F36** Case 002/01 AJ, paras 392-394.

1384 **E465** Case 002/02 TJ, paras 638-650. *See also* **F36** Case 002/01 AJ, paras 396-409.

the *dolus eventualis* standard. Domestic law was not a "primary and independent source" for identifying the *mens rea* for murder in 1975,[1385] nor did it "replace" or "exclude" a contrary CIL rule.[1386] As the TC and SCC demonstrated, post-WWII jurisprudence is a "strong",[1387] if not conclusive,[1388] indication, that the *mens rea* for murder as a CAH under CIL included *dolus eventualis*. The TC therefore was not required to find a general principle of law to establish the state of international law in 1975. It merely needed to demonstrate that its conclusions on the status of CIL were "underpinned" by domestic law.[1389] In finding a general principle, the TC thus surpassed its mandate.

371. In any event, Appellant's claim that the TC was not permitted to rely[1390] on general principles of domestic law[1391] overlooks the consensus across all ECCC Chambers,[1392] including the SCC,[1393] and other international criminal tribunals,[1394] that, where established, general principles are a legitimate and accessible source of ICL. Appellant's claim that the TC wrongly cited article 38(1)(c) of the International Court of Justice ("ICJ") Statute in justification[1395] is contradicted by the only source Appellant relies on, which confirms that "formal sources are identical between public international law and criminal international law."[1396] Indeed, article 15(2) of the International Covenant on Civil and Political Rights ("ICCPR"), which is expressly incorporated into the ECCC's legal framework,[1397] confirms that Appellant's rights are not thereby violated.[1398] Appellant's appeal to the *in dubio pro reo* principle to allegedly prohibit recourse to general principles[1399] is unsubstantiated. He identifies no doubt to be resolved in his favour, and provides no explanation as to how this rule, applicable to questions of law

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1385 **F54** Appeal Brief, para. 613. *See also* para. 618.
1386 **F54** Appeal Brief, paras 601, 613.
1387 **F36** Case 002/01 AJ, para. 395.
1388 The Co-Prosecutors note the absence of any contrary findings in post-WWII law and jurisprudence.
1389 *Tadić* AJ, para. 225; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, paras 84-85; **F36** Case 002/01 AJ, para. 805.
1390 **E465** Case 002/02 TJ, para. 638.
1391 **F54** Appeal Brief, paras 576-580, 588-591, 600-622.
1392 *See e.g.* **CIJs: D427** Closing Order, para. 1302; **PTC: D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, paras 53, 86; **TC:** Case 001-**E188** *Duch* TJ, para. 30.
1393 Case 001-**F28** *Duch* AJ, paras 92, 96, 174, 181-182.
1394 *See e.g.* **ICTY:** *Tadić* AJ, para. 225; *Čelebići* AJ, para. 583; *Blaškić* AJ, paras 34-42; *Furundžija* TJ, paras 177-178; *Kunarac* TJ, para. 439; **SCSL:** SCSL Rules of Procedure and Evidence, Rule 72*bis*(iii); **ICC:** Rome Statute, art. 21(1)(c).
1395 **F54** Appeal Brief, paras 606-611 *challenging* **E465** Case 002/02 TJ, para. 638.
1396 **F54** Appeal Brief, fn. 1077. *See also* Gerhard Werle, *Principles of International Criminal Law*, Asser Press (2005), para. 123 ("[ICL] originates from the same legal sources as international law. These include [...] general principles of law recognized by the world's major legal systems").
1397 ECCC Law, art. 33 new.
1398 ICCPR, art. 15(2).
1399 **F54** Appeal Brief, paras 601, 612, 620, 622.

only where doubts remain *after* the laws of interpretation have been exhausted,[1400] could conceivably exclude a legitimate source of ICL.

372. As to the substance of the general principle, Appellant establishes no error in the TC's finding that domestic law in 1975 established that "when an individual knowingly and willingly engaged in conduct which was likely to lead to death, that conduct would amount to murder or a crime of similar seriousness."[1401] Appellant's contention that the TC's methodology was "superficial"[1402] is unsubstantiated. As required,[1403] the TC found its sources across a range of common law,[1404] civil law[1405] and hybrid[1406] domestic systems. Specifically, Appellant fails to undermine the TC's findings with regard to India, Australia and England.[1407] He does not explain how the TC and the SCC erred by reference to *mens rea* which are satisfied by findings of "reckless indifference to human life" (Australia),[1408] or knowledge that an act is so "imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death" (India).[1409] Appellant's analysis of the English jurisprudence is similarly flawed. In *R v. Hyam*, neither the majority nor the dissents required direct intent to kill; both dissents held that acting with foresight that life was endangered satisfied the *mens rea* for murder.[1410]

373. The Co-Prosecutors also note that the TC's sources were not exhaustive. Many more

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1400 **E50/3/1/4** SCC Decision on KS Release Application, para. 31; *Čelebići* TJ, para. 413.
1401 **E465** Case 002/02 TJ, para. 650. *See also* **F36** Case 002/01 AJ, paras 396-409.
1402 **F54** Appeal Brief, para. 624.
1403 **E465** Case 002/02 TJ, para. 638 *citing* **D97/15/9** PTC JCE Decision, paras 53, 86.
1404 **E465** Case 002/02 TJ, paras 639, 641 *incorporating* **F36** Case 002/01 AJ, paras 396, 402-408 ((i) England and Wales; (ii) Australia; (iii) India; (iv) Singapore; (v) United States).
1405 **E465** Case 002/02 TJ, paras 639, 641 *incorporating* **F36** Case 002/01 AJ, paras 396, 399-401 ((i) Belgium; (ii) Poland); **E465** Case 002/02 TJ, paras 641 ((i) Germany, (ii) Austria, (iii) Switzerland)), 642 (Netherlands), 643 (Italy), 646-647 ((i) Russia; (ii) Japan).
1406 **F36** Case 002/01 AJ, para. 401.
1407 **E465** Case 002/02 TJ, para. 645.
1408 **E465** Case 002/02 TJ, fn. 2010 *citing* New South Wales Crimes Act 1900, s. 18(a).
1409 **E465** Case 002/02 TJ, fn. 2010 *citing* Criminal Code of India 1860, art. 300.
1410 *R v. Hyam*, [1975] AC 55, pp. 93 (Lord Diplock: "in order to amount to the crime of murder, the offender, if he did not intend to kill, must have intended or foreseen as a likely consequence of his act that human life would be endangered."), 98 (Lord Kilbrandon: "if murder is to be proved in the absence of an intention to kill, the jury must be satisfied […] that the accused knew that death was a likely consequence of the act and was indifferent whether that consequence followed or not.").

jurisdictions in Asia,[1411] Africa,[1412] South America,[1413] and Europe[1414] support the conclusion that the *mens rea* for intentional killing in the DK period must be defined "*largo sensu* to encompass *dolus eventualis*".[1415] It is not fatal[1416] that French and Cambodian law did not provide for this. As the TC noted, entirely uniform domestic practice is not required,[1417] and Appellant's reliance on the Rome Statute to argue otherwise is misplaced.[1418]

Inapplicability of lex mitior

374. Appellant erroneously claims that the *mens rea* of *dolus eventualis* cannot be applied as it is precluded by article 30(2)(b) of the Rome Statute, which he avers, is a source of law for CAH under article 9 of the UN-RGC Agreement.[1419] It is an inherent element of *lex mitior* that a more favourable law "must be binding upon the [ECCC]".[1420] The Rome Statute, however, does not reflect CIL in 1975,[1421] and the UN-RGC Agreement[1422] and jurisprudence,[1423] confirm that this Court's subject-matter jurisdiction is determined by the ECCC Law, which does not define CAH by reference to the Rome Statute.[1424]

Accessibility and foreseeability are established

375. This Chamber has already found that *dolus eventualis* murder was accessible and foreseeable to Appellant.[1425] To the extent that Appellant challenges that established

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1411 **Thailand:** Thai Penal Code, 1956, ss 59, 288; **Pakistan:** Pakistan Penal Code, 6 Oct. 1860, s. 300; **Malaysia:** Penal Code, 1936, ss 299-300; **Oman:** Penal Code, 16 Feb. 1974, arts 81, 235; **Sri Lanka:** Penal Code, 1 Jan. 1885, arts 293-294.

1412 **Botswana:** Penal Code, 10 June 1964, ss 202, 204; **Ghana:** Criminal Code, 1960, ss 11, 47; **Kenya:** Penal Code, 1 Aug. 1930, ss 203, 206; **Liberia:** Penal Law, 19 Jul. 1976, s. 14.1(b); **Nigeria:** Criminal Code Act, 1 June 1916, ss 315, 316; **Malawi:** Penal Code, 1 Apr. 1930, ss 209, 212; **Tanzania:** Penal Code, 28 Sept. 1945, ss 196, 200; **Uganda:** Penal Code Act, 15 June 1950, ss 188, 191.

1413 **Colombia:** Penal Code of the Republic of Colombia, 24 Apr. 1936 (as at 1967), arts 12, 362.

1414 **Former Yugoslavia:** Criminal Code, 1 July 1951, arts 7(1)-(2), 135(1); **Romania:** The Penal Code of the Romanian Socialist Republic, 1 Jan. 1969, arts 17, 19, 174.

1415 **F36** Case 002/01 AJ, paras 409-410.

1416 *Contra* **F54** Appeal Brief, para. 629.

1417 **E465** Case 002/02 TJ, para. 638 and citations therein.

1418 Rome Statute, art. 21(1)(c) does not place any higher value on the "national laws of States that would normally exercise jurisdiction over the crime".

1419 **F54** Appeal Brief, paras 581, 596-600 *citing* UN-RGC Agreement, art. 9.

1420 Case 001-**F28** *Duch* AJ, paras 346-351; *D. Nikolić* SJ Appeal, para. 81; *Deronjić* SJ Appeal, para. 97; *Stanišić & Simatović* AJ, para. 128.

1421 Rome Statute, art. 21; *Katanga and Ngudjolo Chui* Confirmation of Charges, paras 506-508; *Šainović* AJ, para. 1648; Case 004/2-**D359/24** & **D360/33** *Ao An* PTC Closing Order Considerations, International Judges' Opinion, paras 570, 588. *See also* **D193/5/5** PTC Decision on Property Ownership RIA, para. 25.

1422 UN-RGC Agreement, art. 2(1). *See also* UN-RGC Agreement, art. 2(2).

1423 *See e.g.* Case 001-**F28** *Duch* AJ, paras 99, 105; Case 001-**E188** *Duch* TJ, para. 281. *See also* **E465** Case 002/02 TJ, paras 298, 300-301.

1424 *See* ECCC Law, art. 5.

1425 **F36** Case 002/01 AJ, para. 765.

jurisprudence through further contention that it did not represent CIL in 1975,[1426] the foregoing analysis demonstrates that this argument must fail. The SCC has also confirmed that general principles of domestic law are accessible to an accused.[1427] Killing with *dolus eventualis* attracted criminal responsibility in Cambodia in 1975, even if not by the name murder,[1428] and given the obvious gravity of the offence, there can be no doubt that Appellant appreciated its criminality in the sense "generally understood".[1429]

Grounds 87-93: Murder with dolus eventualis on the worksites of TK, TTD, 1JD, and KCA[1430] and in the security centres of S-21, KTC, and PK

376. Each of these grounds fail as they are based on the erroneous assertion that the *mens rea* of the CAH murder did not include *dolus eventualis* in 1975. As set out above,[1431] the TC's finding that the definition of the *mens rea* of murder extended to *dolus eventualis* in 1975 was based on appropriate legal sources and applicable rules of interpretation. Appellant's unsupported assertion that he can only be convicted for deaths if he possessed a direct intent to kill[1432] further ignores Article 29 new of ECCC Law in relation to A&A. Appellant thus fails to demonstrate any legal error in his conviction for facilitating murder with *dolus eventualis*.[1433]

Ground 94: Errors concerning the CAH of persecution[1434]

377. **Ground 94 should be dismissed as Appellant fails to demonstrate that the TC erred in law when articulating the *mens rea* required to establish the CAH of persecution.**

378. Appellant's assertion that the correct articulation of the *mens rea* for persecution includes

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1426 **F54** Appeal Brief, paras 633-635.
1427 Case 001-**F28** *Duch* AJ, para. 96.
1428 **E465** Case 002/02 TJ, paras 648-649, 651; **F36** Case 002/01 AJ, paras 397-398.
1429 **F36** Case 002/01 AJ, para. 762, fn. 1983; Case 001-**F28** *Duch* AJ, paras 96-97.
1430 Ground 87: **F54** Appeal Brief, *On the worksites of TK, TTD, 1JD, and KCA*, para. 637; **F54.1.1** Annex A, p. 35 (EN), p. 32 (FR), pp. 48-49 (KH); Ground 88: **F54** Appeal Brief, *On the worksites of TK, TTD, 1JD, and KCA,* para. 637; **F54.1.1** Appeal Brief Annex A, p. 35 (EN), p. 32 (FR), pp. 49-50 (KH); Ground 89: **F54** Appeal Brief, *On the worksites of TK, TTD, 1JD, and KCA,* paras 637, 768; **F54.1.1** Appeal Brief Annex A, p. 35 (EN), p. 32 (FR), p. 49 (KH); Ground 90: **F54** Appeal Brief, *On the worksites of TK, TTD, 1JD, and KCA,* para. 637; **F54.1.1** Appeal Brief Annex A, pp. 35-36 (EN), p. 32 (FR), p. 50 (KH); Ground 91: **F54** Appeal Brief, *In the security centres of S-21, KTC and PK*, para. 638; **F54.1.1** Annex A, p. 36 (EN), p. 50 (KH), pp. 32-33 (FR); Ground 92: **F54** Appeal Brief, *In the security centres of S-21, KTC and PK,* para. 639; **F54.1.1** Appeal Brief Annex A, p. 36 (EN), p. 33 (FR), pp. 50-51 (KH); Ground 93: **F54** Appeal Brief, *In the Security Centres of S-21, KTC and PK,* para. 640; **F54.1.1** Appeal Brief Annex A, p. 36 (EN), p. 33 (FR), p. 51 (KH).
1431 *See* response to Ground 86.
1432 *Contra* **F54** Appeal Brief, paras 637-640.
1433 *See e.g.* **E465** Case 002/02 TJ, paras 4311, 4315-4318, 4328, 4363-4366, 4383.
1434 Ground 94: **F54** Appeal Brief, *Errors concerning the CAH of persecution*, paras 641-655; **F54.1.1** Appeal Brief Annex A, p. 37 (EN), p. 33 (FR), pp. 51-52 (KH).

an "objective to remove" persons from society or from humanity[1435] overlooks that the TC[1436] followed established SCC jurisprudence.[1437] The SCC confirmed that, though a plan of persecution may include removing groups of people from society, this objective need not be established "for each and every defendant *vis-à-vis* the specific persecutory acts for which they were convicted."[1438] Relying on a wealth of post-WWII jurisprudence,[1439] it explained that there is no legal requirement that the perpetrator possess a 'persecutory intent' over and above a discriminatory intent.[1440]

379. Appellant's proposition that the ECCC Chambers' findings are undermined by an "initially consensual" requirement for this additional element at the *ad hoc* tribunals[1441] does not withstand analysis. Of the three ICTY/ICTR judgments relied on,[1442] only one supports his position, and this, as Appellant admits,[1443] was overturned on appeal.[1444] The other two do not include the "objective to remove" as an essential element of the crime,[1445] but rather note that, *on the facts of particular cases*, the deprivation of fundamental rights "can be said" to have that objective.[1446] As the SCC noted, the *ad hoc* jurisprudence has in fact undertaken a "relatively uncontroversial adoption" of the material elements of persecution, including "discriminatory intent", but without any "objective to remove".[1447]

380. Appellant's understanding of post-WWII jurisprudence[1448] is inaccurate and incomplete. Properly analysed, it consistently demonstrates the intent for persecution to be 'mere'

1435 **F54** Appeal Brief, para. 642.
1436 **E465** Case 002/02 TJ, paras 713, 715. This finding is identical to the TC's holdings in Cases 001 and 002/01: *see* Case 001-**E188** *Duch* TJ, para. 379; **E313** Case 002/01 TJ, paras 427, 429.
1437 Case 001-**F28** *Duch* AJ, paras 236-240, fn. 514.
1438 Case 001-**F28** *Duch* AJ, para. 239, fn. 514.
1439 Case 001-**F28** *Duch* AJ, paras 226, 236-240 *confirming* Case 001-**E188** *Duch* TJ, para. 379 *following* a review of, *inter alia*, the IMT Judgment, *Justice* Judgment; *Ministries* Judgment; *Enigster* Judgment; *J and R* Judgment; *Greiser* Judgment; *Eichmann* Case; and *Barbie* Judgment.
1440 Case 001-**F28** *Duch* AJ, fn. 514.
1441 **F54** Appeal Brief, paras 645-652.
1442 **F54** Appeal Brief, paras 645-649 *citing Kupreškić* TJ, para. 634; *Kordić & Čerkez* TJ, paras 214, 219, 220; *Ruggiu* TJ, para. 22.
1443 **F54** Appeal Brief, para. 648.
1444 *Kordić & Čerkez* AJ, para. 111. *See also Blaškić* AJ, para. 165.
1445 *Ruggiu* TJ, para. 21; *Kupreškić* TJ, para. 633.
1446 *Ruggiu* TJ, para. 22; *Kupreškić* TJ, para. 634; *see also Kupreškić* TJ, para. 636, distinguishing the 'mere' discriminatory intent required to establish the *mens rea* of the CAH of persecution, and the intent to destroy the group required to establish genocide, and noting that the intent driving persecution *could* escalate so that it amounts to genocide.
1447 Case 001-**F28** *Duch* AJ, para. 239, fn. 514 (citing the consistent definition of *mens rea* articulated in at least eleven other cases before the *ad hoc* tribunals, which did not include the "objective to remove", while taking account of each of the cases cited by Appellant in the present appeal). *See further Popović* AJ, para. 738; *Šešelj* AJ, para. 159.
1448 **F54** Appeal Brief, paras 653-654.

discriminatory intent "directed against" a specific group or groups.[1449] By contrast, acts committed with the intention to *eliminate* the targeted group amounted to genocide.[1450] Thus, although persecution *could* have the "objective to remove", "lesser forms of racial persecution [...] constituted an integral part in the general policy of the Reich."[1451]

381. In the *Justice* Judgment, the US Military Tribunal noted that, though Rothenberger's discriminatory acts, including denial to Jews of the right to proceed in civil litigation, were not as severe as those that removed Jews by their millions, they were "nevertheless a part of the government-organized plan for the persecution of the Jews [...] by depriving them of the means of livelihood and of equal rights in the courts of law".[1452] In the *RuSHA* Case, the Tribunal noted a document establishing Hübner's desire to *keep* the persecuted group in the annexed region and to "provide housing" for them.[1453] The Supreme National Tribunal of Poland considered that one of "the most important methods" by which Greiser committed persecution was arranging street shows where Jews were forced to dance or do gymnastics, strike each other, or have their beards cut off. [1454]

382. By contrast, Appellant relies on a limited selection of passages, mainly from the International Military Tribunal ("IMT"), which fail to demonstrate that the "objective to remove" was a requisite element of the CAH of persecution.[1455] In the large majority, defendants were also charged with conducting a genocide,[1456] and as such, reference to

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1449 *RuSHA* Judgment, p. 152 (considering "punishment for sexual intercourse with Germans, plunder of public and private property, and evacuations of foreign nationals," and finding that these "[p]ersecutions upon racial grounds were *directed particularly toward the Poles and Jews*," (emphasis added)). *See also* IMT Judgment (Indictment), p. 66 (persecution was charged as a crime "directed against Jews [...and] against persons whose political belief or spiritual aspirations were deemed to be in conflict with the aims of the Nazis"); *Justice* Judgment, pp. 1063-1064.

1450 *See e.g. Eichmann* Case, para. 16. *See also* IMT Judgment (Indictment), pp. 43-44 (Genocide was articulated as having the specific intent "to destroy particular races and classes of people and national, racial, or religious groups").

1451 The *Justice* Judgment dealt with the enactment and implementation of discriminatory laws; *see* pp. 23, 25. There, the Tribunal stated that "Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. [...] *But lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich*" (emphasis added). These included prohibitions on intermarriage and/or sexual intercourse between Jews and Germans. *See* p. 1063.

1452 *Justice* Judgment, p. 1114. By "unquestionably us[ing] his influence *toward achieving discriminatory action* favorable to high Party officials and unfavorable to Poles and Jews," Rothenberger was found to have aided and abetted in the crime of persecution, *see* p. 1118 (emphasis added).

1453 *RuSHA* Judgment, p. 158 ("Poles who will have to be displaced in the course of the settlement must under no condition leave the Warthegau [...] since the Poles will probably be needed later on as manpower").

1454 *Greiser* Judgment, pp. 93-94. Further, Greiser was charged with and convicted of persecuting the Polish population through legal and administrative regulations, p. 73, which did not have an 'objective to remove' but rather "were intended to deprive the Poles of all their rights except those essential to maintain Polish manpower at a minimum physical level," *see* pp. 78-93.

1455 **F54** Appeal Brief, para. 654 *citing* the findings relevant to nine IMT defendants and *Eichmann* Case.

1456 At Nuremberg, Göring, von Ribbentrop, Frank, Frick, Funk, Seyss-Inquart, and Bormann were charged under "Count 3 – War Crimes," as having "conducted deliberate and systematic genocide, viz. the

their intent to remove or destroy the relevant groups can be understood as demonstrating genocidal intent. In the two instances where defendants were *not* charged with conduct amounting to genocide, the IMT did not require any "objective to remove", but rather, much like the *ad hoc* jurisprudence Appellant cites as well as the *Eichmann* Case,[1457] found the objective *could* exist as a matter of evidence, without basing persecution convictions on its presence.[1458]

Grounds 95, 96: No discriminatory intent towards Buddhists and Monks or against the Cham[1459]

383. Both grounds should be dismissed as they are unsubstantiated and merely amount to the repetition of Appellant's erroneous assertion that the *mens rea* of persecution as a CAH required an intent to exclude/objective to remove the impugned group from society. As set out above, there is no legal requirement that the perpetrator possess a 'persecutory intent' over and above a discriminatory intent.[1460]

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extermination of racial and national groups, against civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others." *See* IMT Judgment (Indictment), pp. 43-44, as well as the findings of their culpability under this count at IMT Judgment, pp. 282 (Göring), 288 (von Ribbentrop), 298 (Frank), 301 (Frick), 307 (Funk), 330 (Seyss-Inquart), 341 (Bormann). The IMT issued its reasoning regarding individual culpability under counts 3 (war crimes, including "murder through genocide") and 4 (CAH, including persecution) in the same section, thus, the articulation of the intent for genocide often appeared alongside the Tribunal's consideration of the CAH of persecution.

1457 **F54** Appeal Brief, para. 654, *citing Eichmann* Case, paras 56, 201. In citing *Eichmann* Case, para. 56, Appellant overlooks that the purpose of paras 55-58 was for "background", to describe the different stages of the persecution of the Jews, "solely to establish the place of the Accused and the degree of his personal responsibility within the regime of persecutions." Para. 56 does not mention Eichmann at all, and is less still a discussion of his *mens rea.* Para. 201 refers to the part of the indictment period in which Eichmann was additionally convicted of crimes against the Jewish people (genocide). Appellant overlooks the fact that where the District court was unable to find an "intent to exterminate the Jewish people", Eichmann's convictions were limited to CAH, including persecution. *See* paras 185-186. Thus, in finding Eichmann guilty of the CAH of persecution, the Court did not refer to an "objective to remove", *see* para. 244(5), (6), whereas, in convicting Eichmann of crimes against the Jewish People, the Court specifically referred to his "intent to exterminate the Jewish People". *See* para. 244(1), (2), (3), (4).

1458 Though Streicher supported the extermination of the Jewish people, he was found to have committed persecution not *because of* any separate "objective to remove" Jews from society, but because he continued to write and publish propaganda *directed against Jewish people*, inciting their murder and extermination "at the time when Jews in the East were being killed under the most horrible conditions." *See* IMT Judgment, pp. 303-304. Likewise, von Schirach's culpability rests in his participation in a policy of deportation *directed against Jewish people* in Austria, *see* p. 319. The Co-Prosecutors note that in both these cases, removal of Jews from their current society is inherent in the underlying acts of murder, extermination and deportation, rather than a separate *mens rea* requirement.

1459 Ground 95: **F54** Appeal Brief, *No discriminatory intent towards Buddhists and monks*, para. 656; **F54.1.1** Annex A, p. 37 (EN), p. 34 (FR), p. 52 (KH); Ground 96: **F54** Appeal Brief, *No discriminatory intent towards Cham people*, para. 657; **F54.1.1** Appeal Brief Annex A, p. 37 (EN), p. 34 (FR), p. 52 (KH).

1460 *See* response to Ground 94.

Ground 97: Erroneous analysis of the legality of OIA [1461]

384. **Ground 97 should be dismissed as Appellant fails to establish that the TC erred in law by finding that OIA as a CAH was accessible and foreseeable.**[1462]

385. Appellant concedes that he knew exactly what types of conduct could render him criminally responsible for OIA and raises arguments that have previously been analysed and rejected by the SCC in Case 002/01.[1463] The SCC has already confirmed that "there is no doubt" that OIA was a crime under CIL in 1975,[1464] a finding that, despite his equivocation,[1465] Appellant accepts. The extensive array of international instruments and jurisprudence available in 1975, including those cited by the SCC,[1466] makes abundantly clear that OIA represented CIL that was accessible and foreseeable in 1975.[1467]

386. Moreover, recognising the "natural tension" of a residual category of OIA with *lex certa*,[1468] this Chamber has already confirmed that, contrary to Appellant's submission,[1469] there is *no* requirement that the underlying conduct be criminalised under international law at the time of commission.[1470] Rather, if properly applied, the notion of OIA is sufficiently clear and precise to be consistent with the tenets of accessibility and foreseeability,[1471] such that Appellant knew, in the sense "generally understood", that his conduct was criminal.[1472] Specifically, the SCC held:

> the principle of *nullum crimen sine lege certa* is respected if the specific conduct which is found to constitute [OIA] violates a basic right of the victims and is of similar nature and gravity to other enumerated [CAH].[1473]

1461 Ground 97: **F54** Appeal Brief, *Erroneous Analysis of the Legality of OIA*, paras 659-665; **F54.1.1** Appeal Brief Annex A, p. 38 (EN), p. 34 (FR), p. 53 (KH).

1462 **F54** Appeal Brief, paras 659-665 *citing* **E465** Case 002/02 TJ, para. 723.

1463 **F36** Case 002/01 AJ, paras 572-590. At para. 586, the SCC rejected Nuon Chea's allegation that the TC erred by violating the requirements of accessibility and foreseeability stemming from the principle of legality since the underlying crimes did not exist in CIL in 1975.

1464 **F36** Case 002/01 AJ, para. 576.

1465 **F54** Appeal Brief, paras 660 ("The Defence does not contest the fact that OIA was a crime at the time when the events took place"), 662 ("OIA is not a crime or a specific type of crime").

1466 **F36** Case 002/01 AJ, fns 1463-1464.

1467 *See* London Charter, art. 6(c); Tokyo Charter, art. 5(c); CCL No. 10, art. II(1)(c); Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal, 1950, Principle VI(c); *Ministries* Judgment, pp. 344, 467-475, 865, 911; *Medical* Judgment, pp. 174-180, 198; *Justice* Judgment, pp. 23, 972, 1200; *High Command* Judgment, pp. 465, 580; *Gerbsch* Case, p. 134; *Eichmann* Case, paras 201, 204. *See also* Nazis and Nazi Collaborators (Punishment) Law, 1950, art. 1(b).

1468 **F36** Case 002/01 AJ, paras 576-578.

1469 **F54** Appeal Brief, para. 665.

1470 **F36** Case 002/01 AJ, para. 584.

1471 **F36** Case 002/01 AJ, para. 578.

1472 **F36** Case 002/01 AJ, para. 762, fn. 1983; Case 001-**F28** *Duch* AJ, paras 96-97.

1473 **F36** Case 002/01 AJ, para. 586.

387. As a corollary, the SCC made clear that there is no need to stipulate "material elements" for the underlying conduct.[1474]

388. Moreover, Appellant concedes that he knew that OIA was an "extension" to the enumerated CAH, the content of which would be ascertained using the *ejusdem generis* rule.[1475] Indeed, the SCC determined that *ejusdem generis* is an "essential safeguard" of the principle of legality,[1476] and the US Military Tribunal at Nuremberg used the doctrine to clarify the contours of OIA.[1477] Put another way, Appellant knew that he could be held criminally responsible[1478] for conduct that was both "inhumane" and of a "similar nature and gravity" to the listed CAH. The contours of OIA were further elucidated by post-WWII jurisprudence,[1479] and included acts which violated basic human rights and breached the applicable laws and customs of war, such as the 1899 Hague Regulations, the 1907 Hague Regulations, the 1929 Geneva Convention and 1949 GCs.[1480] Every other ECCC Chamber,[1481] and the *ad hoc* tribunals[1482] have consistently confirmed the legality of OIA after an analysis of post-WWII state practice to confirm, *inter alia*, its accessibility and foreseeability.

1474 **F36** Case 002/01 AJ, para. 589.

1475 **F54** Appeal Brief, paras 661-662.

1476 **F36** Case 002/01 AJ, para. 578.

1477 *See e.g. Flick* Judgment, p. 1215; *Farben* Judgment, pp. 1129-1130.

1478 *Contra* **F54** Appeal Brief, paras 660, 663-665.

1479 *See e.g. Ministries* Judgment, pp. 344, 991 (considering that the plunder of property amounts to an inhumane act where it is committed as part of mass terror against a civilian population or is linked to the other acts of violence enumerated as a CAH); *Gerbsch* Case, p. 134 ("[a]cts of ill-treatment are covered by the terms 'OIA'"); *Zuehlke* Case, p. 145 (illegal detention "fell under the notion of '[OIA] committed against any civilian population'"); *Eichmann* Case, paras 201 ("Causing serious damage to the Jews, bodily or mentally, was also an inhuman act committed against the civilian population."), 204 ("the plunder of property may be considered an inhuman act within the meaning of the definition of "[CAH]" only if it is committed under the pressure of mass terror against any civilian population, or if it is linked to any of the other acts of violence defined by the Law as a [CAH], or as a result of any of those acts"); *Tarnek* Case, p. 540 ("the Court interpreted the words '[OIA]' appearing in the definition of [CAH] as applying only to such [OIA] as resembled in their nature and their gravity those specified in the definition").

1480 *See* **F36** Case 002/01 AJ, para. 584; **D427/1/30** PTC Second IS Closing Order Decision, para. 395; *Justice* Judgment, pp. 3-4, 19, 23, 985 (defendants were charged with and convicted of "murder, torture, and illegal imprisonment of, and brutalities, atrocities, and [OIA] against thousands of persons" as war crimes and [CAH]. In that case, when addressing the issue of CAH as violations of international law, the judges stated that "[t]he charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, *in violation of the laws of war and of humanity*" (emphasis added)); *Medical* Judgment, TWC Vol. I, pp. 16-17, TWC Vol II, pp. 174-180, 198 (the war crime of conducting 'medical experiments' without consent was also charged and found to constitute OIA as CAH); *Ministries* Judgment, pp. 467-468, 552.

1481 *See e.g.* **PTC: D427/1/30** PTC Second IS Closing Order Decision, paras 371, 385-388, 395-396, 398; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, paras 130-131, 156-157, 165; **TC**: Case 001-**E188** *Duch* TJ, para. 367; **E313** Case 002/01 TJ, para. 435; **OCIJ: D427** Closing Order, para. 1314; Case 003-**D267** Closing Order, paras 59-61.

1482 *See e.g. Stakić* AJ, para. 315; *Blagojević & Jokić* TJ, paras 624-626; *Kupreškić* TJ, paras 562-566.

Ground 98: Abridged summary of formal unlawfulness [1483]

389. **Ground 98 should be dismissed as Appellant fails to establish that the TC erred in law by allegedly 'truncating' the SCC's "formal unlawfulness" component for identifying OIAs.[1484]**

390. This ground must fail as Appellant does not explain how the TC applied a "truncated"[1485] definition of "formal unlawfulness" when it concluded, *by quoting directly* from the SCC's Case 002/01 Appeal Judgment, that "assessing whether conduct infringes 'basic rights appertaining to human beings, as identified under international legal instruments' was one way of introducing a 'requirement of formal international unlawfulness'".[1486]

391. Relying on an overly literal interpretation of a different aspect of the SCC's discussion,[1487] Appellant erroneously asserts that the TC was required to identify "prohibitions" of the relevant conduct in human rights instruments, in addition to the "rights" that conduct violated.[1488] Appellant fails to articulate any legal distinction between the infringement of a right and violation of a prohibition, or to explain why both are required. As the SCC's own examples show, human rights instruments use the two drafting techniques interchangeably,[1489] and both define the "*broad* tenets of human rights" with which an OIA may interfere.[1490] There is no difference, for example, between violations of the right to life articulated in many human rights instruments,[1491] and the prohibition of murder in common article 3 of the 1949 GCs. Requiring specific conduct to be expressly forbidden defeats the very purpose of the residual category of OIAs,[1492] reintroducing through the backdoor a requirement explicitly excluded by the SCC.[1493]

392. A "formal unlawfulness" component is not expressly required at the *ad hoc* Tribunals to

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1483 Ground 98: **F54** Appeal Brief, *Abridged summary of formal unlawfulness*, paras 666-671; **F54.1.1** Appeal Brief Annex A, p. 38 (EN), p. 34 (FR), p. 53 (KH).

1484 **F54** Appeal Brief, paras 666-671. *See further* **F54** Appeal Brief, paras 1098-1116, 1281-1287.

1485 **F54** Appeal Brief, paras 658, 671, 1103.

1486 **E465** Case 002/02 TJ, para. 726 *citing* **F36** Case 002/01 AJ, para. 584. *See further*, para. 586 ("the [SCC] considers that the principle of *nullum crimen sine lege certa* is respected if the specific conduct which is found to constitute other inhumane acts violates a *basic right* of the victims" (emphasis added)).

1487 *See e.g.* **F54** Appeal Brief, paras 666, 669 *citing* **F36** Case 002/01 AJ, para. 584 ("[T]he 'formal unlawfulness' requirement is to be achieved by identifying affirmative articulation of rights and prohibitions contained in human rights instruments applicable at the time relevant for charges of 'other inhumane acts'").

1488 **F54** Appeal Brief, paras 666, 669, 1102, 1107, 1282.

1489 *See e.g.* **F36** Case 002/01 AJ, para. 584, referring to the rights and prohibitions contained in UDHR.

1490 **F36** Case 002/01 AJ, para. 585 (emphasis added).

1491 UDHR, art. 3; ECHR, art. 2.

1492 *Brima* AJ, paras 183-185; *Kupreškić* TJ, para. 563. *See also* Commentary to the Fourth Geneva Convention, p. 39.

1493 **F36** Case 002/01 AJ, para. 584.

define OIA,[1494] as the SCC noted.[1495] However, where other tribunals, including cases cited by Appellant, have looked to international human rights law to assess gravity, their analysis bears out the TC's interpretation. Drawing on rights and prohibitions without distinction to ascertain the corpus of "basic rights appertaining to human beings",[1496] the tribunals have not required prohibition of the specific conduct in question.[1497]

C. TREATMENT OF TARGETED GROUPS

1. BUDDHISTS

393. The TC correctly found the CAH of persecution on religious grounds was committed against Buddhists, including monks in the TK Cooperatives,[1498] pursuant to a CPK policy targeting Buddhists nationwide, which was intrinsically linked to the common purpose.[1499]

394. Appellant's three grounds regarding these crimes fail as they variously misunderstand the law on *de facto* discrimination, adopt an erroneous piecemeal reading to either the evidence or the Judgment, and in some instances fail to substantiate argumentation.[1500] Appellant specifically overlooks the discriminatory *consequences* of the acts on Buddhists in the TK Cooperatives, their cumulative impact, and the fact that they occurred in the context of a larger persecutory campaign against Buddhists.

Ground 188: Alleged policy regarding the Buddhists[1501]

395. **Ground 188 should be dismissed as Appellant fails to establish that the TC erred in law and fact by finding that there was a criminal CPK policy against Buddhists and that it was part of the common purpose.**

396. The ground fails because (i) Appellant ignores what evidence the TC relied on to find the existence of a policy against Buddhists, including Buddhist monks; (ii) it is limited to Appellant's unfounded arguments in his other appeal grounds to erroneously argue the

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1494 The Appeals Chambers of the ICTY and SCSL have excluded an express human rights basis for conduct amounting to OIAs, requiring only that the act be of a similar nature and gravity as the enumerated acts. *See e.g. Krajišnik* AJ, para. 331; *Brima* AJ, paras 198-200; *D Milošević* AJ, paras 108-109.

1495 *See* **F36** Case 002/01 AJ, para. 584.

1496 *Stakić* AJ, paras 315-317, especially fn. 649; *Kupreškić* TJ, para. 566.

1497 *See e.g. Kupreškić* TJ, para. 566 (enforced prostitution is "indisputably a serious attack on human dignity pursuant to most international instruments on human rights," thus finding that the conduct may amount to an OIA without requiring any specific prohibition of "enforced prostitution".)

1498 **E465** Case 002/02 TJ, paras 1182-1187.

1499 **E465** Case 002/02 TJ, paras 4013-4022. *See* response to Ground 188.

1500 Grounds 188, 108-109.

1501 Ground 188: **F54** Appeal Brief, *Alleged policy regarding the Buddhists*, paras 1586-1591; **F54.1.1** Appeal Brief Annex A, p. 65 (EN), p. 60 (FR), p. 92 (KH).

policy was not criminal; and (iii) Appellant does not substantiate his assertion that the criminal policy was not part of the common purpose to, *inter alia*, "defend the country against enemies and radically transform the population into an atheistic and homogenous Khmer society of worker-peasants".[1502]

397. First, the TC's finding that "a centrally-devised policy to abolish Buddhist practices and forbid the practice of Buddhism in DK existed throughout the indictment period" was *not* based on the persecutory acts against Buddhists in the TK Cooperatives.[1503] Rather, it was based on (i) "particularly probative" CPK material,[1504] taking into account the historical context in which the CPK was already pressuring Buddhist monks to leave the monkhood to join the revolution prior to 17 April 1975;[1505] and (ii) "consistent patterns of conduct *beyond the crime base* which corroborate the existence of a centrally-devised policy".[1506]

398. Appellant therefore ignores the TC's reasonable reliance on, *inter alia*, (i) a CPK policy document, dated 22 September 1975, that assessed at least 90 percent of monks to have left the monkhood, acknowledged the impact of abandoned pagodas on Buddhist practice, and stated that "this special layer [of the society] will no longer cause any worry" because the "unstoppable movement" against them had resulted in "significant change [...] *observed* in our society";[1507] (ii) CPK notebooks and a magazine that describe monks as a "special class", "petty bourgeoisie", and being susceptible to enemies;[1508] (iii) evidence of CPK officials considering Buddhism to be "reactionary"[1509] and incompatible with the revolution;[1510] and (iv) "scant" reference to Buddhism or

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1502 **E465** Case 002/02 TJ, para. 4021. *See also* para. 4068.

1503 **E465** Case 002/02 TJ, para. 4017. *Contra* **F54** Appeal Brief, paras 1589, 1586.

1504 **E465** Case 002/02 TJ, para. 3865.

1505 **E465** Case 002/02 TJ, para. 4015 *cross-referring* to, *inter alia*, para. 264 (including citations therein). *See also* paras 191, 1085.

1506 **E465** Case 002/02 TJ, para. 3865 (emphasis added).

1507 **E465** Case 002/02 TJ, para. 4015 *cross-referring* to, *inter alia*, para. 1088, fn. 3631 *citing* **E3/99** Policy Document No. 6, 22 Sept. 1975, EN 00244275 (emphasis added) and *reiterated* at para. 3850. *See also* paras 1085, 1089, 3757.

1508 **E465** Case 002/02 TJ, para. 4015 *cross-referring* to, *inter alia*, paras 3850 (fns 12861-12862 *cross-referring* to paras 3750 and 3832, which cite **E3/1233** Notebook, undated, EN 00711617; **E3/834** Combined S-21 Notebook, Apr.-Dec. 1978, EN 00184509), 1091 (fn. 3635 *citing*, *inter alia*, **E3/135** *Revolutionary Flag*, June 1977, EN 00142907). *See also* paras 1084, 1088, 3846 (including fn. 12848 *cross-referring* to, *inter alia*, para. 3784), 3884.

1509 **E465** Case 002/02 TJ, para. 4015 *cross-referring* to, *inter alia*, paras 1092 (fn. 3637 *citing* **E1/56.1** Kaing Guek Eav, T. 29 Mar. 2012, pp. 8-9), 1090 (fns 3633-3634 *citing* **E3/259** DK Constitution, EN 00184838; **E3/273** FBIS, *Phnom Penh Reportage on Third National Congress: Khieu Samphan Report*, 5 Jan. 1976, EN 00167816). *See also* fns 3703, 10819, paras 3763, 3846.

1510 **E465** Case 002/02 TJ, para. 4015 *cross-referring* to, *inter alia*, para. 1108 (fn. 3704 *citing* two press articles regarding Minister of Propaganda Yun Yat). *See also* para. 4020.

monks in CPK publications, speeches, and broadcasts after early 1976.[1511]

399. Additionally, the TC reasonably found that the existence of this centrally devised policy was corroborated by evidence beyond the TK Cooperatives. Based on a plethora of trial testimonies and some WRIs that the TC cited as illustrative examples, it found (i) "a consistent and widespread pattern of forcible defrocking of monks in the aftermath of 17 April 1975, followed by their expulsion from pagodas throughout the country"; (ii) subsequent destruction of pagodas and religious objects, or their desecration through sacrilegious use; (iii) prohibition on Buddhist worshipping, rituals, and practices during the indictment period; and (iv) "[w]itnesses were told about Buddhism's incompatibility with the revolution, and described in court the complete destruction of Buddhism during the DK period."[1512] Contrary to Appellant's misleading claims, he did not challenge this evidence outside the TK Cooperatives in Grounds 108 and 109, which concern persecutory acts against Buddhists *in* the TK Cooperatives.[1513]

400. In effect, the evidence of a policy to abolish Buddhist practices and forbid the practice of Buddhism during the indictment period was so strong that the TC did not need to rely on its findings in the TK Cooperatives to infer the existence of such a policy. The fact that the same pattern of conduct against Buddhists occurred in the TK Cooperatives as it did elsewhere in the DK only reinforces the reasonableness of the TC's finding of the existence of the policy.

401. Second, Appellant fails to demonstrate any error in the TC finding "that the policy targeting Buddhists [...] involved the commission of crimes".[1514] For reasons already provided in this Response, Appellant's reiteration of Grounds 59, 95, 108, and 109, fails to undermine the TC's legally correct and reasonable findings on the CAH of persecution of Buddhists in the TK Cooperatives.[1515] Further, Appellant overlooks that the criminal acts against Buddhists in TK District were "consistent" with the CPK's centrally-devised policy *and* persecutory treatment of Buddhists outside the district.[1516]

1511 **E465** Case 002/02 TJ, para. 4015 *cross-referring* to, *inter alia*, para. 1091.

1512 **E465** Case 002/02 TJ, paras 4015-4016.

1513 *Contra* **F54** Appeal Brief, paras 1589, 1591 (fns 3034, 3038 *cross-referring* to paras 743-747). *See* response to Grounds 108-109.

1514 **E465** Case 002/02 TJ, para. 4018 and *reiterated* at para. 4022. For the evidence relied on by the TC, *see* para. 4019 (including cross-references therein).

1515 *See* response to Grounds 59 (*saisine*) (*contra* **F54** Appeal Brief, paras 1586, 1589), 95 (*mens rea*) (*contra* **F54** Appeal Brief, para. 1587), 108 (*de facto* discrimination) (*contra* **F54** Appeal Brief, paras 1590, 1588-1589), and 109 (physical and mental effects) (*contra* **F54** Appeal Brief, paras 1588-1589). *See also* **E465** Case 002/02 TJ, para. 4019 (including cross-references therein).

1516 **E465** Case 002/02 TJ, para. 4020.

402. Third, Appellant merely asserts but fails to explain why the TC erred in finding that the criminal acts against Buddhists in the TK Cooperatives "were encompassed by the common purpose".[1517] The TC found that the abolition of Buddhist practices across TK District was "consistent" with the prohibition of Buddhism being "incompatib[le] with revolutionary principles".[1518] Based on the extensive and consistent evidentiary record, the TC reasonably held that the CPK policy targeting Buddhists for adverse treatment was implemented as a criminal means to "defend the country against enemies and radically transform the population into an atheistic and homogenous Khmer society of worker-peasants" according to the CPK's revolutionary objective.[1519] The crimes committed pursuant to this policy were thus encompassed by the common purpose.[1520]

Ground 108: There was no persecution on religious grounds: equal treatment does not constitute discriminatory treatment[1521]

403. **Ground 108 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *actus reus* of persecution on religious grounds of Buddhists and Buddhist monks in TK District is established.**

404. The ground fails because Appellant's arguments are premised on a misunderstanding of the law on *de facto* discrimination and a piecemeal reading of the TC's legal findings.

405. Appellant erroneously alleges that *de facto* discrimination cannot take place when certain measures apply equally to all members of a heterogenous group.[1522] This is legally incorrect and ignores the settled jurisprudence of the ECCC, which states that an act or omission "discriminates in fact" where there are "actual discriminatory *consequences*" for members of a specific group.[1523] There is thus no legal requirement to differentiate between "direct" or "indirect" discrimination.[1524] Moreover, an act or omission is

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1517 **E465** Case 002/02 TJ, para. 4018 and *reiterated* at paras 4021-4022. *Contra* **F54** Appeal Brief, para. 1591. *See* response to Grounds 178 and 189, 175, 176, 177 & 244 (Errors Regarding the Alleged Common Purpose and the CPK's Socialist Revolution Project).

1518 **E465** Case 002/02 TJ, para. 4019.

1519 **E465** Case 002/02 TJ, para. 4021. *See also* response to Ground 178.

1520 *See* response to Ground 178.

1521 Ground 108: **F54** Appeal Brief, *There was no persecution on religious grounds: Equal treatment does not constitute discriminatory treatment*, paras 743-745; **F54.1.1** Appeal Brief Annex A, p. 41 (EN), p. 37 (FR), pp. 57-58 (KH). Regarding Appellant's reiterated appeal grounds at **F54** Appeal Brief, para. 743, *see* response to Grounds 59 (*saisine*), 94 (persecution *mens rea* law).

1522 **F54** Appeal Brief, para. 745.

1523 Case 001-**F28** *Duch* AJ, paras 263, 267 (emphasis added). In reaching its conclusions, the SCC confirmed, at para. 263, that "the factual findings in post-World War II jurisprudence, as surveyed in part above, support" this finding, thus confirming that it formed part of CIL by 1975

1524 *Contra* **F54** Appeal Brief, para. 744.

discriminatory in fact "where 'a victim is targeted *because of the victim's membership in a group* defined by the perpetrator on specific grounds, namely on political, racial or religious basis'".[1525] Appellant therefore fails to demonstrate any legal error in the TC recognising that *de facto* discrimination is determined "[i]rrespective of whether equality of outcome was the ultimate goal",[1526] and by having regard to "the differing impact which absolute physical equality [i.e. treating everyone the same] inevitably has depending on people's differing backgrounds".[1527]

406. Applying the correct law, the TC found that Buddhists[1528] and monks[1529] suffered the discriminatory consequences of the CPK's policy to eradicate religion and were targeted in TK District *due to their membership in a religious group*. The TC thus correctly rejected Nuon Chea's unfounded claim that there was no *de facto* discrimination because Buddhists were treated like everyone else in DK.[1530]

Ground 109: There was no persecution on religious grounds: lack of evidence of physical or mental effects on Buddhists [1531]

407. **Ground 109 should be dismissed as Appellant fails to establish that the TC erred in fact in establishing the *actus reus* of persecution on religious grounds of Buddhists and Buddhist monks in TK District.**

408. The ground fails because Appellant does not demonstrate that the TC made an unreasonable assessment of the evidence underpinning its legal finding that "the physical and mental impact of [...] events infringed [Buddhists'] fundamental rights to a degree

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1525 Case 001-**F28** *Duch* AJ, para. 272 (emphasis added and original emphasis removed) and *reiterated* at **F36** Case 002/01 AJ, paras 667, 690; **E465** Case 002/02 TJ, para. 714. Regarding Buddhists, for example, (i) monks were forced to defrock and renounce their faith and (ii) symbols, manuscripts, scriptures, and places of worship that were unique to Buddhism were destroyed or used for non-religious purposes. *See* **E465** Case 002/02 TJ, paras 1183-1185.

1526 **E465** Case 002/02 TJ, para. 1186. *Contra* **F54** Appeal Brief, para. 745.

1527 **E465** Case 002/02 TJ, para. 1185. *Contra* **F54** Appeal Brief, para. 744.

1528 **E465** Case 002/02 TJ, para. 1186 ("[T]he destruction of Buddhist symbols, the disappearance of former monks, the requisition of places of worship, and the banning of outward expression of religious practice or belief [...] discriminated in fact because it targeted those with Buddhist beliefs and backgrounds, based entirely on what these places, symbols and practices meant to those persons".).

1529 **E465** Case 002/02 TJ, para. 1183 (Monks who were "deliberately" gathered and sent to Angk Roka Pagoda, where they were "forced" to defrock, had been "identified [...] on the basis of their religious identity and targeted [...] because they were monks".) and *reiterated* at para. 1185 ("[A]s the victims of this conduct were members of the targeted religious group (Buddhist monks), the conduct was discriminatory in fact".).

1530 **E465** Case 002/02 TJ, paras 1185, 1182. As part of its response to Nuon Chea, the TC reiterated its earlier legal findings of Buddhists, including monks, having suffered *de facto* discrimination. *See* paras 1185-1186.

1531 Ground 109: **F54** Appeal Brief, *There was no persecution on religious grounds: Lack of evidence of physical or mental effects on Buddhists*, paras 743, 746-747; **F54.1.1** Appeal Brief Annex A, p. 41 (EN), pp. 37-38 (FR), p. 58 (KH). Regarding Appellant's reiterated appeal grounds at **F54** Appeal Brief, para. 743, *see* response to Grounds 59 (*saisine*), 94 (persecution *mens rea* law).

of gravity similar to that of other crimes against humanity".[1532] Appellant fails to prove that no reasonable trier of fact could have reached that finding upon a holistic, as opposed to piecemeal, assessment of the evidence.[1533] His erroneous complaint (i) misconstrues this finding; (ii) is limited to one item of evidence that he unpersuasively challenges; (iii) ignores the cumulative impact of the persecutory acts that were committed against Buddhists in the district; and (iv) overlooks that those acts occurred in the context of the CPK furthering a larger persecutory campaign against Buddhists.[1534] Moreover, Appellant does not dispute the TC's additional legal finding on the gravity of discriminatory acts against monks *per se*,[1535] which also underpins the *actus reus* of persecution.

409. Relying on reasoning developed by the SCC, the TC correctly articulated the gravity threshold, which is met by examining the relevant acts "in their context and with consideration of their cumulative effect."[1536] Where the underlying persecutory acts are themselves CAH, they are "clearly acts of significant gravity which result in the violation of fundamental rights" and which "[rise] to the level of gravity and severity of [the] underlying CAH".[1537] In assessing whether "other acts" (i.e. non-enumerated CAH) amount to the crime of persecution,[1538] Chambers should not focus on whether a specific persecutory act or omission itself breaches a human right that is fundamental in nature, but "whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights such that it is equal in gravity or severity to other underlying crimes against humanity".[1539]

410. The degree of gravity is intensified where "an act or omission is targeted at an individual merely because of that individual's membership in a particular group"[1540] and Chambers must consider whether the relevant acts were committed in the context of, or as part of a

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1532 **E465** Case 002/02 TJ, para. 1186.
1533 *See* Standard of Review (Errors of fact).
1534 *See* **E465** Case 002/02 TJ, para. 716, fn. 2198 *citing*, *inter alia*, Case 001-**F28** *Duch* AJ, para. 259. *Contra* **F54** Appeal Brief, para. 746.
1535 **E465** Case 002/02 TJ, para. 1187. *See also* para. 1185 (gravity of "forc[ing] Buddhist monks to renounce their faith [...], in particular what the monks were forced to give up").
1536 **E465** Case 002/02 TJ, para. 716, fn. 2198 *citing* Case 001-**F28** *Duch* AJ, paras 256-259, 261. This is likewise the approach to determining whether 'other acts' reach the gravity threshold, as the collective examination of acts within their context "determines the gravity of the acts as a whole", *see* Case 001-**F28** *Duch* AJ, para. 257 *citing Brđanin* TJ, fn. 2585.
1537 Case 001-**F28** *Duch* AJ, paras 261-262.
1538 The SCC has noted that the gravity threshold is relevant solely for determining whether 'other acts' amount to the CAH of persecution, *see* Case 001-**F28** *Duch* AJ, para. 261.
1539 Case 001-**F28** *Duch* AJ, para. 257.
1540 Case 001-**F28** *Duch* AJ, para. 259.

chain of events in a larger persecutory campaign, the ultimate goal and end result of which was extremely grave, resulting in a gross violation of a fundamental right.[1541] At all relevant times in the Trial Judgment, the TC applied this well-established legal test.[1542]

411. The TC's legal finding on the gravity of persecutory acts against Buddhists was *not* limited to illustrative examples such as Bun Saroeun's victim impact statement and wedding ceremonies not being conducted in accordance with Cambodian tradition.[1543] Rather, it was based on evidence "in relation to the destruction of Buddhist symbols, the disappearance of former monks, the requisition of places of worship, and the banning of outward expression of religious practice or belief".[1544] A holistic reading of the legal finding, with earlier legal and factual findings (and their cross-references), demonstrates that the finding was also based on evidence from, *inter alia*, experts, witnesses, and CPs on "the importance of religious beliefs and practices [...], and their place in Cambodian society at the time",[1545] the scale and duration of the persecutory acts in the district,[1546] and the extent those acts impacted Buddhists.[1547]

412. In particular, the TC recognised the prominent role Buddhism had in Cambodia before 1975,[1548] including how it "was inextricably intertwined with Cambodian identity and affected most aspects of life"[1549] and that Buddhist monks were of a "special class".[1550] By 1976,[1551] there was "a district-wide ban on the practice of Buddhism and its

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1541 Case 001-**F28** *Duch* AJ, para. 259.

1542 **E465** Case 002/02 TJ, paras 1179, 1412, 1691, 3331. *See also* response to Grounds 119, 143, and 149.

1543 *Contra* **F54** Appeal Brief, para. 746.

1544 **E465** Case 002/02 TJ, para. 1186.

1545 **E465** Case 002/02 TJ, para. 1185. *See also* fn. 3613, which cross-refers to paras 257-264 (section "3.4 Buddhism in Cambodia before 1975").

1546 Scale: *E.g.* **E465** Case 002/02 TJ, paras 1183 (regarding (i) district secretary's instruction to disrobe Buddhist monks and (ii) "general pattern across Tram Kak district" for forcibly disrobing "hundreds of monks" with fns 4030-4032 *cross-referring* to paras 1087, 1105), 1184 (regarding (i) Buddhism banned by destroying Buddhist symbols, desecrating pagodas, and the "complete abolition of Buddhist practices" and (ii) there being "an organised sustained attack against religion" with fns 4034-4036 *cross-referring* to paras 1105, 1107-1108). Duration: *E.g.* **E465** Case 002/02 TJ, paras 1094-1099 (outlining a sustained operation for several months after 17 April 1975 to "force monks to leave the monkhood"), 1105, 1107-1108 (outlining the attack on Buddhist symbols and prohibition against practising Buddhism from 17 April 1975 until the end of the DK regime).

1547 *See e.g.* **E465** Case 002/02 TJ, paras 1184-1187 (including fns 4039, 4041).

1548 *See* **E465** Case 002/02 TJ, paras 257-264 (section "3.4 Buddhism in Cambodia before 1975").

1549 **E465** Case 002/02 TJ, para. 258, fn. 647 *citing* **E3/20** Elizabeth Becker, *When the War Was Over*, EN 00237894-95.

1550 **E465** Case 002/02 TJ, fn. 4037 *cross-referring* to, *inter alia*, para. 1084, which cites in fn. 3613 various DK documents. *See also* para. 1088, fn. 3631 *citing* **E3/99** Policy Document No. 6, 22 Sept. 1975, EN 00244275.

1551 **E465** Case 002/02 TJ, para. 1095, fns 3647 and 3650 *citing*, *inter alia*, **E1/263.1** Em Phoeung, T. 16 Feb. 2015, pp. 21, 52, 60-61. *See also* para. 4017.

manifestation",[1552] an absence of monks,[1553] and the desecration of symbols, holy texts, and pagodas through sacrilegious use.[1554] Unsurprisingly, the cumulative impact of these acts in TK District meant Buddhists could no longer hold rituals.[1555] They were "on their own"[1556] for the remainder of the DK regime,[1557] compelling some to risk their lives to secretly maintain their Buddhist beliefs.[1558]

413. In addition to the cumulative impact, Appellant fails to appreciate that the TC's legal finding on the gravity of the persecutory acts in the district includes highly probative evidence that the acts were committed in the context of a larger persecutory campaign against Buddhists,[1559] implemented in TK District pursuant to a May 1975 order.[1560]

2. EX-KR OFFICIALS

414. The TC correctly found CAH were committed against former Khmer Republic officials ("ex-KR") (including civil servants and former military officials), pursuant to a CPK policy targeting ex-KR, which was intrinsically linked to the common purpose.[1561]

415. Appellant's three grounds[1562] regarding these crimes fail as he misinterprets the *saisine*, misrepresents the TC's findings in Case 002/01,[1563] and incorrectly assesses the

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1552 **E465** Case 002/02 TJ, para. 1186, fn. 4038 *cross-referring* to paras 1105 and 1108, which refer to testimonies, WRIs, press articles, and a media statement. *See also* paras 1102-1103, fns 3675 (Chang Srey Mom), 3679 (Sao Han), 3691 (Neang Ouch), 3702 (TK District record).

1553 **E465** Case 002/02 TJ, para. 1105, fn. 3691 *citing* **E1/273.1** Neang Ouch, T. 9 Mar. 2015, p. 47. *See also* fns 3631 (CPK policy document), 3661 (Em Phoeung), 3701 (Bun Saroeun), para. 1183 (fn. 4028 *cross-referring* to paras 1094-1096).

1554 Symbols and texts: **E465** Case 002/02 TJ, fn. 3683 *citing* **E1/263.1** Em Phoeung, T. 16 Feb. 2015, pp. 67-68. *See also* fns 3669 (Riel Son), 3684 (Sao Han), 3686 (Phneou Yav), 3689 (Note: The fn. should cite to **E1/247.1** Meas Sokha, T. 8 Jan. 2015, pp. 53-54 to accord with the fn. in the Khmer Trial Judgment.), 3698 (Pech Chim). Pagodas: **E465** Case 002/02 TJ, paras 1102, 1105, 1108. *See also* fn. 3699 (Bun Saroeun).

1555 **E465** Case 002/02 TJ, paras 1095 (fn. 3651 *citing* **E1/263.1** Em Phoeung, T. 16 Feb. 2015, pp. 52, 59-61); 1105 (fn. 3692 *citing* **E1/264.1** Phneou Yav, T. 17 Feb. 2015, p. 47). *See also* fn. 9495 (Keo Chandara).

1556 **E465** Case 002/02 TJ, para. 1095, fn. 3650 *citing* **E1/263.1** Em Phoeung, T. 16 Feb. 2015, pp. 52, 60-61. *See also* para. 1107 (Bun Saroeun); **E1/402.1** Alexander Hinton, T. 15 Mar. 2016, 11.15.21-11.21.46, p. 58, line 17-p. 61, line 24.

1557 **E465** Case 002/02 TJ, paras 1105 (fn. 3691 *citing* **E1/273.1** Neang Ouch, T. 9 Mar. 2015, p. 47), 1108 (fns 3703-3704 *citing*, *inter alia*, **E1/259.1** Elizabeth Becker, T. 9 Feb. 2015, p. 54 and press articles regarding Minister of Propaganda Yun Yat). *See also* fns 3702 (TK District record), 3637 (Kaing Guek Eav).

1558 **E465** Case 002/02 TJ, fns 3697 (*citing* **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, p. 36; **E1/255.1** Chang Srey Mom, T. 2 Feb. 2015, p. 16), 3702 (*citing* **E3/8424** TK District Record, 31 Aug. 1977). *See also* **E1/263.1** Em Phoeung, T. 16 Feb. 2015, 09.54.22-09.57.30, p. 19, lines 4-5; **E3/5136** Pol Moeun WRI, EN 00231816.

1559 *See* response to Ground 188. *See also* **E465** Case 002/02 TJ, paras 1093 (including fn. 3638, which cross-refers to "Section 3: Historical Background, para. 264; Section 16.4.3.3: Common Purpose: Targeting of Specific Groups: Buddhists, paras 4015-4017"), 1088-1089, 815.

1560 **E465** Case 002/02 TJ, para. 1087 (fns 3626-3627 *citing* **E1/291.1** Pech Chim, T. 23 Apr. 2015, pp. 69-70, 93-94; **E1/290.1** Pech Chim, T. 22 Apr. 2015, pp. 16-17). *See also* fns 3665 (WRI), 4030.

1561 **E465** Case 002/02 TJ, para. 4061.

1562 Grounds 187, 106 and 120.

1563 Grounds 187.

relevance and probative value of the evidence on which the TC's findings were based.[1564]

Ground 187: Alleged Policy with respect to the ex-KR soldiers [1565]

416. **Ground 187 should be dismissed as Appellant fails to establish that the TC erred in fact and in law by finding that there was a criminal CPK policy discriminating against ex-KR soldiers and officials, and that it was part of the common purpose.**

417. The ground fails as Appellant does not demonstrate that the TC erred in fact and in law by (i) exceeding its *saisine*;[1566] (ii) relying on the events at Tuol Po Chrey in the Northwest Zone to conclude the existence of a CPK policy discriminating against ex-KR soldiers and officials;[1567] (iii) finding the *actus reus* of persecution on political grounds of ex-KR soldiers at the TK Cooperatives[1568] and 1JD;[1569] and (iv) relying on Appellant's victory speech.[1570] Claims (i) and (iii) are repeated as independent grounds of appeal and are addressed elsewhere in this Response.

418. The second claim fails as Appellant erred in assessing the legal significance of his acquittal by the SCC in Case 002/01 with respect to the crimes committed at Tuol Po Chrey.[1571] Appellant misleadingly argues that he had been acquitted of the *facts* regarding the crimes committed at Tuol Po Chrey,[1572] when in fact the SCC only found that it was unreasonable to find that "a *policy contemplating the execution of* Khmer Republic soldiers and officials existed *at the time* of Tuol Po Chrey".[1573] The SCC explicitly affirmed the finding Appellant challenges,[1574] stating "it has found no unreasonableness in the TC's finding that at least 250 Khmer Republic soldiers and officials were killed" at Tuol Po Chrey.[1575] The TC thus did not err in relying on the events at Tuol Po Chrey as support for its conclusion that there was a policy of discrimination against ex-KR from 17 April 1975 to late 1975.[1576]

419. The fourth claim fails, as Appellant's arguments regarding the TC's review of his victory

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1564 Grounds 187, 106 and 120.
1565 Ground 187: **F54** Appeal Brief, *Alleged Policy with respect to the ex-KR soldiers,* paras 1578-1585; **F54.1.1** Appeal Brief Annex A, p. 64 (EN), p. 59 (FR), p. 92 (KH).
1566 **F54** Appeal Brief, para. 1578, fns 3014-3017; *See* response to Grounds 64, 71, 74, 81.
1567 **F54** Appeal Brief, para. 1582.
1568 **F54** Appeal Brief, para. 1579, fn. 3018; *See* response to Ground 106.
1569 **F54** Appeal Brief, para. 1579, fn. 3019; *See* response to Ground 120.
1570 **F54** Appeal Brief, para. 1581.
1571 **F54** Appeal Brief, para. 1582.
1572 **F54** Appeal Brief, para. 1582.
1573 **F36** Case 002/01 AJ, para. 972 (emphasis added).
1574 **F54** Appeal Brief, para. 1582; **E465** Case 002/02 TJ, para. 4036
1575 **F36** Case 002/01 AJ, para. 902.
1576 **E465** Case 002/02 TJ, para. 4036, fn. 13364.

speech are misleading, and further ignore the totality of evidence demonstrating the existence of a policy targeting ex-KR officials and soldiers. Appellant makes a pedantic argument that he only considered the heads of the ex-KR, not all ex-KR, as enemies.[1577] He relies on his own statement, where referred to the heads "of the most traitorous, fascist and corrupt regime that exists" as "the enemy" in a speech without referring to *all* ex-KR as traitors.[1578] Nonetheless, it is precisely these adjectives, chosen by him, that evince the vitriol towards the former regime and explain why ex-KR soldiers and officials were targeted *in general*, regardless of rank.

420. Moreover, and more substantively, Appellant ignores the extensive evidence the TC took into account when he claims that the TC had to *particularly* rely on Appellant's victory speech to establish discrimination against ex-KR.[1579] Specifically, the TC cited consistent accounts of persecution of ex-KR officials and soldiers occurring on a nationwide basis throughout the duration of the DK regime.[1580]

421. Appellant overlooks that the TC established the disputed policy by relying on numerous other speeches, directives and meetings occurring during this period at the highest CPK levels.[1581] The TC relied on 28 speeches, meetings, directives and publications throughout, and immediately prior to, the DK period, all of which involved CPK leaders.[1582] The TC considered that, according to Duch, "former soldiers and officers of [the] Lon Nol regime were the key enemies of the CPK after 17 April 1975".[1583] Immediately prior to, and during, 1975, the TC's consideration of evidence also reveals, *inter alia,* the CPK focused on the arrest of high-ranking civil servants and soldiers.[1584]

422. The TC found that the CPK's policy gradually broadened to include all former ex-KR soldiers, officials and their families, notwithstanding rank. The TC found evidence of this wider scope in Yang Sokhom's WRI which states that attendees at district-level

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1577 **F54** Appeal Brief, para. 1581.

1578 **E3/118** FBIS, *Khieu Samphan 21 April Victory Message on Phnom Penh Radio*, 21 Apr. 1975, EN 00166994, 00166977 ("After the most courageous and stubborn fight, after enduring all sorts of suffering and difficulties with great heroism and after enduring great sacrifices for 5 years and 1 month, our most valiant CPNLAF and our great people *have totally smashed* the most ferocious war of aggression of the *US imperialists* and completely crushed *the most traitorous, fascist and corrupt regime* of traitors Lon Nol, Sirik Matak, Son Ngoc Thanh, Cheng Heng, In Tam, Long Boret and Sosthene Fernandez") (emphasis added)).

1579 **F54** Appeal Brief, para. 1581.

1580 **E465** Case 002/02 TJ, paras 4026-4049.

1581 **E465** Case 002/02 TJ, paras 4026-4029, 4032, 4034, 4037-4040, 4041 (fns 13382, 13383), 4046 (fn. 13397), 4047 (fns 13402, 13403).

1582 **E465** Case 002/02 TJ, paras 4026-4029, 4032, 4034, 4037-4040, 4041 (fns 13382, 13383), 4046 (fn. 13397), 4047 (fns 13402, 13403).

1583 **E465** Case 002/02 TJ, para. 4032.

1584 **E465** Case 002/02 TJ, para. 4038.

meetings in 1977 were ordered to kill any civil servants or soldiers of the Khmer Republic.[1585] The TC also considered various issues of *RF* throughout 1975-1978 which blamed the shortcomings of the unsustainable collective regime on ex-KR, praised the elimination of ex-KR officials and identified that the "contemptible Nol's group" had been "smashed".[1586]

423. In addition, and substantively, the TC also considered the lengthy duration and wide geographical scope of the persecutory acts against ex-KR officials and soldiers to determine the existence of this policy. Significantly, the TC relied on 52 unique witness accounts and documents detailing the persecution of ex-KR soldiers, officials and their families.[1587] Commencing immediately prior to April 1975, the TC's analysis of evidence shows remarkable consistency in accounts throughout the duration of the DK regime.[1588]

424. From as early as 1972 to April 1975, the TC considered eight witness testimonies and 18 other documents including refugee accounts to find the emergence of the impugned policy, in relation to officials and soldiers of the Khmer Republic.[1589] For instance, Saut Saing's testimony revealed that "there were more prisoners who were former Lon Nol soldiers or civil servants" at KTC from 1973-1975.[1590] Similarly, for the period from April to late 1975, the TC relied on 27 witness testimonies, 24 WRIs, and 17 other documents in addition to prisoner lists from S-21 to establish the nationwide hunt, subsequent disappearance, arrests and/or execution of high-ranking former members of the KR armed forces, civilian officials and their families.[1591] For instance, the arrests and execution of 250 former Khmer Republic soldiers and officials at Tuol Po Chrey was described by six witnesses.[1592]

425. Moreover, the TC found that this discriminatory practice continued into 1976, based on three WRIs, 25 witness testimonies, and nine other documents, including a DK telegram reporting to Pol Pot, Nuon Chea, Ieng Sary, Vorn Vet and Son Sen, refugee accounts reported by US officials and Amnesty International.[1593] For instance, Prum Sarun recounted that "the Khmer Rouge gathered up the families of Lon Nol soldiers and took

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1585 **E465** Case 002/02 TJ, paras 4056, 4046, fn. 13397.
1586 **E465** Case 002/02 TJ, para. 4047, fn. 13403.
1587 **E465** Case 002/02 TJ, paras 4026-4049.
1588 **E465** Case 002/02 TJ, paras 4026-4049.
1589 **E465** Case 002/02 TJ, paras 4026-4031 (documents cited in fns 13335-13354).
1590 **E465** Case 002/02 TJ, para. 4031, fn. 13354.
1591 **E465** Case 002/02 TJ, paras 4032-4041 (documents cited in fns13355-13385).
1592 **E465** Case 002/02 TJ, para. 4036, fn. 13364.
1593 **E465** Case 002/02 TJ, paras 4042-4049.

them to live at the Au Pongmoan base", before killing the high-ranking officials.[1594]

426. Further, the TC was able to find that the disappearance, execution and arrests intensified in 1977 based on three first-hand witness testimonies, another DK Telegram and five WRIs.[1595] The DK telegram from Sector 801 to Pol Pot, Nuon Chea, Ieng Sary, Vorn Vet and Son Sen details identification processes for former officials, police and soldiers.[1596] The first-hand witness accounts reveal, *inter alia,* Preap Sokhoeurn and Sieng Chanthy's brothers' arrests, Chech Sopha's uncle and relatives' disappearance and the disappearance and arrests of Lon Nol soldiers.[1597] The individuals in question were all former Khmer Republic soldiers, officials or their families.[1598]

427. Additionally, the continuation of these practices in 1978 was evident to the TC from six WRIs of eye witnesses, another DK Telegram, and a DK Report.[1599] For instance, Chhim Srorn stated "[CPK] killed those who had been involved with the LON Nol government probably in August 1978" and In Choeun recalled that his nephew and others were arrested in 1979 based on an accusation of being in the Military Police during the Lon Nol regime.[1600] On a structural level, the DK report on 4 August 1978 to '*Angkar*' noted the screening of enemies "from various units and [the] military [including] the elements of the 17 April including former civil servants".[1601]

428. Further, there was also a great degree of consistency amongst the dozens of witness accounts and documents relied upon by the TC to find a policy of targeting ex-KR officials and soldiers was established when analysed against a geographical cross-section of DK. The TC found practice of this targeting across the Northwest, Southwest, East, West, Northeast and the North Zone as well as in Phnom Penh.[1602] Based on this extensive and consistent evidentiary record, the TC reasonably held that the CPK policy targeting ex-KR officials and soldiers for adverse treatment was implemented as a criminal means to "defend the country against enemies and radically transform the population into a homogenous Khmer society" according to the CPK's revolutionary objective.[1603] The crimes committed pursuant to this policy to achieve that objective were thus

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1594 **E465** Case 002/02 TJ, para. 4046, fn. 13396.
1595 **E465** Case 002/02 TJ, paras 4042-4049.
1596 **E465** Case 002/02 TJ, para. 4048, fn. 13404.
1597 **E465** Case 002/02 TJ, para. 4046, fns 13397, 13398.
1598 **E465** Case 002/02 TJ, para. 4046, fns 13397, 13398.
1599 **E465** Case 002/02 TJ, paras 4046-4049.
1600 **E465** Case 002/02 TJ, para. 4046, fn. 13398.
1601 **E465** Case 002/02 TJ, para. 4048, fn. 13404.
1602 **E465** Case 002/02 TJ, paras 4026-4049.
1603 **E465** Case 002/02 TJ, paras 4053, 4056, 4060.

encompassed by the common purpose.[1604]

Ground 106: Ex-KR were not persecuted on political grounds[1605]

429. **Ground 106 should be dismissed as Appellant fails to establish that the TC erred in fact by finding the *actus reus* was established for persecution on political grounds of ex-KR officials in the TK Cooperatives.**

430. The ground fails as Appellant erroneously argues that the TC erred in fact by finding that (i) orders were given to search and arrest ex-KR officials; (ii) a killing operation started in April 1977 against ex-KR officials in TK; and (iii) by referring to a paragraph in the Judgment relating to KTC as support for finding persecution against ex-KR officials in TK.

431. First, Appellant fails to demonstrate that there was no probative evidence to support the TC finding that orders were given to search for and arrest ex-KR officials in TK.[1606] He does not acknowledge the totality, extent, and quality of the evidence the TC relied on to make this finding.[1607] His challenge to this finding is limited to two paragraphs in the Judgment concerning two witnesses, Seng Soeun and Riel Son, and one contemporaneous CPK document.

432. In any event, regarding Seng Soeun, Appellant incorrectly assesses the probative value of his evidence, arguing it was beyond the geographic scope of the trial.[1608] It is well settled that evidence beyond the geographic scope of an indictment can be used to (i) clarify context, (ii) establish by inference the elements of criminal conduct occurring during the material period, and (iii) demonstrate a deliberate pattern of conduct.[1609] Thus, evidence of orders to search, arrest, and kill ex-KR officials given to military members in one district within Sector 13 is clearly relevant and probative to assist in clarifying the context and establishing by inference with other evidence the search and arrest of ex-KR officials within TK district. Regarding Riel Son, Appellant's argument that, as the witness could not provide a specific date of the meeting at which it was ordered to search for ex-KR officials, his testimony has no probative value,[1610] fails to acknowledge that it

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1604 **E465** Case 002/02 TJ, paras 4049-4061. *Contra* **F54** Appeal Brief, para. 1584. *See also* response to Ground 178.

1605 Ground 106: **F54** Appeal Brief, *Ex-KR were not persecuted on political grounds,* paras 719-726; **F54.1.1** Appeal Brief Annex A, p. 40 (EN), p. 37 (FR), pp. 56-57 (KH).

1606 **F54** Appeal Brief, paras 721-723.

1607 **E465** Case 002/02 TJ, paras 1175, 1062-1063, 1080-1081, 2813-2814, 2643, 2790, 2795-2801, 2840-2841.

1608 **F54** Appeal Brief, para. 721.

1609 *See* response to Ground 3.

1610 **F54** Appeal Brief, para. 722.

is not unreasonable for a witness to not know a specific date just under 40 years later.

433. Appellant's complaint that the TC erred by using the CPK's *RF* (September–October 1976) edition to corroborate Riel Son's testimony is also without merit. While the TC did not explain the meaning of the phrase "life-and-death contradictions" as Appellant states,[1611] the meaning of the phrase is reasonably inferred from its context. As used in the magazine, the term "life-and-death contradictions" was used to describe the difference between the "proletarian class" and government officials and soldiers who could not be reformed by education.[1612] The CPK document made a pertinent distinction between "secondary contradictions" and "life-and-death contradictions"[1613] - the former being "contradictions due to misunderstanding" which must be "sorted by successive education", and the latter being "antagonistic contradictions" which must be sorted by "implementing the *dictatorship* of the proletarian class over this group".[1614] Such evidence of the antagonistic and aggressive attitude the CPK had toward those it deemed irreformable was relevant and probative for the TC to consider in providing context to Riel Son's testimony as to the purges. Earlier and later editions of the CPK's *RF* provide context for the meaning of the phrase "life-and-death contradictions" in relation to ex-KR officials, namely, by virtue of their identity, individuals from this group must be killed.[1615]

434. Second, Appellant does not demonstrate that there was a lack of evidence of a killing

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1611 **F54** Appeal Brief, para. 723. *Contra* **E465** Case 002/02 TJ, para. 1062.

1612 **E3/10** *Revolutionary Flag*, Sept.-Oct. 1976, EN 00450529-30. ("In the base areas, as for the characteristics of the contradictions that we can detect, most of them are government officials, policemen, soldiers, and students. This comes from the capitalists and the landowners not showing themselves. They are the instigators, but they do not show their faces. When they held power, they did not show their faces; they just paid government agents to show their faces.").

1613 **E3/10** *Revolutionary Flag*, Sept.-Oct. 1976, EN 00450530.

1614 **E3/10** *Revolutionary Flag*, Sept.-Oct. 1976, EN 00450531 (emphasis added).

1615 **E465** Case 002/02 TJ, para. 4047, fn. 13402: **E3/747** *Revolutionary Flag*, Aug. 1978, EN 00499784-85 ("In just one month our Party liberated 70-75 percent of the villages and subdistricts throughout the country. With a little more time the revolutionary movement would certainly have completely swept clean the contemptible Lon Nol traitors and none would have remained"), fn.13403: **E3/5** *Revolutionary Flag*, Aug. 1975, EN 00401496-97 ("However the Party's analysis was that the enemy situation had the American imperialists and the Thieu [Ky] group but their core forces were the traitors in Kampuchea meaning the contemptible Nol's group [....] Despite the fact that at the time militarily we were few and there were more than 40,000 of the enemy and including the royal police there were more than 60,000 of them. This was the army. As for the militia and the village defence forces, there were many more tens of thousands, many hundreds of thousands. As for us we had at the most companies but after several months of fighting and sweeping them away the enemy was smashed"). Regarding the use and interpretation of the terms "life-and-death contradictions" during the DK *see* **E465** Case 002/02 TJ, paras 3403 ("life-and-death contradictions between DK and the "Yuon" enemies), 3829 (CIA, Yuon and KGB agents and "contemptible Lon Nol traitors" are "life and death foes"), 3813 ("life-and-death contradictions" remaining in the society with reactionary and counter-revolutionary, which according to Suong Sikoeun, were enemies of the revolution, "Lon Nol traitor clique" and American imperialists), 2174 (CIA, KGB and Yuon agents are "life and death enemies"), 4269.

operation starting in April 1977 in TK.[1616] Again, Appellant ignores the comprehensive body of evidence comprising witnesses, CPs, and TK District records, upon which the TC relied to make this finding.[1617] Appellant limits his argument to an erroneous assertion that Khoem Boeun's testimony and a report that emanated from Cheang Tong commune within TK District, both providing direct evidence of the killing operation, were outside of the geographic scope of the case. As detailed in the response to Grounds 39 and 64, all communes in TK District were within the *saisine* of the investigation and trial and, consequently, her evidence and the report from Cheang Tong commune are highly probative of the finding that the witness received "successive instructions from the district to sweep clean 'high ranking' soldiers or officers".[1618]

435. Appellant's claim that other evidence cited to support the TC's finding in paragraph 1080 lacks probative value is without merit, as it simply ignores the content of the evidence. For example, the report from Popel commune dated 8 May 1977 that "the number of military families smashed by *Angkar* and died is 393 or 106 families [...] 892 persons or 231 military families remain" provides compelling evidence, on its own, of a killing operation starting in April 1977.[1619] Nonetheless, two other documents were relied on by the TC in that paragraph to support the finding that, around April and May 1977, ex-KR officials were being arrested and were planned to be arrested in TK District.[1620] More substantively, as to proof of persecutory acts such as arrests and killings against ex-KR officials from April 1977 in TK, Appellant completely ignores other corroborative findings and evidence, including evidence relating to KTC, the District Security Office where many ex-KR officials were executed.[1621] The consistency of the evidence from TK and KTC witnesses, high-level CPK policy documents, and local CPK records from both inside and outside TK District, provided the TC with a solid foundation to make this evidential finding.

436. Third, Appellant fails to demonstrate that the TC erroneously referred to a section in the Judgment relating to KTC.[1622] Appellant baselessly argues that the TC erred by referring to paragraph 2643 in the Judgment to provide support for its finding that ex-KR officials

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1616 **F54** Appeal Brief, paras 724-725.
1617 **E465** Case 002/02 TJ, paras 1063, 1081, 2643, 1175, 1062, 1080, 2813, 2814, 2790, 2795-2801, 2840-41.
1618 **E465** Case 002/02 TJ, para. 1063 *citing* **E1/296.1** Khoem Boeun, T. 4 May 2015, pp. 47-48.
1619 **E465** Case 002/02 TJ, para. 1080, fn. 3593 *citing* **E3/2048** Tram Kak District Record, 8 May 1977, EN 01454946.
1620 **E465** Case 002/02 TJ, para. 1080, fns 3590 (*citing* **E3/4629** Tram Kak District Record, 11 April 1977, EN 00322133), 3592 (*citing* **E3/2050** Tram Kak District Record, 6 May 1977, EN 00276576).
1621 **E465** Case 002/02 TJ, paras 1063, 1081, 2643, 1080, 1175, 1062, 2813, 2814, 2790, 2795-2801, 2840-41.
1622 **F54** Appeal Brief, para. 726.

were targeted for arrest and killing starting in April and May 1977 in paragraph 2813, footnote 9622. Paragraph 2643 in turn provides a reference to the allegations in the Closing Order relating to murder at KTC, as opposed to an analysis of evidence admitted at trial. Although this is correct, Appellant fails to mention that in the same footnote the TC also referred to paragraphs 2840 and 2841, which both provide factual findings and evidentiary support for the killing operation against ex-KR officials in April and May 1977.

Ground 120: Treatment of ex-KR soldiers[1623]

437. **Ground 120 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding the *actus reus* of persecution on political grounds of ex-KR soldiers at 1JD.**

438. Appellant argues without merit that *none* of the evidence cited in support of this finding has been established to the requisite standard, be it (i) the arrest of Hun Sethany's father,[1624] (ii) the arrest of a group of ex-KR officials based on Uth Seng's testimony,[1625] or (iii) the practice of identifying ex-KR soldiers and officials at 1JD.[1626]

439. The ground fails for three reasons. First, Appellant excludes two crucial testimonies from the areas surrounding 1JD from its assessment of the evidence. The TC cited Prak Yut's testimony that she and other district secretaries made lists of former Lon Nol soldiers,[1627] and Or Ho's testimony that, as chief of Prey Srangae village, there was a practice of identifying and arresting former Khmer Republic civil servants.[1628]

440. Second, Appellant repeats his piecemeal approach to the evidence in his challenge to the probative value of Hun Sethany and Uth Seng's testimonies, rather than the required holistic assessment. Appellant unsuccessfully challenges Hun Sethany's testimony on the basis that it was her sibling who witnessed the arrest of their father;[1629] and Uth Seng's testimony on the basis that Uth Seng did not know whether the disappeared workers were actually executed, having only overheard the militia claim to have drowned the

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1623 Ground 120: **F54** Appeal Brief, *Treatment of the ex-KR soldiers,* paras 798-803; **F54.1.1** Appeal Brief Annex A, p. 44 (EN), p. 40 (FR), p. 63 (KH).
1624 **F54** Appeal Brief, para. 801, fn. 1436; **E465** Case 002/02 TJ para. 1662, fn. 5655 *citing* **E1/306.1** Hun Sethany, T. 27 May 2015, pp. 17-18, 36-39.
1625 **F54** Appeal Brief, para. 802, fn. 1437; **E465** Case 002/02 TJ para. 1690, fn. 5744 referring to paras 1662-1663.
1626 **F54** Appeal Brief, para. 799, fn. 1435; **E465** Case 002/02 TJ para. 1690, fn. 5743 referring to paras 1660, 1662-1663.
1627 **E465** Case 002/02 TJ, para. 1661; **E1/378.1** Prak Yut, T. 19 Jan. 2016, pp. 34-37.
1628 **E465** Case 002/02 TJ, para. 1660; **E1/301.1** Or Ho, T. 19 May 2015, pp. 16-17, 18-20.
1629 **F54** Appeal Brief, para. 801.

disappeared workers.[1630] However, it is well established that the TC can rely on even uncorroborated hearsay evidence as long as it does so with caution.[1631] The TC's cautious approach can be seen in reaching its conclusion after considering Hun Sethany and Uth Seng's testimonies not in isolation, but together with Prak Yut, You Van, and Or Ho's testimonies.[1632]

441. The TC rightly found Uth Seng's testimony "internally consistent and convincing" and "consistent with the general practice to identify" ex-KR. [1633] In considering this practice in the area surrounding 1st January Dam[1634] the TC noted the testimony of Or Hor, a village chief in Sector 42 and later a chief of a work unit, who testified that if ex-KR were discovered in the commune they would be arrested and taken to the security office and that families of ex-KR in his village were also identified for arrest. [1635] The TC also noted the testimony of Prak Yut who confirmed this targeting practice in adjoining Sector 41, where she and other District Secretaries made lists of ex-KR for re-education and further referral to the Sector Secretary if they were beyond re-education. [1636] You Van, a subordinate of Prak Yut, testified to the specifics of Prak Yut's instructions, testifying that Prak Yut ordered her to make these lists of ex-KR as well as Cham and Vietnamese and that those on the lists should be "cleaned up" or "purged". [1637] Moreover, Hun Sethany's evidence that workers from 1JD included workers from Sector 41 and 42, where the evidence of targeting ex-KR was clearly evident - supports the TC's findings on the implementation of the targeting policy at IJD.[1638]

442. The transcript of Hun Sethany's testimony disproves Appellant's claim that there was a "lack of evidence establishing to the requisite standard the arrest/disappearance of HUN Sethany's father". Unchallenged, by the Appellant through his Counsel's questioning, Hun Sethany gave clear and compelling evidence that: her father was a school principal in the Lon Nol regime; [1639] he was a hard and unrelenting worker at IJD; [1640] she recalled "very well" her sister told her that she saw her father taken away by the Khmer Rouge

1630 **F54** Appeal Brief, para. 803.
1631 **F36** Case 002/01 AJ, para. 302. *See* response to Ground 32 (Hearsay).
1632 **E465** Case 002/02 TJ, para. 1661.
1633 **E465** Case 002/02 TJ, para. 1663.
1634 **E465** Case 002/02 TJ, para. 1660.
1635 **E465** Case 002/02 TJ, para. 1660.
1636 **E465** Case 002/02 TJ, para. 1661.
1637 **E465** Case 002/02 TJ, para. 1661.
1638 **E1/306.1** Hun Sethany, T. 27 May 2015, 10.03.36-10.06.15, p. 23, lines 9-14.
1639 **E1/306.1** Hun Sethany, T. 27 May 2015, 10.59.14-11.01.32, p. 34, lines 6-8.
1640 **E1/306.1** Hun Sethany, T. 27 May 2015, 10.55.55-10.59.14, p. 33, lines 3-11.

on 5th April; [1641] that since the day her sister told her, she (Hun Sethany) was distraught;[1642] her siblings told her that her father was taken and killed at Baray Choan Dek pagoda;[1643] after the DK period she went to the Pagoda and found parts of skeletons including skulls, in pits and graves. [1644] Consequently, Appellant has not demonstrated that it was unreasonable for the TC to rely on this killing and disappearance of Hun Sethany's father along with the other evidence before the Chamber to determine that the policy of targeting ex-KR was implemented at IJD.

443. Third, Appellant erroneously states that the TC erred in relying on a general policy of discrimination against ex-KR soldiers to establish such discrimination at 1JD when the TC was unable to establish such discrimination based on evidence directly relating to the 1JD.[1645] Having identified above that the TC rightly considered four testimonies directly relating to 1JD which established discrimination against ex-KR soldiers, the TC correctly determined the treatment of ex-KR soldiers at 1JD was part of a general policy against ex-KR soldiers, clarifying the context of the events at 1JD.[1646]

3. CHAM

444. The TC correctly found that the crime of genocide and the CAH of murder, extermination, imprisonment, torture, persecution on religious and political grounds, and OIA through forced transfer were committed against the Cham[1647] pursuant to a CPK policy targeting the Cham for adverse treatment based on their identity, which was intrinsically linked to the common purpose.[1648]

445. Appellant's 19 grounds[1649] regarding these crimes fail, as they variously adopt an erroneous piecemeal approach to the evidence and the Judgment, merely disagree with the TC's findings, or misunderstand the relevant law. In particular, Appellant's claims focus on specific criminal acts committed against the Cham in isolation, failing to consider the totality of crimes committed against the Cham across the country and throughout the DK period. Appellant also repeatedly misunderstands and misapplies the

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1641 **E1/306.1** Hun Sethany, T. 27 May 2015, 09.50.06-09.52.41, p. 17-18, lines 24-25,1-5.
1642 **E1/306.1** Hun Sethany, T. 27 May 2015, 10.53.02-10.55.55, p. 32, lines 7-10.
1643 **E1/306.1** Hun Sethany, T. 27 May 2015, 10.53.02-10.55.55, p. 32, lines 2-4.
1644 **E1/306.1** Hun Sethany, T. 27 May 2015, 10.55.55-10.59.14, p. 33, lines 14-17.
1645 **F54** Appeal Brief, para. 799.
1646 **E465** Case 002/02 TJ, para. 60, fn. 151.
1647 **E465** Case 002/02 TJ, paras 3314-3316, 3343-3348. Appellant does not contest the TC's findings that genocide and the CAH of imprisonment were committed against the Cham.
1648 **E465** Case 002/02 TJ, paras 3227-3228, 3998. *See* response to Ground 186.
1649 Grounds 5, 121-122, 136-149, 150, 186.

law on the CAH of persecution.[1650]

Ground 186: Alleged policy regarding the Cham[1651]

446. **Ground 186 should be dismissed as Appellant fails to establish that the TC erred in fact and in law by finding that there was a criminal CPK policy targeting the Cham, and that it was part of the common purpose.**

447. The ground fails as Appellant does not demonstrate that the TC erred in fact and law by (i) finding that a policy targeting the Cham existed despite an "absence" of official CPK documents saying so, (ii) using the occurrence of crimes to attempt to justify its theory and distorting the evidence, (iii) wrongfully concealing witness testimony and ignoring expert evidence, and (iv) unreasonably finding that the Cham were in fact targeted.

448. First, Appellant baselessly asserts that an alleged "absence" of any official CPK document regarding a policy against the Cham,[1652] and the "positive" messages toward the Cham in CPK documents, including the DK Constitution,[1653] mean the only reasonable finding was that there was no policy targeting the Cham.[1654] Appellant's claim is not only misleading but also ignores the totality of evidence demonstrating the existence of a policy targeting the Cham.

449. Although public CPK documents referring to the Cham appear to cease in October 1975,[1655] the TC considered later internal documents evincing a policy targeting the Cham. Significantly, this included a telegram from East Zone Secretary Sao Phim reporting to Pol Pot on the transfer of Cham.[1656] The TC reasonably found that Telegram 15 establishes that the CPK specifically targeted the East Zone Cham population and demonstrates that the policy targeting the Cham was set by the Party Centre.[1657] The TC considered further contemporaneous documents including a telegram,[1658] meeting minutes,[1659] and a report[1660] demonstrating that Cham were "under high scrutiny".[1661]

1650 *See e.g.* response to Grounds 122, 141, 146, 147. *See also* response to Ground 108.
1651 Ground 186: **F54** Appeal Brief, *Alleged policy regarding the Cham*, paras 1561-1577; **F54.1.1** Appeal Brief Annex A, p. 64 (EN), p. 59 (FR), pp. 91-92 (KH).
1652 **F54** Appeal Brief, paras 1566-1571.
1653 **F54** Appeal Brief, paras 1566-1568.
1654 **F54** Appeal Brief, para. 1569.
1655 **E465** Case 002/02 TJ, para. 3209.
1656 **E3/1680** Telegram 15 from Sao Phim to Pol Pot, 30 Nov. 1975 ("Telegram 15").
1657 **E465** Case 002/02 TJ, paras 3212-3213.
1658 **E3/511** Telegram 94, 2 Apr. 1976.
1659 **E3/800** Minutes of Meeting Secretaries and Deputy Secretaries of Divisions and Regiments, 16 Sept. 1976, EN 00184338.
1660 **E3/178** Weekly Report of Sector 5 Committee, 21 May 1977, EN 00342709.
1661 **E465** Case 002/02 TJ, para. 3214.

450. The TC also considered CPK publications which, although not mentioning the Cham specifically, provide vital context and insight into the CPK's position toward religious and ethnic minorities, such as the Cham. For example, the DK Constitution explicitly states that "[r]eactionary religions which are detrimental to [DK] and Kampuchean people are absolutely forbidden".[1662] By stressing that religion was detrimental to the "Kampuchean people", the DK Constitution stigmatised the Cham for being both religious and non-Khmer. The need to preserve the "Kampuchean race" was further underlined in additional documents, including records of Appellant's speeches.[1663]

451. The totality of this evidence not only clearly demonstrates a context in which it was inevitable that Cham would be targeted by the CPK, but also highlights the misleading nature of Appellant's claims that the identity of the Cham "was never a problem for the CPK" and that CPK messaging was "positive".[1664] It is unreasonable to suggest that the CPK considered the Cham in a positive light given its clear hostility toward the two defining features of Cham identity – their religion and their non-Khmer ethnicity. Indeed, the TC reasonably found, following an assessment of the evidence as a whole, that the CPK's positive public messages and the protection of religion in the DK Constitution were "disingenuous" and did not bear any probative value regarding a Cham policy.[1665]

452. Appellant further does not justify why the TC could not rely on in-court evidence in making its findings on policy. The TC is clearly entitled to make findings based on in-court evidence, even in the absence of contemporaneous documents.[1666] In addition to the documentary evidence discussed above, the TC referred to the in-court testimony of 10 witnesses and civil parties, including former officials, written interviews of two further witnesses, and experts.[1667] The TC reasonably found that this evidence demonstrated that "the CPK specifically targeted the Cham [...] in a program which was expected to fully assimilate them into a single Khmer nation and identity".[1668] Aside from baseless allegations regarding the evidence of Duch, Math Ly, and expert witnesses, addressed below in this Response, Appellant does not raise any issue regarding the in-court evidence referred to by the TC in its summary of the evidence of a policy targeting

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1662 **E3/259** DK Constitution, 5 Jan. 1976, art. 20, EN 00184838.
1663 **E465** Case 002/02 TJ, para. 3216.
1664 **F54** Appeal Brief, paras 1566-1568.
1665 **E465** Case 002/02 TJ, para. 3227.
1666 *See e.g. Đorđević* TJ, para. 2078 (finding that the seizure of documents amounted to a widespread and systematic policy despite there being no written orders), upheld on appeal at *Đorđević* AJ, para. 156.
1667 **E465** Case 002/02 TJ, paras 3217-3219.
1668 **E465** Case 002/02 TJ, para. 3217.

the Cham. Appellant thus fails to demonstrate that, upon a holistic assessment of the evidence, the TC's findings on the existence of a policy targeting the Cham were unreasonable.

453. Appellant then claims, without merit, that the TC "erred in fact and in law by using the occurrence of crimes to attempt to justify its theory and by distorting the evidence".[1669] Appellant refers to the finding that the treatment of Cham demonstrated the CPK's objective of creating an atheistic and homogenous society without class divisions,[1670] ignoring the context in which it was made. The TC did not make this finding in establishing the existence of the policy targeting the Cham, but rather in establishing that the targeting policy involved the commission of crimes which were encompassed by the JCE.[1671] In any case, Appellant fails to demonstrate the finding was unreasonable. He merely asserts it is "incorrect in the absence of evidence of a policy" and "collides [...] with the reality of the facts".[1672]

454. Appellant, notably, fails to articulate any legal error. Although the TC did not rely on occurrence of crimes in finding the existence of a policy, it would not have been erroneous to do so. International tribunals have found that crimes can evince a policy when those crimes are systematic, or demonstrate a pattern in the way they are committed.[1673] The TC repeatedly found that crimes were systematically committed against the Cham,[1674] thus, the TC could reasonably have inferred a policy on this basis.

455. With respect to the alleged "distortion of evidence", Appellant cites paragraphs 3207, 3211 and 3216 of the Judgment, claiming a "distortion of Khieu Samphan's comments which had absolutely no relation to the Cham".[1675] This is untrue. Paragraphs 3207 and 3211 do not refer to "comments" made by Appellant in evidence, but to sections of Appellant's Closing Brief concerning the Cham.[1676] Paragraph 3216 cites speeches given

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1669 **F54** Appeal Brief, paras 1569-1571.
1670 **F54** Appeal Brief, para. 1570 *citing* **E465** Case 002/02 TJ, para. 3993.
1671 *See* **E465** Case 002/02 TJ, paras 3991-3993. The reasonableness of the TC's findings in relation to the crimes is addressed in the response to Grounds 121-122, 136-137, 139-149.
1672 **F54** Appeal Brief, para. 1571.
1673 *See e.g. Brima* TJ, para. 231 ("the pattern of crimes evinces a policy"); *Situation in the Republic of Côte d'Ivoire* PTC Authorisation of Investigation, para. 100 ("the pro-Ouattara forces *acted pursuant to a policy* [...] *as demonstrated by the regular pattern of the crimes* in which particular ethnic groups were targeted [...] The Chamber finds that the systematic manner in which these attacks were carried out *strongly suggests the existence of an organisational policy*." (emphasis added)).
1674 *See e.g.* **E465** Case 002/02 TJ, paras 3308 (murder), 3316 (imprisonment), 3339 (forced transfer).
1675 **F54** Appeal Brief, para. 1569, fn. 2995.
1676 **E465** Case 002/02 TJ, paras 3207, 3211 refer specifically to sections entitled "No policy aimed at destroying the Cham as a group existed", "Alleged policy specifically targeting the Cham", and "Movement of the Cham population during Movement of the Population (Phase 2)".

by Appellant in which he calls for the preservation of the "Kampuchean race". His words were not "distorted". Although he may not have explicitly mentioned the Cham in these speeches, they are clearly relevant to the CPK's position toward non-Khmer people.

456. Third, Appellant baselessly accuses the TC of concealing witness testimony,[1677] specifically, the evidence of Duch and [Math] Ly. Appellant further falsely alleges that the TC did not consider the testimony of several experts, specifically Stephen Heder, François Ponchaud, Philip Short and Henri Locard.[1678] Far from "concealing" the evidence of these witnesses and experts, the TC highlighted Appellant's interpretation of their evidence, noting that:

> [Appellant referred] to Duch's and others' testimonies [...] to submit that the Cham were not specifically targeted by the CPK due to their religious beliefs or ethnicity, but rather that they were treated the same as the rest of the population under a Marxist regime. The Khieu Samphan Defence refers to former CPK cadres [...] Duch and Math Ly as well as witnesses and experts Philip Short, François Ponchaud, Stephen Heder and Henri Locard who all stated that there was no policy targeting the Cham or no specific hatred toward the Cham expressed by the CPK.[1679]

457. The TC also correctly recalled that some of these expert witnesses did give evidence that the Cham were targeted.[1680] For example, François Ponchaud explained that from 1978 "the Khmer Rouge [...] sought out the Cham as Cham, not because the Cham were disobeying *Angkar* law, but because they were Cham. They went into villages, sought out the Cham. The Cham were taken away and undoubtedly killed".[1681] In testimony quoted by Appellant,[1682] Stephen Heder referred to "early policies that could be described as anti-Cham".[1683] Further, to the extent that it was relevant, the TC did refer to the evidence of Duch and Math Ly.[1684] Appellant may disagree with the findings made by the TC, but he fails to demonstrate that the TC either ignored relevant evidence or made

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1677 **F54** Appeal Brief, para. 1572.
1678 **F54** Appeal Brief, para. 1573.
1679 **E465** Case 002/02 TJ, para. 3222.
1680 **E465** Case 002/02 TJ, para. 3226.
1681 **E1/180.1** François Ponchaud, T. 11 Apr. 2013, 10.22.53-10.25.46, p. 39, lines 10-14.
1682 **F54** Appeal Brief, para. 1573.
1683 **E1/223.1** Stephen Heder, T. 15 July 2013, 15.14.57-15.17.12, p. 102, lines 18-19.
1684 *See e.g.* **E465** Case 002/02 TJ, paras 3215, 3219, 3223, 3233, 3255 and footnotes thereof. Appellant's inconsistent approach to this evidence is noteworthy. Appellant repeatedly asserts that interviews conducted out of court are inherently of low probative value and cannot be relied upon (*see e.g.* **F54** Appeal Brief, paras 731, 882, 974). Math Ly's evidence consisted only of interviews conducted out of court, as he died in 2004 before having the opportunity to testify (*see* **E465** Case 002/02 TJ, para. 1626, fn. 10818). Appellant does not explain why the TC should have relied on this evidence over other evidence before it.

findings no reasonable fact finder could have made based on the evidence as a whole.

458. Fourth, Appellant repeats several erroneous claims, addressed in detail elsewhere in this Response, regarding the targeting of the Cham,[1685] and whether the TC was seised of the crime of forced transfer.[1686] With regard to the latter, Appellant does not explain the relevance of this incorrect claim to the TC's finding of a policy targeting the Cham.

459. Finally, Appellant repeats his incorrect claim, discredited in Grounds 83 and 150, that the TC's finding that Cham were persecuted during Movement of Population Phase 2 ("MOP Phase 2") breached the doctrine of *res judicata*.[1687] Appellant further incorrectly claims that because of *res judicata,* the TC "could not in any case make use of these facts to establish the existence of a policy".[1688] While it has been shown the TC did not breach the doctrine of *res judicata,*[1689] this is irrelevant, as *res judicata* does not prohibit the use of facts but the re-litigation of conclusively determined issues.[1690] The existence of a policy targeting the Cham was not litigated in Case 002/01.

460. Based on the extensive and consistent evidentiary record, the TC reasonably held that the CPK policy to target the Cham was implemented as a criminal means to "defend the country against enemies and radically transform the population into a homogenous Khmer society",[1691] implemented through the policy to identify, arrest, isolate and smash enemies according to the CPK's revolutionary objective.[1692] The crimes committed pursuant to this policy were thus encompassed by the common purpose.[1693]

Ground 121: There was no discrimination in fact against the Cham[1694]

461. **Ground 121 should be dismissed as Appellant fails to establish that the TC erred in law and fact by finding that the Cham suffered "discrimination in fact" at 1JD.**

462. The ground fails as Appellant does not establish that the TC (i) erred in law by referring to events outside of 1JD; (ii) erred in fact by finding that Cham were forced to consume pork and prohibited from practising their religion and speaking their language; and (iii)

1685 *See* response to Grounds 141-148.
1686 *See* response to Ground 82.
1687 **F54** Appeal Brief, para. 1576.
1688 **F54** Appeal Brief, para. 1576.
1689 *See* response to Ground 150.
1690 *See e.g. Čelebici* TJ, para. 228 ("The doctrine of *res judicata* is limited, in criminal cases, to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated").
1691 **E465** Case 002/02 TJ, paras 3990-3998.
1692 *See e.g.* **E465** Case 002/02 TJ, paras 3993-3994.
1693 *See* response to Ground 178.
1694 Ground 121: **F54** Appeal Brief, *There was no discrimination in fact against the Cham*, paras 804-812; **F54.1.1** Appeal Brief Annex A, p. 45 (EN), p. 41 (FR), pp. 63-64 (KH).

erred in fact by inaccurately cross-referencing an earlier finding.

463. First, Appellant argues the TC erred in law by referring to events that occurred outside of the 1JD site in Sectors 41, 42 and 43.[1695] The TC, however, only referred to these events to provide context for the acts that occurred at 1JD itself.[1696] Despite Appellant's assertions that these events "could not be used to establish the crimes committed", no finding of discrimination against the Cham occurring at 1JD was actually based on these events. Indeed, the TC made no finding at all regarding these events.[1697]

464. Second, Appellant baselessly alleges the TC erred in fact when finding that Cham were forced to consume pork at 1JD. Appellant bizarrely mischaracterises Om Chy's testimony as being that pork was a "welcome exception for the nutritional intake of the workers".[1698] Far from being "welcome", Om Chy described Cham resorting to eating salt or consuming only soup to avoid eating pork.[1699] Appellant also asserts that Cham had a choice whether to eat pork or not as they could choose to eat nothing at all instead.[1700] Needless to say, a "choice" between eating pork or starvation is no choice at all. Finally, although Appellant acknowledges that the TC also relied on the testimony of Seang Sovida and Meas Laihour in finding that Cham were forced to eat pork, he raises no issue at all with their evidence. Thus, Appellant has not demonstrated that the finding that the Cham were forced to eat pork based on their evidence was unreasonable.

465. Again, Appellant asserts that the TC erred in fact because the forced consumption of pork and prohibition of religious practice applied to everyone at 1JD and thus were not acts that "discriminated in fact".[1701] This argument has already been shown to be baseless.[1702]

466. Appellant further asserts that the TC erred in fact by finding that Cham were prohibited from speaking their language. Appellant's only complaint is that the TC relied on the testimony of a single witness.[1703] Not only is it well established that a single witness can

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1695 **F54** Appeal Brief, para. 806.

1696 **E465** Case 002/02 TJ, paras 1654 ("The Chamber considers that the treatment of the Cham at [1JD] must also be viewed *in the context* of how they were treated in the villages from which they were selected in Sectors 41, 42 and 43."), 1655, 1656 ("*With this backdrop*, the Chamber now considers the treatment of the Cham people at [1JD]."") (emphasis added).

1697 **E465** Case 002/02 TJ, para. 1655.

1698 **F54** Appeal Brief, para. 809.

1699 **E1/326.1** Om Chy, T. 30 July 2015, 13.30.16-13.32.28, p. 64, lines 9-12 ("The Cham people who strictly adhered to their religious practice would restrain themselves from eating pork and they would resort to eating salt instead while others who could not stand the hunger would eat the soup, not the pork.")

1700 **F54** Appeal Brief, para. 809.

1701 **F54** Appeal Brief, paras 810-811.

1702 *See* response to Ground 108. *See also* response to Ground 122.

1703 **F54** Appeal Brief, para. 812.

be relied upon to support a finding,[1704] Appellant does not even challenge the witness' credibility, thus failing to demonstrate that this finding was unreasonable.

467. Third, Appellant argues that the TC erred in fact because it recalled a finding that Cham were discriminated against at 1JD by cross-referencing to paragraph 1658, which does not contain this finding.[1705] This is a mere typographical error, not an error in fact. It is clear from the text of the Judgment that the intended reference is the finding in paragraph 1659.[1706]

468. Finally, and in any case, the TC found that a wide range of discriminatory acts were committed against the Cham, not only at 1JD, but at various locations across Cambodia.[1707] Thus the elements of persecution would have been satisfied even without the discriminatory acts found to have been committed at 1JD.

Ground 122: Equal treatment does amount to discriminatory treatment[1708]

469. **Ground 122 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *actus reus* of the crime of persecution on religious grounds was established at 1JD.**

470. The ground fails as Appellant misunderstands the law on *de facto* discrimination. As noted above,[1709] there is no legal requirement to differentiate between "direct" or "indirect" discrimination when establishing the existence of *de facto* discrimination. Thus, feeding pork to a diverse group is *de facto* discrimination if, as was the case at 1JD,[1710] it had discriminatory consequences for those amongst the group who cannot eat pork. Similarly, prohibiting a group of people from practising religion or speaking a language is *de facto* discrimination if those prohibitions in fact target specific individuals within the group. In any case, as noted above,[1711] the TC found a wide range of discriminatory acts were committed against the Cham at various locations across Cambodia.[1712] Thus, the *actus reus* of persecution on religious grounds is satisfied even

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1704 *Nahimana* AJ, para. 949.
1705 **F54** Appeal Brief, para. 805 *referring to* **E465** Case 002/02 TJ, para. 1695, fn. 5753.
1706 **E465** Case 002/02 TJ, paras 1695 ("[t]he Chamber *has found* that Cham […] suffered discrimination" (emphasis added)), 1659 ("[t]he Chamber *finds* that Cham suffered discrimination" (emphasis added)).
1707 **E465** Case 002/02 TJ, para. 3328.
1708 Ground 122: **F54** Appeal Brief, *Equal treatment does amount to discriminatory treatment*, para. 813; **F54.1.1** Appeal Brief Annex A, p. 45 (EN), p. 41 (FR), p. 64 (KH).
1709 *See* response to Ground 108.
1710 *See* response to Ground 121.
1711 *See* response to Ground 121.
1712 **E465** Case 002/02 TJ, para. 3328. Such acts included those separately found to amount to independent CAH, including murder, extermination, and imprisonment, *see* **E465** Case 002/02 TJ, para. 3331.

without the discriminatory acts found to have been committed at 1JD.

Ground 141: Lack of discrimination in fact against the Cham during the MOP2[1713]

471. **Ground 141 should be dismissed as Appellant fails to establish that the TC erred in law and fact by finding that the forced movement of Cham was discriminatory, thereby establishing the *actus reus* of persecution on political grounds.**

472. The ground fails as to the alleged legal error, as Appellant misrepresents the SCC's definition of *de facto* discrimination by confusing its analysis of the facts in Case 002/01 with a general "test" for discrimination.[1714] Consequently, the alleged factual error also fails, as Appellant has not demonstrated that, on application of the correct test for *de facto* discrimination,[1715] the finding that the forced movement of Cham was discriminatory was one that no reasonable trier of fact could have reached.

473. Appellant's argument relies on an incorrect assertion that the SCC established a new "test" for discrimination in the Case 002/01 AJ. As noted in this Response, however, it is settled law at the ECCC that *de facto* discrimination occurs when a victim is targeted due to their membership in a group defined by the perpetrator on specific grounds.[1716] The "test" cited by Appellant was merely an explanation regarding how the definition of "discrimination in fact" could be established *vis-à-vis* the movement of NP within the factual matrix of Case 002/01.[1717] Indeed, this analysis was explicitly limited by this Chamber to the "persecution of [NP] *as covered by* [Case 002/01]".[1718]

474. The movement of the Cham was found to be factually and legally distinct from the movement of NP in Case 002/01.[1719] While the dispersion of Cham also occurred in the context of a broader population movement, the TC found that Cham were specifically targeted for movement *because* they were perceived to be enemies following Cham

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1713 Ground 141: **F54** Appeal Brief, *Lack of discrimination in fact against the Cham during the MOP2*, paras 926-927; **F54.1.1** Appeal Brief Annex A, p. 50 (EN), p. 46 (FR), p. 71 (KH).

1714 **F54** Appeal Brief, paras 926-927.

1715 *See* Case 001-**F28** *Duch* AJ, paras 263, 267, 272; **F36** Case 002/01 AJ, paras 667, 690.

1716 *See* response to Ground 108.

1717 **F36** Case 002/01 AJ, para. 701 cited in **F54** Appeal Brief, para. 926, fn. 1688.

1718 **F36** Case 002/01 AJ, para. 701 (emphasis added). Further, had the TC applied the "test" from Case 002/01 suggested by Appellant, it would have in effect only have been assessing *de facto* discrimination insofar as it could have been established when applied to the facts of Case 002/01. This would have been an error given the significant factual differences between the movement of NP in Case 002/01 and the movement of Cham in Case 002/02.

1719 Fundamental to the SCC's analysis in Case 002/01 was finding that population transfers of BP and NP were motivated for the same reasons, and thus, there was no discriminatory treatment. *See* **F36** Case 002/01 AJ, para. 702. The Co-Prosecutors note that the TC was cognisant of the SCC's findings before it expressly distinguished them. *See* **E465** Case 002/02 TJ, para. 3321.

rebellions.[1720] That is to say, Cham were targeted for movement because of their membership in a group, defined on a political basis. Thus, in a scenario that differed factually from the movement of NP in Case 002/01, the TC correctly articulated and applied the law in finding that the Cham suffered *de facto* discrimination during MOP Phase 2 due to the way they were targeted.

Ground 144: Evidence of undifferentiated treatment with respect to food provided and restrictions on religious and cultural practices under DK[1721]

475. **Ground 144 should be dismissed as Appellant fails to establish the TC erred in law or fact in its finding on the *actus reus* of the CAH persecution on religious grounds.**

476. The ground fails as Appellant does not demonstrate that the TC erred in fact by finding that (i) discriminatory treatment of Cham was proved at 1JD; (ii) the CPK implemented a policy specifically targeting the Cham as an ethnic and religious group; (iii) restrictions placed on the Cham were "discriminatory in fact"; and (iv) Cham were forced to eat pork and Korans were burned.

477. First, Appellant claims, without merit that the evidence the TC relied on in finding the discriminatory treatment of Cham at 1JD was insufficient, and thus should not have been used as a basis for finding Cham were persecuted.[1722] As already noted in this Response, however, the TC's findings of discrimination at 1JD were correct.[1723]

478. Second, Appellant has not demonstrated that there was insufficient evidence to support the finding of a policy targeting the Cham.[1724] Further, even if the TC's use of the phrase "the early years" in its discussion of the development of the CPK's policy toward the Cham is contradictory, it does not give rise to an actual miscarriage of justice. When read in context and with footnotes, it is clear that the TC merely used this turn of phrase to highlight the escalation of the CPK's policy toward the Cham over time.[1725]

479. Third, and as already noted in numerous other grounds, Appellant's claims[1726] relating to the so-called "undifferentiated treatment" of the Cham fails as he misunderstands the legal requirements of *de facto* discrimination, which occurs where a victim is targeted

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1720 **E465** Case 002/02 TJ, paras 3322-3323.
1721 Ground 144: **F54** Appeal Brief, *Evidence of undifferentiated treatment with regard to food supplied and restrictions on religious and cultural practices under DK*, paras 934-951; **F54.1.1** Appeal Brief Annex A, p. 51 (EN), pp. 46-47 (FR), pp. 72-73 (KH).
1722 **F54** Appeal Brief, paras 935, 941.
1723 *See* response to Grounds 121 and 122.
1724 *See* response to Ground 186.
1725 **E465** Case 002/02 TJ, para. 3228.
1726 **F54** Appeal Brief, paras 939-942.

because of their membership in a group or when members of the group have suffered discriminatory consequences.[1727] Contrary to Appellant's assertions,[1728] the TC did not err in concluding that the Cham were discriminated against in fact because they were "predominantly and particularly affected" by the measures the CPK forcibly imposed which "specifically targeted [them] in practice".[1729]

480. Appellant's assertion that "only the alleged obligation to eat pork and the alleged burning of copies of the Koran could constitute differential treatment"[1730] is baseless, as he fails to explain why the other discriminatory acts found to have been committed against the Cham do not constitute "differential treatment", including acts which could only have been targeted at the Cham, such as banning daily prayers and destroying mosques.[1731]

481. Fourth, Appellant's claims relating to the forced consumption of pork and burning of Korans fail, as Appellant grossly misrepresents the evidence before the TC, and does not demonstrate that the TC erred in assessing the evidence.[1732] For example, Appellant incorrectly claims that Sos Min did not elaborate on the circumstances under which Cham were forced to eat pork.[1733] Sos Min clearly articulated that Cham would be accused of not giving up their religion and could be considered enemies of *Angkar* if they did not eat pork,[1734] and recalled Cham eating pork out of fear.[1735] Appellant similarly misrepresents the evidence of Him Man, suggesting that his evidence was that Cham were not forced to eat pork because they were not monitored while eating, while ignoring that he stated that Cham were threatened with being shot if they did not eat pork.[1736] Having misrepresented the evidence of Sos Min and Him Man, Appellant then falsely

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1727 *See* response to Ground 108.

1728 **F54** Appeal Brief, paras 940-942 *impugning* **E465** Case 002/02 TJ, paras 3232, 3233, 3238, 3242, 3250, 3328.

1729 **E465** Case 002/02 TJ, paras 3232, 3242, 3250, 3328.

1730 **F54** Appeal Brief, para. 942.

1731 *See* response to Ground 146.

1732 **F54** Appeal Brief, paras 943-947.

1733 **F54** Appeal Brief, para. 944.

1734 **E1/343.1** Sos Min, T. 8 Sept. 2015, 14.19.39-14.22.30, p. 72, lines 8-12 ("We were forced to eat the food that we could not eat. And if we did not eat, we would be accused of not giving up to our religious practice. And that would be subject to be monitored. If we opposed any of the principles they imposed, then we would be accused of being an enemy of *Angkar*.").

1735 **E1/343.1** Sos Min, T. 8 Sept. 2015, 09.24.29-09.27.14, p. 9, line 21-p. 10, line 4 ("[Kob Sath] was the one that ordered us to eat pork; we understood that he received such an order from the upper level. Out of fear, he himself also ate the pork […] [H]e was also a Cham person […] but he actually was afraid of the upper level and he himself also ate the pork").

1736 **E1/349.1** Him Man, T. 17 Sept. 2015, 11.09.06-11.12.23, p. 41, lines 4-8 ("At that time we were threatened if we were not to consume the pork then we would be shot. Some people were weeping while they were eating pork. Here the meat that I refer to is pork. I made this response because I myself had to force myself to eat pork; otherwise I would be shot dead.").

claims that Leop Neang's evidence "is the only testimony that really speaks of threats" with regard to the consumption of pork,[1737] which is patently false.

482. Appellant's claim that no reasonable trier of fact could have found that Korans were burned is equally without merit.[1738] This claim relies primarily on assertions regarding the credibility and probative value of witnesses' evidence,[1739] which do not demonstrate that the TC exceeded its discretion in assessing the evidence.[1740] Appellant misrepresents the evidence further by, for example, entirely ignoring evidence indicating that the confiscation and burning of Korans was a factor leading to the Koh Phal rebellion.[1741]

483. Finally, Appellant baselessly claims the TC erred in law by relying "solely" on interviews conducted by Nate Thayer to find that "all over the country [...] copies of the Koran were seized and burned".[1742] Appellant takes issue with the nature of the interviews (including that they were "completed by hand"),[1743] but fails to demonstrate that the TC went beyond the deference given to it to assess evidence.[1744] In any case, the impugned "finding" was merely a summary of the substance of the interviews, which relevantly only went to the TC's finding that Korans were also burned in locations outside the East Zone and Central Zone.

Ground 145: Prohibited restrictions on freedom of religion[1745]

484. **Ground 145 should be dismissed as Appellant fails to establish the TC erred in law by finding that the *actus reus* of persecution on religious grounds was established.**

485. The ground fails as Appellant misconstrues the TC's findings, suggesting that the finding of the impermissibility of cultural and religious restrictions imposed on the Cham was related to the *later* finding on the violation of fundamental rights. In doing so, Appellant entirely ignores the TC's actual findings on the violation of fundamental rights against the Cham.[1746]

486. Despite Appellant's claim,[1747] the TC issued entirely distinct findings on (i) *de facto*

1737 **F54** Appeal Brief, para. 946.
1738 **F54** Appeal Brief, paras 943, 948-950.
1739 **F54** Appeal Brief, paras 948-950.
1740 *See* **F36** Case 002/01 AJ, paras 88, 89, 227; Case 001-**F28** *Duch* AJ, para. 17.
1741 *See* **E465** Case 002/02 TJ, paras 3252-3253.
1742 **F54** Appeal Brief, para. 950 *citing* **E465** Case 002/02 TJ, paras 3249-3250.
1743 **F54** Appeal Brief, para. 950.
1744 *See* **F36** Case 002/01 AJ, paras 88, 89, 227.
1745 Ground 145: **F54** Appeal Brief, *Prohibited restrictions on freedom of religion*, paras 952-953; **F54.1.1** Appeal Brief Annex A, p. 51 (EN), p. 47 (FR), p. 73 (KH).
1746 **E465** Case 002/02 TJ, para. 3328.
1747 **F54** Appeal Brief, para. 953.

discrimination occasioned by the restrictions, and (ii) the violation of fundamental rights and freedoms variously infringed upon and violated by *all* the discriminatory acts perpetrated against the Cham,[1748] as was required.[1749] Appellant's assertions that the TC erred by confusing the constitutive elements of persecution[1750] are thus patently false and should be dismissed.

487. Moreover, the TC's finding that the discriminatory restrictions were impermissible did not lack analysis.[1751] To support its conclusion, the TC referred to, and thus clearly analysed, the grounds on which the freedom to manifest one's religion may permissibly be restricted,[1752] rejecting the applicability of those grounds to "the facts of the case".[1753]

Ground 146: Unlawful criminalisation of alleged indirect discrimination[1754]

488. **Ground 146 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *actus reus* of persecution of the Cham on religious grounds is established.**

489. The ground fails as Appellant erroneously asserts that the treatment of Cham was undifferentiated, ignoring key findings that contradict his argument. Appellant further misunderstands the legal definition of "discrimination in fact."

490. First, Appellant's argument relies on the mistaken assertion that the treatment of the Cham was undifferentiated and thus "indirect discrimination".[1755] He entirely ignores the TC's findings that the discriminatory acts were committed in pursuit of a policy specifically targeting the Cham.[1756] While Appellant may disagree with this finding, he

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1748 For the findings on discrimination in fact, *see* **E465** Case 002/02 TJ, paras 3328-3329; for the violation of fundamental rights and the gravity threshold, *see* **E465** Case 002/02 TJ, paras 3330-3331.

1749 As the SCC has previously found, "the crux of the analysis lies not in determining whether a specific persecutory act or omission *itself* breaches a human right that is fundamental in nature. Rather, it lies in determining whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights"; *see* **F28** *Duch* AJ, paras 256-258 (quote at para. 257). *See further* response to Ground 109.

1750 **F54** Appeal Brief, para. 953.

1751 **F54** Appeal Brief, paras 952-953.

1752 **E465** Case 002/02 TJ, para. 3328 referring to **E465** Case 002/02 TJ, paras 719-721. *See in particular*, para. 720 ("The Chamber concurs [...] that the right to manifest one's religion may be subject to some restrictions. Such restrictions must be prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.") *citing* ICCPR, art. 18(3); ECHR, art. 9(2).

1753 **E465** Case 002/02 TJ, para. 721. The Co-Prosecutors note further that, whilst it was not required to do so, the TC *did*, in those referenced paragraphs (**E465** Case 002/02 TJ, paras 719-721), clearly identify a fundamental right infringed by the cultural and religious restrictions. See further response to Ground 148.

1754 Ground 146: **F54** Appeal Brief, *Unlawful criminalisation of alleged indirect discrimination*, paras 954-956; **F54.1.1** Appeal Brief Annex A, pp. 51-52 (EN), p. 47 (FR), p. 73 (KH).

1755 **F54** Appeal Brief, para. 955.

1756 **E465** Case 002/02 TJ, para. 3328.

has not demonstrated that it was made in error.[1757] He further ignores that, far from being "undifferentiated treatment", many of the acts the TC found to have been committed could *only* have targeted the Cham, for example, the prohibition of daily prayers, burning of Korans, forcing them to only speak Khmer, forcing them to abandon their traditional clothes and haircuts, and the dismantling of mosques,[1758] which concern aspects unique to Cham culture.

491. Second, Appellant's assertion[1759] that the TC erred by finding that acts of "indirect discrimination" were "discrimination in fact" ignores that there is no legal requirement to differentiate between "direct" or "indirect" discrimination when assessing the existence of *de facto* discrimination, as established above.[1760] And, as further outlined above, an act may apply to an entire population and yet still amount to discrimination in fact if it has discriminatory consequences for the specific group.[1761]

Ground 147: Lack of intent to discriminate in relation to religious/cultural practices[1762]

492. **Ground 147 should be dismissed as Appellant fails to establish that the TC erred in law by finding that restrictions were imposed with the intention of discriminating against the Cham because of their religious and cultural practices.**

493. The ground fails, as Appellant both misrepresents the TC's findings and misunderstands the law. Appellant erroneously asserts that the TC did not give reasons for its finding of intent, referring in particular to the absence of footnotes on the finding.[1763] When the finding is read in its entirety and in context, it is clear this is incorrect. The impugned sentence begins by referring the reader to the preceding paragraph,[1764] which summarises the TC's findings relevant to intent.[1765] These findings are themselves footnoted.

494. Appellant also asserts without merit that the TC erroneously implied intent from its finding that discriminatory acts affected religious practices. To the contrary, the TC explicitly found that the acts were implemented pursuant to a policy specifically targeting the Cham as a religious group.[1766] Appellant's claim that the TC erred by relying on

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1757 *See* response to Ground 186.
1758 **E465** Case 002/02 TJ, para. 3328.
1759 **F54** Appeal Brief, paras 954-955.
1760 *See* response to Ground 108.
1761 *See* response to Ground 122.
1762 Ground 147: **F54** Appeal Brief, *Lack of intent to discriminate on the basis of religious/cultural practices*, paras 957-959; **F54.1.1** Appeal Brief Annex A, p. 52 (EN), p. 47 (FR), pp. 73-74 (KH).
1763 **F54** Appeal Brief, para. 958.
1764 **E465** Case 002/02 TJ, para. 3329 ("In light of the above…").
1765 **E465** Case 002/02 TJ, para. 3328.
1766 **E465** Case 002/02 TJ, paras 3228, 3328.

"indirect discrimination" misunderstands the law,[1767] as discussed in response to Ground 146.[1768] In any case, the TC did not attempt to characterise "indirect discrimination in fact without discriminatory intent", but made explicit findings of intent.[1769]

495. As to Appellant's comment that persecution on cultural grounds does not exist in international criminal law,[1770] the TC merely found there was an intent to discriminate because of both the religious and cultural practices of the Cham.[1771] The TC did not assert that a separate crime was committed or that such a crime exists. No legal error was made.

496. Finally, Appellant's claim that the TC somehow erred by finding the Cham were targeted on both political and religious grounds fails as it wrongly assumes a victim group cannot be targeted multiple times on different persecutory grounds.[1772] Appellant provides no explanation as to why this would be the case. In this case, the charges for persecution on political grounds and persecution on religious grounds were distinct charges arising from different facts and addressing different criminal behaviour.[1773] Thus, contrary to Appellant's complaint, the TC did not "[make] a change to the grounds of persecution in its analysis" and fail to give reasons for doing so.[1774] Rather, as was entirely appropriate, the charges were considered independently of each other and full reasons as to why both charges were found to be proved were provided.[1775]

Ground 136: Lack of specificity and generalisation about executions at the Trea Village security centre[1776]

497. **Ground 136 should be dismissed as Appellant fails to establish that the TC erred in fact or law by finding that executions were carried out at Trea Village security centre in 1978, thereby establishing the *actus reus* of murder.**

498. The ground fails as Appellant has not demonstrated that the TC either (i) made unreasonable findings from the testimony of It Sen, No Sates and Math Sor, (ii) made unreasonable extrapolations without evidence, or (iii) erred in law with regard to the *actus reus* of murder.

1767 **F54** Appeal Brief, para. 958.
1768 *See* response to Ground 146.
1769 **E465** Case 002/02 TJ, paras 3328-3329.
1770 **F54** Appeal Brief, para. 958.
1771 **E465** Case 002/02 TJ, para. 3329.
1772 **F54** Appeal Brief, para. 959.
1773 **D427** Closing Order, paras 1416-1418 (political), 1419-1421 (religious).
1774 **F54** Appeal Brief, para. 959.
1775 **E465** Case 002/02 TJ, paras 3320-3326 (political), 3327-3332 (religious).
1776 Ground 136: **F54** Appeal Brief, *Lack of specificity and generalisation about executions at the Trea Village Security Centre*, paras 894-898; **F54.1.1** Appeal Brief Annex A, pp. 48-49 (EN), p. 44 (FR), p. 69 (KH).

499. First, Appellant submits that the TC could not establish the *actus reus* of murder solely on the basis of the testimonies of Math Sor, No Sates and It Sen.[1777] Appellant attacks the credibility and reliability of No Sates and Math Sor,[1778] but fails to show that the TC went beyond the deference given to it to assess the credibility and reliability of evidence.[1779] Notably, the TC gave a reasoned explanation as to its assessment of these witnesses, dismissing similar arguments raised by Appellant at trial.[1780]

500. Further, Appellant asserts that the TC erred with regard to It Sen's location when he witnessed executions take place.[1781] While there may have been some confusion in It Sen's testimony regarding his precise location,[1782] he unambiguously stated that "[he] could see what happened very clearly",[1783] and that he was able to identify the detainees as Cham before he saw them being killed.[1784] Appellant has not challenged this evidence and fails to demonstrate that the TC's findings were unreasonable.

501. Second, Appellant argues, in the alternative, that the finding that Cham were executed at Trea Village was unreasonably extrapolated from one incident witnessed by No Sates and Math Sor.[1785] This argument fails, as the TC's findings were not extrapolated from one incident: No Sates and Math Sor gave evidence of separate incidents of Cham, either being executed or floating dead in the river.[1786] Appellant also entirely ignores It Sen's evidence of the executions he witnessed.[1787] In any case, Appellant does not explain why a single incident of Cham being executed could not satisfy the *actus reus* of murder.

502. Third, in his summary of this ground contained in Annex A, Appellant appears to allege

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1777 **F54** Appeal Brief, para. 897.
1778 **F54** Appeal Brief, para. 896-897.
1779 *See* Standard of Review (Errors of Fact).
1780 **E465** Case 002/02 TJ, paras 3279-3280.
1781 **F54** Appeal Brief, para. 895.
1782 Responding to the Co-Prosecutors, It Sen described seeing Cham being killed at night while hiding in a bush after he had escaped. In cross-examination, he appeared to clarify that he saw it during the day before his escape, but then immediately went on to describe the event also happening at night: **E1/342.1** It Sen, T. 7 Sept. 2015, 15.14.56-15.17.05, p. 93, lines 3-6 ("After I managed to slip away from the house, I was hiding myself inside several bushes of sago palms about five metres away from the route where the soldiers were taking the Cham people to the riverfront"), 15.23.00-15.25.10, p. 95, lines 23-p. 96, line 1 ("that is what I saw during the daytime. During the night, they – Cham people were undressed to their shorts. They were dragged out of the houses, blindfolded, tied up, and attached to a rope").
1783 **E1/342.1** It Sen, T. 7 Sept. 2015, 15.23.00-15.25.10, p. 96, lines 14-15.
1784 **E1/342.1** It Sen, T. 7 Sept. 2015, 15.06.43-15.09.53, p. 90, lines 3-11 ("I peeped through the window, and I could see that there were full of Cham people in those nearby houses [...] We noticed through the window that they were all Cham").
1785 **F54** Appeal Brief, para. 898.
1786 **E465** Case 002/02 TJ, paras 3278-3279.
1787 **E465** Case 002/02 TJ, para. 3276.

that the TC erred in law by finding that executions satisfied the *actus reus* of murder.[1788] This claim is unsubstantiated and, accordingly, should be dismissed.[1789] In any case, executions plainly satisfy the *actus reus* of murder. The *actus reus* of murder is an act or omission causing the death of the victim.[1790] An execution is by definition an act causing the death of the victim.

Ground 137: Insufficient evidence of the alleged executions at Wat Au Trakuon [1791]

503. **Ground 137 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Cham were executed at Wat Au Trakuon in 1977, thereby establishing the *actus reus* of murder.**

504. The ground fails as Appellant does not demonstrate that the TC unreasonably found that (i) Cham were rounded up in various villages in Kang Meas district and taken to Wat Au Trakuon, and (ii) a large number of people, including a majority of Cham, were executed at Wat Au Trakuon in 1977.

505. First, Appellant misrepresents the Judgment in claiming that the TC had insufficient evidence to make findings on arrests in Kang Meas district. He incorrectly claims the TC found that "it had before it essentially only 'hearsay accounts'".[1792] To the contrary, the TC found that there was direct evidence from villagers, members of security forces and militiamen of Cham being systematically rounded up in various villages of Kang Meas district and taken to Wat Au Trakuon.[1793] Appellant also asserts that the evidence of four direct witnesses from Peam Chi Kang commune and Angkor Ban village 2 was insufficient for the TC to find that people were arrested "solely for the reason that they were Cham".[1794] The TC did not, however, make such finding from the evidence of these witnesses,[1795] nor was any such finding relevant to the *actus reus* of murder.[1796]

506. Appellant also baselessly asserts the TC "erred in law" by finding that hundreds of Cham from within Peam Chi Kang commune were arrested by members of the Long Sword

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1788 **F54.1.1** Appeal Brief Annex A, p. 49 ("Challenged finding: The *actus reus* of murder has been established for the executions carried out at the Trea Village security centre in 1978").

1789 IR 105(3). *See also* Standard of Review.

1790 **E465** Case 002/02 TJ, para. 627; **E313** Case 002/01 TJ, para. 412; Case 001-**E188** *Duch* TJ, para. 331.

1791 Ground 137: **F54** Appeal Brief, *Insufficient evidence concerning the alleged executions at Wat Au Trakuon*, paras 899-910; **F54.1.1** Appeal Brief Annex A, p. 49 (EN), p. 45 (FR), pp. 69-70 (KH).

1792 **F54** Appeal Brief, para. 900 *citing* **E465** Case 002/02 TJ, para. 3302.

1793 **E465** Case 002/02 TJ, para. 3302

1794 **F54** Appeal Brief, paras 900, 905.

1795 For the TC's discussion of the evidence of orders targeting the Cham, *see* **E465** Case 002/02 TJ, paras 3285-3290; *see further* **E465** Case 002/02 TJ, paras 3217-3228.

1796 **E465** Case 002/02 TJ, para. 3306.

Group in early 1977.[1797] Appellant provides no explanation as to what the alleged *legal* error is, however, merely asserting that the evidence was of "low probative value"[1798] and that the TC should have drawn different conclusions from isolated witness testimony,[1799] which fails to demonstrate either a legal or factual error.

507. Second, Appellant incorrectly claims that the TC erred in finding that a majority of executed at Wat Au Trakuon in 1977 were Cham, because there was evidence that some Khmer were also there.[1800] This illogical argument fails as there is no error. A finding that Cham were in the majority necessarily implies that some non-Cham were also present. Further, Appellant claims the witness testimony stating that Cham were the majority was "based solely on hearsay".[1801] To the contrary, although the witness Muy Vanny was told by others that the people were Cham, he saw for himself that these people were in the majority.[1802] In any case, it is within the discretion of the TC to consider, and rely on, hearsay evidence.[1803]

508. Appellant also alleges the TC erred in finding that evidence of killings at Wat Au Trakuon was corroborated by members of the security forces working there at the time,[1804] as well as numerous WRIs.[1805] Oddly, Appellant only takes issue with the testimony of Him Man, who was not a member of the security forces, and entirely ignores the actual security personnel who provided corroborating evidence - Muy Vanny, Sen Srun and Samreth Muy.[1806] With respect to the WRIs, Appellant merely asserts that they are of low probative value, but does not explain why their use as corroborating evidence is an error.[1807]

509. Finally, Appellant claims, without merit, that the TC erred "in fact and in law" by finding that there was direct evidence of Cham being tied up at Wat Au Trakuon before being taken away *en masse*.[1808] Appellant provides no explanation as to what the alleged legal error is and claims, without out any further argument, that this finding "was not

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1797 **F54** Appeal Brief, para. 901; **E465** Case 002/02 TJ, para. 3292.
1798 **F54** Appeal Brief, paras 899, 901-902
1799 **F54** Appeal Brief, paras 903-904.
1800 **F54** Appeal Brief, para. 906; **E465** Case 002/02 TJ, para. 3306.
1801 **F54** Appeal Brief, para. 908.
1802 **E1/373.1** Muy Vanny, T. 11 Jan. 2016, 13.50.03-13.57.19, pp. 47-49 (witnessing many Cham arriving at Wat Au Trakuon by boat and fewer Khmer arriving by ox cart), 14.25.06-14.28.50, pp. 65-66 (witnessing Cham being held in the main temple at Wat Au Trakuon).
1803 *See* response to Ground 32 (Hearsay).
1804 **F54** Appeal Brief, para. 907.
1805 **F54** Appeal Brief, para. 909.
1806 **E465** Case 002/02 TJ, paras 3297-3299.
1807 **F54** Appeal Brief, para. 909.
1808 **F54** Appeal Brief, para. 910 *citing* **E465** Case 002/02 TJ, para. 3302.

established and was not sufficient to establish BRD that Cham were being executed".[1809] In any case, the finding that Cham were being executed was not inferred solely from evidence that Cham were tied up at the pagoda before being taken away *en masse*. This evidence merely contributed to the overwhelming proof that Cham were executed.[1810]

Ground 138: Unreasonable findings about the numeric threshold of established executions[1811]

510. **Ground 138 should be dismissed as Appellant fails to establish the TC erred in fact by finding that executions constituting the *actus reus* of extermination were committed at Wat Au Trakuon and Trea Village.**

511. Appellant's claim that the TC erred in fact by "extrapolating and speculating on the number of victims" is premised on the incorrect assertion that the TC erred in finding executions occurred at Trea Village and Wat Au Trakuon. As discussed in response to Grounds 136 and 137, Appellant fails to demonstrate that the TC's findings that Cham were executed at these sites were unreasonable.[1812] Moreover, far from "speculating" on a number, the TC explicitly found that it was unable to establish a definite number of victims executed at these sites.[1813] In any event, the *actus reus* of extermination does not require a specific number of deaths to be identified.[1814]

Ground 139: Unreasonable findings about an intention to kill the Cham on a large scale[1815]

512. **Ground 139 should be dismissed as Appellant fails to establish the TC erred in fact by finding that the *mens rea* of the crime of extermination was established with regard to the executions at Wat Au Trakuon in 1977 and at Trea Village.**

513. The ground fails as Appellant (i) ignores the TC's relevant reasoning and findings, (ii) makes unsubstantiated challenges to its assessment of evidence, and (iii) misrepresents witness testimony.

514. First, Appellant misstates the TC's finding of intent, by entirely ignoring a substantial aspect of its reasoning: finding that the killings of Cham "were organised and deliberate,

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1809 **F54** Appeal Brief, para. 910.
1810 **E465** Case 002/02 TJ, para. 3302.
1811 Ground 138: **F54** Appeal Brief, *Unreasonable findings about the numeric threshold of established executions*, para. 911; **F54.1.1** Appeal Brief Annex A, p. 49 (EN), p. 45 (FR), p. 70 (KH).
1812 *See* response to Grounds 136 and 137.
1813 **E465** Case 002/02 TJ, para. 3311.
1814 *Rukundo* AJ, paras 187, 189; *Stakić* TJ, paras 654-655; **D427** Closing Order, para. 1382.
1815 Ground 139: **F54** Appeal Brief, *Unreasonable findings about an intention to kill the Cham on a large scale*, paras 912-924; **F54.1.1** Appeal Brief Annex A, pp. 49-50 (EN), p. 45 (FR), pp. 70-71 (KH).

pursuant to the CPK general policy targeting the Cham".[1816] Appellant rather implies that intent was based solely on the evidence of specific orders and meetings,[1817] and focuses exclusively on this aspect.

515. Appellant wrongly asserts that the TC erred in fact by finding that Ke Pauk ordered Ban Seak to destroy all the Cham at a meeting in Kampong Thma.[1818] The TC made no such finding.[1819] Rather, it found that a meeting was held discussing the smashing of enemies, and soon after, Cham were transferred and disappeared.[1820] Far from a "distortion",[1821] this finding was entirely consistent with Van Mat's evidence.[1822] Appellant further erroneously claims that the TC erred by not providing "any valid references to support its finding" in relation to the Central Zone[1823] when, in fact, the TC provided detailed reasons and references,[1824] with which Appellant merely disagrees.

516. Second, Appellant misrepresents the TC's assessment of Prak Yut and Sen Srun's testimonies.[1825] The TC provided detailed reasons regarding Prak Yut's credibility,[1826] and her evidence was broadly corroborated.[1827] The TC did not "erroneously discar[d]" Sen Srun's evidence of Cham not being discussed at a meeting, but rather expressly addressed that evidence.[1828] In any event, the TC is entitled to accept part of a witness' testimony and reject other parts.[1829]

517. Concerning You Van, Appellant merely disagrees with the TC's assessment of the evidence, which primarily went to the fact that lists identifying non-Khmer were compiled, and then non-Khmer gradually disappeared.[1830] It also corroborated aspects of the evidence of Prak Yut.[1831] Appellant raises largely irrelevant considerations, such as the lists also containing names of non-Cham, to dispute the evidence. He fails to show that the TC went beyond the deference given to it to assess the evidence, [1832] however, or

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1816 **E465** Case 002/02 TJ, para. 3313.
1817 **F54** Appeal Brief, para. 912.
1818 **F54** Appeal Brief, paras 913-914.
1819 It expressly acknowledged Ban Seak's denial that he gave such an order: **E465** Case 002/02 TJ, para. 3273.
1820 **E465** Case 002/02 TJ, para. 3275.
1821 **F54** Appeal Brief, para. 913.
1822 **E1/398.1** Van Mat, T. 9 Mar. 2016,10.50.46-10.53.18, p. 35, line 1, ("After the meeting, they evacuated the Cham people").
1823 **F54** Appeal Brief, para. 915.
1824 **E465** Case 002/02 TJ, paras 3285-3290.
1825 **F54** Appeal Brief, paras 916-918.
1826 **E465** Case 002/02 TJ, para. 3191.
1827 **E465** Case 002/02 TJ, para. 3285.
1828 **E465** Case 002/02 TJ, para. 3286 contra **F54** Appeal Brief, para. 917.
1829 *See* Standard of Review (Errors of Fact, Reasoned Decision).
1830 **E465** Case 002/02 TJ, para. 3287.
1831 **E465** Case 002/02 TJ, para. 3288.
1832 *See* **F36** Case 002/01 AJ, paras 88-89, 227; Case 001-**F28** AJ, para. 17.

that You Van's evidence was critical to the TC's finding of intent.

518. Third, Appellant erroneously asserts that Yean Lon and Say Doeun's evidence should have been rejected as hearsay.[1833] The TC has broad discretion to consider hearsay evidence,[1834] and Appellant has not demonstrated that the TC exceeded its discretion, particularly as this evidence was corroborated.[1835] Appellant also misrepresents Say Doeun's evidence by suggesting he was speculating on the origin of orders,[1836] even though he repeatedly stated he was told that the orders came from the upper echelon.[1837]

519. Appellant similarly misstates Samrit Muy's evidence, suggesting he "speculat[ed]" that a meeting he attended was connected to arrests of Cham.[1838] Samrit Muy simply recalled, rather, that Cham were arrested not long after the meeting,[1839] as the TC accurately noted.[1840]

Ground 140: Torture[1841]

520. **Ground 140 should be dismissed as Appellant fails to establish the TC erred in fact by finding that torture was committed at Trea Village security centre.**

521. The ground fails as Appellant (i) has not demonstrated that the TC's finding that Cham were tortured was one that no reasonable fact finder could have found, and (ii) misrepresents the challenged witness testimony.

522. With respect to the *actus reus* of torture, Appellant merely asserts that the TC cannot rely on a single witness to support a finding BRD. The ground fails, as it is well-established that a Trial Chamber can rely on a single witness to support a finding.[1842] Appellant has not demonstrated that this finding that the Cham were beaten was one that no reasonable fact finder could have found.

523. As to the *mens rea* of torture, Appellant falsely claims that It Sen's testimony was

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1833 **F54** Appeal Brief, paras 919, 921.
1834 *See* response to Ground 32 (Hearsay).
1835 **E465** Case 002/02 TJ, para. 3285.
1836 **F54** Appeal Brief, para. 920.
1837 **E1/374.1** Say Doeun, T. 12 Jan. 2016, 14.11.04-14.12.13, p. 71, lines 7-9 ("[Pheap] said the orders came from the upper echelon to the commune level and then she relayed those orders to us"), 15.24.09-15.25.23, p. 90, lines 2-4, ("Q: So it was [Pheap], herself, who said, 'This is an order I got from the upper level?'? A: Yes, that is correct"), 15.24.09-15.25.23, p 90, lines 7-8 ("[Pheap] simply told us that [the order] came from the upper level").
1838 **F54** Appeal Brief, para. 923.
1839 **E1/347.1** Samrit Muy, T. 15 Sept. 2015, 10.16.20-10.22.00, pp. 29-31.
1840 **E465** Case 002/02 TJ, paras 3286, 3290.
1841 Ground 140: **F54** Appeal Brief, *Torture*, para. 925; **F54.1.1** Appeal Brief Annex A, p. 50 (EN), p. 45-46 (FR), p. 71 (KH).
1842 *Nahimana* AJ, para. 949.

contradictory. Appellant attacks the credibility of the witness' evidence stating that he was repeatedly kicked while being asked whether he was Muslim,[1843] arguing that the evidence was contradictory as the witness believed the torturers already knew he was Cham.[1844] That fact alone does not contradict his evidence. In any event, Appellant has not shown that such a "contradiction" would negate the TC's finding that the beatings were to identify whether detainees were Cham and thus satisfied the *mens rea* of torture.[1845]

Ground 142: Error regarding the main aim of MOP[1846]

524. **Ground 142 should be dismissed as Appellant fails to establish the TC erred in fact in finding that forced movement of Cham was perpetrated with a discriminatory intent, thus establishing the *mens rea* of the CAH persecution on political grounds.**

525. The ground fails, as Appellant incorrectly asserts that the TC failed to consider three "factors" which allegedly contradict its finding that the Cham were targeted with a discriminatory intent. He also fails to demonstrate that these factors indicate that the TC's ultimate finding was one that no reasonable trier of fact could have reached.

526. First, Appellant incorrectly asserts that the TC did not explain why it considered "break[ing] up their communities" and "easing tensions" were the primary purposes for dispersing Cham.[1847] The TC clearly explained that this was established by Telegram 15.[1848] Appellant may disagree with the TC's assessment of Telegram 15, but he has not demonstrated this finding was unreasonable.

527. Second, Appellant incorrectly asserts that the TC failed to mention the displacement of Cham living on the Vietnamese border,[1849] essentially repeating an unsuccessful argument he raised at trial.[1850] Not only did the TC acknowledge this argument,[1851] it expressly found that that those living along the Mekong river were especially targeted over those living close to the border.[1852] It is thus clear that the TC considered both groups

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1843 **E1/342.1** It Sen, T. 7 Sept. 2015, 14.38.16-14.40.55, p. 86, lines 14-15 ("They kicked us repeatedly and they asked whether we were Muslims").
1844 **E1/342.1** It Sen, T. 7 Sept. 2015, 14.38.16-14.40.55, p. 86, line 19 ("they knew that we were Chams").
1845 **E465** Case 002/02 TJ, para. 3318.
1846 Ground 142: **F54** Appeal Brief, *Error regarding the main aim of MOP*, paras 928-931; **F54.1.1** Appeal Brief Annex A, p. 50 (EN), p. 46 (FR), pp. 71-72.
1847 **F54** Appeal Brief, para. 928-929.
1848 **E465** Case 002/02 TJ, para. 3212 *citing* **E3/1680** Telegram 15 from Sao Phim to Pol Pot, 30 Nov. 1975.
1849 **F54** Appeal Brief, para. 930.
1850 **E457/6/4/1** KS Case 002/02 Closing Brief, para. 1620.
1851 **E465** Case 002/02 TJ, paras 3211-3212.
1852 **E465** Case 002/02 TJ, para. 3212.

of Cham in its reasoning. Again, Appellant merely disagrees with the conclusion reached by the TC without demonstrating that it was unreasonable.

528. Third, Appellant incorrectly asserts that the TC erroneously concluded that there was intent to punish through the displacement of the Cham.[1853] The TC made no such finding. Rather, it found that the of East Zone Cham were principally intended to ease tensions after the rebellions and to break up their communities.[1854] As for the argument regarding the existence of plans to move populations made prior to the Cham rebellions, again Appellant is essentially repeating an unsuccessful argument raised at trial.[1855] He fails to demonstrate that any pre-existing plans would preclude the TC from reasonably finding that a discriminatory intent existed after the rebellions.

Ground 143: Illegal mention of out-of-scope arrests in an attempt to establish the required level of severity[1856]

529. **Ground 143 should be dismissed as Appellant fails to establish the TC erred in law in its assessment of the gravity of persecution by including allegations of arrests.**

530. The ground fails, as Appellant incorrectly asserts that the TC's reference to arrests was "unsubstantiated, unreferenced and unrelated" to the crime of persecution.[1857] To the contrary, in the impugned paragraph, the TC made explicit reference to the acts charged as persecution in the CO,[1858] which unambiguously includes arrests as a persecutory act.[1859] As such, the TC properly considered these acts in the gravity assessment.

531. In any case, Appellant has not demonstrated the alleged error invalidates the decision, as he has not shown that the requisite gravity would not have been established had the TC excluded arrests from its consideration. As noted elsewhere in this Response,[1860] persecutory acts are to be considered for their gravity cumulatively. The TC found the acts violated fundamental rights[1861] and also included acts which independently

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1853 **F54** Appeal Brief, para. 930.
1854 **E465** Case 002/02 TJ, para. 3322.
1855 **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1611-1613.
1856 Ground 143: **F54** Appeal Brief, *Unlawful mention of out-of-context arrests in an attempt to establish the required level of severity*, para. 932; **F54.1.1** Appeal Brief Annex A, pp. 50-51 (EN), p. 46 (FR), p. 72 (KH).
1857 **F54** Appeal Brief, para. 932.
1858 **E465** Case 002/02 TJ, para. 3325 ("*The acts charged as persecution include* […] acts which, on their own, do not necessarily amount to crimes (in particular arrests)" (emphasis added)).
1859 **D427** Closing Order, para. 268. *See also* **E465** Case 002/02 TJ, fn. 11017.
1860 *See* response to Ground 109.
1861 **E465** Case 002/02 TJ, para. 3324.

amounted to CAH.[1862]

Ground 148: Breach of fundamental rights[1863]

532. **Ground 148 should be dismissed as Appellant fails to establish the TC erred in law by finding that acts committed against the Cham violated fundamental rights.**

533. The ground fails as Appellant does not demonstrate that the TC erred in law by not finding that specific acts breached specific rights, nor that the acts committed against the Cham did not breach the fundamental rights listed.

534. As noted above,[1864] persecutory acts are to be considered cumulatively and contextually,[1865] and as the SCC previously explained, "the crux of the analysis lies not in determining whether a specific persecutory act or omission *itself* breaches a human right that is fundamental in nature."[1866] Appellant's complaint that "none of the listed restrictions [...] breach[ed] any of the fundamental rights listed"[1867] is thus incorrect. Applying the correct law, the TC found that the cumulative effect of being forbidden from praying and speaking mother languages, being forced to wear certain clothes and hairstyles, being forced to eat religiously forbidden foods, having sacred texts and places of worship destroyed, and being killed for resisting such acts, together with all the other acts perpetrated against the Cham (including, but not limited to, murder, extermination, imprisonment, torture, and OIA (forced transfer)) violated fundamental rights.[1868]

535. As to Appellant's comment regarding a lack of finding that the acts breached freedom of religion,[1869] there has been no error, as no such finding was required to satisfy the elements of the crime. Religious persecution requires that victims be targeted because of their membership in a group defined by the perpetrator on a religious basis,[1870] *not* that the persecutory acts violated freedom of religion. Nevertheless, it is clear that the TC considered that the acts committed against the Cham *did* violate the fundamental right to

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1862 This included OIA of forcible transfer, *see* **E465** Case 002/02 TJ, paras 3325, 3335-3340.

1863 Ground 148: **F54** Appeal Brief, *Breach of fundamental rights*, paras 960-961; **F54.1.1** Appeal Brief Annex A, p. 52 (EN), pp. 47-48 (FR), p. 74 (KH).

1864 *See* response to Ground 109.

1865 Case 001-**F28** *Duch* AJ, paras 256-259. *See* in particular, para. 257 ("the crux of the analysis [...] lies in determining whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights").

1866 Case 001-**F28** *Duch* AJ, para. 257 (emphasis in original).

1867 **F54** Appeal Brief, paras 960-61.

1868 *See* **E465** Case 002/02 TJ, paras 3330-3331.

1869 **F54** Appeal Brief, para. 961.

1870 Case 001-**F28** *Duch* AJ, para. 272.

freedom of religion, including the right to manifest one's religion.[1871]

Ground 149: Finally, the threshold of severity of the acts characterising discrimination in fact[1872]

536. **Ground 149 should be dismissed as Appellant fails to establish the TC erred in law and fact in assessing the severity of persecutory acts committed against the Cham.**

537. The ground fails with regard to the alleged errors as Appellant misconstrues the TC's findings, and makes assertions which are factually and/or legally incorrect.

538. Fundamentally, the TC's assessment of the acts underlying the persecution conviction, (and which were thus relevant to the gravity assessment) were *not* limited to the religious and cultural restrictions set out in paragraph 3328 of the TJ, as Appellant asserts.[1873] Similarly, his claim that the TC "never considered the CAH of murder, extermination, imprisonment, [persecution], torture or genocide as a basis for the discriminatory treatment of the alleged persecution on religious grounds" wholly misinterprets the Judgment and the charges relevant to Case 002/02.[1874] As the TC made clear when setting out the religious persecution charge against the Cham, both upon severance of Case 002[1875] and then again in the Judgment,[1876] *all* acts committed nationwide throughout the DK period (including during MOP Phase 2) are relevant. These "include[d]", but were not limited to, the suppression of Cham culture, traditions and language.[1877]

539. The TC thus did not introduce new discriminatory acts, but rather made factual[1878] and legal[1879] findings on all the facts underlying the persecution charge and correctly took

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1871 **E465** Case 002/02 TJ, para. 3328 referring to **E465** Case 002/02 TJ, paras 719-721. The TC held, citing international human rights legislation, that "freedom of thought, conscience and religion", including the right to manifest one's religion, is recognised internationally as a fundamental right (**E465** Case 002/02 TJ, paras 720-721 citing ICCPR, art. 18; ECHR, art. 9). The Chamber determined that impermissible restrictions on those freedoms, such as those it found had been imposed on the Cham, constituted breaches of a fundamental right amounting to persecution on religious grounds.

1872 Ground 149: **F54** Appeal Brief, Finally, the threshold of severity of the acts characterising discrimination in fact, paras 962-963; **F54.1.1** Appeal Brief Annex A, p. 52 (EN), p. 48 (FR), pp. 74-75 (KH).

1873 **F54** Appeal Brief, para. 963.

1874 **F54** Appeal Brief, para. 963.

1875 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, paras 5(ii)(b)(8) ("Persecution on Religious Grounds (1415, 1419-1421, 1423, 1425) (limited to movement of population phase two (limited to treatment of the Cham); […] 1st January Dam Worksite; and treatment of Cham). The underlying facts are set out in para. 3(i), (iv) (xi) and include *all* the facts in the Closing Order relating to the treatment of the Cham with the exception of Kroch Chhmar Security Centre. *See also* **E301/9/1** TC Additional Severance and Scope Decision, para. 43.

1876 **E465** Case 002/02 TJ, paras 3184, 3327, 3332.

1877 **E465** Case 002/02 TJ, para. 3327 *citing* **D427** Closing Order, para. 1420. Indeed, in the same paragraph, the TC itemised killings and forced transfers among the underlying persecutory acts charged.

1878 **E465** Case 002/02 TJ, paras 3185-3304.

1879 **E465** Case 002/02 TJ, paras 3305-3326, 3333-3348 (characterising the underlying acts as, *inter alia*, murder, extermination, torture, OIA and genocide).

them into account when finding that the crime of religious persecution had been established.[1880] Appellant's assertions that these crimes were not established BRD,[1881] and that the TC erred by inferring a CPK policy,[1882] are both incorrect for reasons set out elsewhere.[1883]

540. Appellant's further complaints that the TC did not identify which acts attained the requisite degree of severity[1884] misunderstands the law. As already established, all persecutory acts against a targeted group are to be considered cumulatively in assessing gravity,[1885] and the TC's acknowledgement that many of the acts amounted to enumerated CAH[1886] is determinative of this assessment.[1887] Further and in any event, the TC found that the acts committed against the Cham violated fundamental rights.[1888]

Ground 5: Bis in idem[1889]

541. **Ground 5 should be summarily dismissed as Appellant fails to present arguments in support of the allegation that the TC violated the principle of *non bis in idem*.**

542. The ground fails as Appellant merely refers to paragraphs of the Appeal Brief covered by Grounds 82 and 83 without presenting any arguments establishing a ground of appeal independent of these grounds. Further, Appellant asserts that the SCC should reverse the "new convictions" allegedly entered by the TC in breach of the principle *non bis in idem* and find that the trial was unfair, but does not identify any specific convictions or explain *why* the trial was unfair. Accordingly, the ground should be summarily dismissed.[1890]

Grounds 83 & 150: Breach of the principle of Res Judicata[1891]

543. **Grounds 83 & 150 should be dismissed as Appellant fails to establish that the TC**

1880 **E465** Case 002/02 TJ, paras 3331-3332.
1881 **F54** Appeal Brief, para. 963.
1882 **F54** Appeal Brief, para. 963.
1883 *See* response to Grounds 136 (murder), 138-139 (extermination), 140 (torture), 186 (Cham policy).
1884 **F54** Appeal Brief, para. 963.
1885 *See* response to Ground 109. *See in particular* Case 001-**F28** *Duch* AJ, paras 256-259.
1886 **E465** Case 002/02 TJ, para. 3331.
1887 Case 001-**F28** *Duch* AJ, paras 260-262.
1888 **E465** Case 002/02 TJ, para. 3330.
1889 Ground 5: **F54** Appeal Brief, *Bis in idem,* para. 134; **F54.1.1** Appeal Brief Annex A, p. 5 (EN), p. 5 (FR), p. 6 (KH).
1890 IR 105(3).
1891 Ground 150: **F54** Appeal Brief, *Breach of the principle of Res Judicata*, paras 964-965; **F54.1.1** Appeal Brief Annex A, pp. 52-53 (EN), p. 48 (FR), p. 75 (KH). Ground 83: **F54** Appeal Brief, *Absence of saisine for facts relating to OIA of forcible transfer of populations in the course of MOP2*, paras 544-546; **F54.1.1** Appeal Brief Annex A, p. 33 (EN), p. 30 (FR), pp. 46-47 (KH). In Ground 83, Appellant incorrectly claims that the forced transfer of Cham was included in Case 002/01 as part of the MOP Phase 2, in an argument that is substantively identical to that articulated in Ground 150. The Co-Prosecutors thus consider this a sufficient response to both Grounds 83 and 150.

ruled in breach of the doctrine of *res judicata* by finding that the CAH of OIA of forced transfer was committed against the Cham during MOP Phase 2.

544. The ground fails as it is based on Appellant's incorrect claim that the forced transfer of Cham was included in Case 002/01 as part of MOP Phase 2.[1892] It was not. The TC recognised in Case 002/01 that the forced movement of Cham formed "the basis of both forced transfer and religious persecution charges in connection with [MOP Phase 2]".[1893] As the charges were inextricably linked but the latter charges were outside the scope of Case 002/01, the TC decided it would "not make findings in [Case 002/01] concerning allegations of the forced movement of the Cham that are also charged as religious persecution".[1894] This, in effect, excluded any consideration of the forced movement of Cham from Case 002/01. The TC also declined to hear any witnesses in Case 002/01 on the forced movement of Cham.[1895] The TC cannot have breached *res judicata* when the forced transfer of Cham has never been adjudicated.

545. Further, Appellant's assertion that the TC erred in finding "discrimination in fact" against the Cham during MOP Phase 2 and therefore "should have found that [the Cham] were included in [MOP Phase 2] already examined by the same judges in [Case 002/01]" is entirely without merit.[1896] As discussed in response to Ground 141, Appellant fails to demonstrate that the TC erred in its finding that there was "discrimination in fact".[1897]

546. Similarly flawed is Appellant's citation, without any explanation, of this Chamber's findings on discrimination relating to the persecution of NP on political grounds in Case 002/01.[1898] These findings are, with respect, irrelevant to the question of whether the forced transfer of Cham has previously been adjudicated.

4. VIETNAMESE

547. The TC correctly found that crimes of genocide, CAH through deportation, persecution on racial grounds, and GB through wilful killings, torture, inhumane treatment, wilful infliction of great suffering or serious injury to body or health, wilful deprivation of the rights of a fair and regular trial, and unlawful confinement of civilians were committed

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1892 **F54** Appeal Brief, paras 964-965.
1893 **E313** Case 002/01 TJ, para. 627.
1894 **E313** Case 002/01 TJ, para. 627.
1895 *See* **E284/5** Co-Prosecutors' request for clarification of findings regarding the Joint Criminal Enterprise alleged in Case 002/01, 27 Aug. 2013, para. 11.
1896 **F54** Appeal Brief, para. 964.
1897 *See* response to Ground 141.
1898 **F54** Appeal Brief, para. 965 *citing* **F36** Case 002/01 AJ, paras 705-706.

against the Vietnamese,[1899] all committed pursuant to a policy intrinsically linked to the common purpose.[1900]

548. Appellant's 19 grounds[1901] regarding these crimes fail, as they variously adopt an erroneous piecemeal approach to either the evidence or the Judgment, fail to sufficiently articulate or substantiate the alleged errors, and merely disagree with the TC's interpretation of evidence. Appellant often simply reiterates dismissed challenges contained in his final trial brief, and further repeats the same claims multiple times in his appellate brief, without articulating a novel error. Appellant also fails to establish that any alleged legal or factual error would invalidate the Judgment, in whole or part, or occasion an actual miscarriage of justice.[1902]

i. The Policy to Target the Vietnamese

Ground 185: Alleged policy towards Vietnamese [1903]

549. **Ground 185 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that there was a criminal CPK policy of targeting the Vietnamese for adverse treatment and destruction, and that it was part of the common purpose.**

550. The ground fails as Appellant makes unsubstantiated challenges to the TC's assessment of evidence, ignoring the totality of evidence demonstrating the existence of the policy, and merely disagrees with the TC's conclusion that crimes against the Vietnamese were conducted in accordance with this policy.

551. Appellant's repetitive claims regarding the identification of Vietnamese through matrilineal targeting and the creation of lists in Prey Veng and Svay Rieng are meritless.[1904] More broadly, the TC relied on contemporaneous evidence and witness testimony demonstrating that these practices occurred across Cambodia.[1905]

552. Appellant's further repeated claims that the CPK's action and speeches are explained by the conflict between the DK and Vietnam, and that CPK speeches always referred to the Vietnamese army fail to establish any bias or error in the TC's interpretation of the

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1899 **E465** Case 002/02 TJ, paras 3490-3519.
1900 **E465** Case 002/02 TJ, paras 3999-4012.
1901 Grounds 103-105, 110-112, 126, 128, 130, 151-159, 185.
1902 Thus, in addition to the grounds discussed below, Grounds 41, 56, 60, 80, 103-105, 110-112, 126, 128, 130, 151-159, and 185 should also be dismissed.
1903 Ground 185: **F54** Appeal Brief, *Alleged policy towards Vietnamese*, paras 1551-1560; **F54.1.1** Appeal Brief Annex A, p. 64 (EN), p. 59 (FR), p. 91 (KH).
1904 **F54** Appeal Brief, para. 1559. *See* response to Ground 158.
1905 **E465** Case 002/02 TJ, paras 3420-3428.

evidence.[1906] Rather, the TC expressly analysed evidence in light of the conflict with Vietnam, indicating where it considered the content to refer to Vietnamese armed forces rather than civilians.[1907] Moreover, the TC correctly analysed, *inter alia*, contemporary documents showing that CPK leadership continuously identified the Vietnamese as enemies, particularly from May 1976.[1908] For example, Meas Voeun, a former Khmer Rouge regiment commander who served as security for Appellant, testified that all Vietnamese people, regardless of status or age, were "considered [as] enemies".[1909]

553. Appellant's plain language defeats the claim that his speeches can only be interpreted as encouragement to DK forces to defend against a military enemy.[1910] The TC cited two of his 1978 speeches wherein (i) he pledged on behalf of the CPK to forever exterminate all Vietnamese aggressor agents from "our units" and Cambodian territory, and enemies of all stripes, particularly the expansionist, annexationist Vietnamese enemy, to preserve the nation and the Cambodian race;[1911] and (ii) stated that the Vietnamese had "stirred up [Cambodian's] national hatred".[1912] The TC reasonably concluded from the context and reference to the "Cambodian race" and "national hatred" that Appellant's words targeted all Vietnamese indiscriminately.[1913] The TC also heard Ek Hen testify that Appellant said that "Khmer shall be free of Vietnamese, or the 'Yuon'"[1914] at a training session he conducted. Appellant's sentiment in such speeches was further evidenced in his words to Norodom Sihanouk, who stated that Appellant suggested that "the best thing we could do was incite [Cambodians] to hate the *Yuons* more and more every day".[1915]

554. Appellant fails to establish that the TC erred in reasonably concluding from the evidence

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1906 **F54** Appeal Brief, paras 1554, 1557, 1558. *See* response to Grounds 179 (interpretation of CPK speeches in light of context), 27 (TC's general interpretation of CPK speeches).

1907 *See e.g.* **E465** Case 002/02 TJ, para. 3389 *citing* **E3/741** DK Document, Instructions of Office 870, 3 Jan. 1978. *See also* para. 3416.

1908 **E465** Case 002/02 TJ, para. 3389. Elsewhere in his brief (*see* **F54** Appeal Brief, paras 1411-1412), Appellant disputes the TC's consideration that Vietnamese were considered an "acute enemy" of the CPK before 1975, disagreeing with the TC's assessment of two books. The TC is not required to justify every step of its reasoning (*see* Standard of Review (Reasoned Decision)) and Appellant fails to demonstrate that the TC's assessment of the books was unreasonable. Further, the finding of the Vietnamese as enemies was corroborated by the findings and evidence cited in this response. *See also* Section VIII.C.1. Common Purpose, in particular response to Grounds 179, 189.

1909 **E1/387.1** Meas Voeun, T. 3 Feb. 2016, 09.54.58-09.58.15, p. 24, lines 4-16.

1910 **F54** Appeal Brief, para. 1558. *See also* response to Grounds 179 and 27.

1911 **E465** Case 002/02 TJ, para. 3399 *citing* **E3/562** Phnom Penh Rally Marks 17th April Anniversary, EN S 00010563.

1912 **E465** Case 002/02 TJ, para. 3400 *citing* **E3/169** Khieu Samphan Speech at Anniversary Meeting, EN 00280396.

1913 **E465** Case 002/02 TJ, paras 3399-3400. *See also* para. 3406.

1914 **E465** Case 002/02 TJ, para. 3390 *citing* **E1/217.1** Ek Hen, T. 3 July 2013, 11.30.15-11.33.02, p. 47, lines 21-23. *See also* response to Ground 20.

1915 **E465** Case 002/02 TJ, para. 3401 *citing* **E3/1819** Norodom Sihanouk, *War and Hope*, EN 00349591.

in toto that the term "Yuon"[1916] was a derogatory term related to both civilians and soldiers.[1917] The TC interpreted the term on a case-by-case basis taking into account the circumstances in which it was used.[1918] It considered that the term had long been used in Cambodia[1919] and acknowledged examples where witnesses used the term to refer to Vietnam or Vietnamese in general terms.[1920] However, it also considered: (i) contemporary records and trial testimony where "Yuon" was used to describe children or babies, (ii) the *RF* stating that the Yuon were the "national enemy", (iii) various testimony that the Vietnamese were characterised as the "hereditary enemy" of the Khmer, (iv) documents describing Yuon "agents" as the most dangerous enemy, and (v) the CPK's *Black Paper*, published in 1978, which defined Yuon as "savage" and "the name given by Kampuchea's people to the Vietnamese".[1921]

555. Further, Appellant fails to demonstrate that the TC erred in finding that Pol Pot's "One against 30" April 1978 speech was directed against the Vietnamese population as a whole,[1922] not just Vietnam and its armed forces.[1923] The speech leaves no doubt that Pol Pot regarded Vietnamese civilians as enemies to be killed.[1924] Referring to the total populations of Vietnam and DK he asked, "the Yuon have a population of 50,000,000 and Kampuchea has only 8,000,000 [...] can 8,000,000 fight 50,000,000 aggressors?"[1925] Other references make clear Pol Pot is referring to a war between people, not a war between military adversaries: "Up until today we have implemented 1 against 30, meaning we lose 1, the Yuon lose 30. [...] So when we have 2,000,000 we already have more than we need to fight them because they only have 50,000,000."[1926] Similarly, "*1 against 30*. If we cannot implement this slogan, we cannot seize victory. This issue does not just apply to the Army: the entire Party, the entire Army, *the entire people absorb*

1916 **F54** Appeal Brief, paras 1480-1485.
1917 **E465** Case 002/02 TJ, para. 3381. *Contra* **F54** Appeal Brief, paras 1482-1485.
1918 **E465** Case 002/02 TJ, paras 3379, 3381, *particularly* fns 11386, 11393 (*note* that the TC even cited the same witness referenced in Appellant's brief, Sao Sak, as someone who used the term more generally). *See also* **E465** Case 002/02 TJ, para. 3380, fn. 11388 (showing Appellant's arguments were considered).
1919 **E465** Case 002/02 TJ, para. 3853.
1920 **E465** Case 002/02 TJ, para. 3379, *contra* **F54** Appeal Brief, paras 1483-1484.
1921 **E465** Case 002/02 TJ, paras 3379, 3381. Appellant's disputes over the consideration of the Black Paper is addressed in response to Grounds 189, 175, 176, 177 & 244 (Errors regarding the alleged common purpose and the CPK's socialist revolution project), *particularly*, in the section noting the TC's objective analysis of the "Great Leap Forward" and the context that led to it.
1922 **E465** Case 002/02 TJ, para. 3402. *See also* response to Ground 179.
1923 **F54** Appeal Brief, para. 1482.
1924 *See* **E465** Case 002/02 TJ, para. 3402.
1925 **E3/4604** *Revolutionary Flag*, Apr. 1978, EN 00519833.
1926 **E3/4604** *Revolutionary Flag*, Apr. 1978, EN 00519834, 00519837.

this line and view and stance."[1927] Moreover, his claim that the TC erred in interpreting the speech by reference to the Case 002/01 Appeal Judgment is misleading,[1928] as the SCC noted there that the definition of the term "enemy" *prior* to 1975 had not been clarified,[1929] which is inapposite to the current situation, where the TC clearly defined the terms used to describe the Vietnamese. As Appellant notes the importance of considering how a public statement is interpreted by persons concerned,[1930] he cannot then omit evidence such as a notebook from S-21, where many Vietnamese civilians were killed,[1931] recording that the line designated by the Party against the Yuon is "One against 30".[1932]

556. Again without merit, Appellant claims that the TC made no link between speeches, the *RF* and *Revolutionary Youth* ("*RY*") magazines, and the perpetrators of crimes against the Vietnamese.[1933] Appellant's claim ignores the TC's review of the contents of such speeches and publications, detailing, for example, that *RF* referred to the "genocidal *Yuon* enemy of the Kampuchean race"[1934] and how CPK publications and leaders used terms including "eradicate", "smash", "sweep away", "wipe out", "exterminate", "liquidate", and "annihilate" to describe how the Yuon were to be treated.[1935] Subsequently, the TC analysed,[1936] *inter alia*, various contemporaneous telegrams showing that the arrest and execution of Vietnamese civilians was reported to CPK leaders.[1937] For example, the TC referred to a report from Office 401 to *Angkar* that it had applied the Party's "line to routinely remove, screen, and sweep clean" enemies, by screening for "Yuon aliens".[1938] The result of this screening: "Smashed 100 ethnic Yuons: included small and big adults and children."[1939]

557. Similarly, Appellant's claim that the existence of the policy was the only way to establish intent for the crimes being prosecuted is unmoored from the facts.[1940] Appellant only

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1927 **E3/4604** *Revolutionary Flag*, Apr. 1978, EN 00519834 (*emphasis added*).
1928 **F54** Appeal Brief, para. 1085.
1929 **F36** Case 002/01 AJ, para. 930.
1930 **F54** Appeal Brief, para. 1085.
1931 *See* **E465** Case 002/02 TJ, para. 2621.
1932 **E465** Case 002/02 TJ, para. 3405 *citing* **E3/833** S-21 Notebook of Mam Nai, June 1975-Oct. 1978, EN 00184600. *See also* response to Grounds 126, 179.
1933 **F54** Appeal Brief, para. 1559.
1934 **E465** Case 002/02 TJ, para. 3403 *citing* **E3/746** *Revolutionary Flag*, July 1978, EN 00428289.
1935 **E465** Case 002/02 TJ, para. 3407.
1936 *See* **E465** Case 002/02 TJ, paras 3410-3411.
1937 **E465** Case 002/02 TJ, paras 3408-3412.
1938 **E465** Case 002/02 TJ, para. 3410 *citing* **E3/1094** Report from Office 401 to Angkar, 4 Aug. 1978, EN 00315368.
1939 **E3/1094** Report from Office 401 to Angkar, 4 Aug. 1978, EN 00315374.
1940 **F54** Appeal Brief, para. 1555.

quotes the TC's conclusions on the *mens rea* for persecution and genocide and totally disregards the weight of evidence demonstrating otherwise.[1941]

558. In addition to simply repeating his erroneous claims that the TC (i) exceeded the *saisine*[1942] and (ii) erred in finding that crimes occurred,[1943] Appellant baselessly claims that the various crimes committed against the Vietnamese were not part of a policy.[1944] The TC detailed how the Vietnamese in various locations were singled out and mistreated due to their perceived race,[1945] and reasonably concluded, on the totality of the evidence, that a centrally-devised policy targeting the Vietnamese for adverse treatment in DK existed throughout the indictment period.[1946]

559. Finally, contrary to Appellant's erroneous assertion,[1947] the TC did explain how the CPK's treatment of the Vietnamese served in the application of the common purpose, as the CPK policy to target and destroy Vietnamese in Cambodia,[1948] implemented through the policy to identify, arrest, isolate, and smash enemies,[1949] was a criminal means to "defend the country against enemies and radically transform the population into a homogenous Khmer society", according to the CPK's revolutionary objective.[1950]

ii. Deportation of the Vietnamese

Ground 151: Deportation[1951]

560. **Ground 151 should be dismissed as Appellant fails to establish that the TC erred in law or fact in finding Vietnamese were deported from Prey Veng in 1975 and 1976.**

561. This ground fails with regard to the alleged error, the type of which Appellant does not articulate, as, in addition to his allegation of lack of *saisine*,[1952] Appellant makes a series of inaccurate assertions regarding the TC's approach to the evidence.

562. Appellant's claim that the TC unreasonably extrapolated the evidence from three villages as showing Vietnamese being gathered and evacuated from villages throughout Prey

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1941 **F54** Appeal Brief, paras 1555-1556.
1942 **F54** Appeal Brief, para. 1551. *See* response to Grounds 41, 60, 80, 84.
1943 **F54** Appeal Brief, para. 1552. *See* response to Grounds 103 & 104, 105, 110, 111, 126, 128, 130, 151-159.
1944 **F54** Appeal Brief, para. 1560.
1945 *See* **E465** Case 002/02 TJ, paras 3515-3516.
1946 **E465** Case 002/02 TJ, para. 3417.
1947 **F54** Appeal Brief, para. 1553.
1948 *See* **E465** Case 002/02 TJ, paras 3382-3417.
1949 *See* response to Grounds 179, 189.
1950 *See* **E465** Case 002/02 TJ, paras 4003-4005, 4012. *See also* response to Ground 178.
1951 Ground 151: **F54** Appeal Brief, *Deportation*, paras 966-980; **F54.1.1** Appeal Brief Annex A, p. 53 (EN), p. 48 (FR), p. 75 (KH).
1952 *See* response to Ground 41.

Veng is erroneous.[1953] First, the TC was referring to accounts on the Case File of such events that took place throughout the province, while subsequently focusing on "[s]pecific instances of families being gathered, removed and seen leaving by boats" in particular villages.[1954] Second, there is no minimum number of persons required to prove the charge of deportation.[1955]

563. Contrary to Appellant's claim, the TC did not distort Sao Sak's evidence.[1956] While Sao Sak clarified that she did not witness the events, she confirmed that every few days Vietnamese families disappeared in the village and she was told that these families were sent to Vietnam.[1957] Sao Sak did not change her evidence regarding Vietnamese being deported, but testified that over time Vietnamese were taken to be killed rather than being sent to Vietnam.[1958] Further, Appellant erroneously suggests that it was impossible for the TC to place Sao Sak's evidence regarding the deportation of the Vietnamese in 1975 or 1976.[1959] In fact, Sao Sak testified that "Before 1975, [Khmer and Vietnamese in the village] had normal relationship. Later, people were evacuated and they were sorted out, and Vietnamese people were sorted out and gathered during the time."[1960]

564. The two WRIs referred to by the TC were not the only basis for establishing that deportation took place, they corroborate the testimony of Sao Sak, whom Appellant had the opportunity to confront.[1961] Em Bunnim and Bun Reun each told the OCIJ, in interviews collected for the purpose of a criminal trial,[1962] that they had witnessed Vietnamese people being sent from Anglung Trea back to Vietnam.[1963]

565. Contrary to Appellant's assertion that Doung Oeurn provided limited and unsubstantiated information regarding transfers of Vietnamese from Pou Chentam village,[1964] the witness testified to personal knowledge about Vietnamese in the area having to return to Vietnam from 1975 as she had urged her husband – who was Vietnamese –he should leave.[1965]

1953 **F54** Appeal Brief, paras 967-968.
1954 **E465** Case 002/02 TJ, para. 3505.
1955 *See* **E465** Case 002/02 TJ, para. 674.
1956 **F54** Appeal Brief, paras 969-970.
1957 **E1/363.1** Sao Sak, T. 7 Dec. 2015, 09.43.02-09.44.10, p. 16, lines 3-10.
1958 **E1/362.1** Sao Sak, T. 3 Dec. 2015, 15.20.07-15.21.41, p. 90, lines 12-16. *Contra* **F54** Appeal Brief, para. 971.
1959 **F54** Appeal Brief, para. 972.
1960 **E1/362.1** Sao Sak, T. 3 Dec. 2015, 14.33.01-14.34.19, p. 80, lines 2-4. *See also* **E1/363.1** Sao Sak, T. 7 Dec. 2015, 09.58.25-10.01.10, p. 22, lines 18-22.
1961 *Contra* **F54** Appeal Brief, paras 974-976.
1962 *See* **F36** Case 002/01 AJ, para. 296.
1963 **E3/7760** Em Bunnim WRI, EN 00322930; **E3/7811** Bun Reun WRI, EN 00282554.
1964 **F54** Appeal Brief, para. 977. *See also* response to Ground 32 (Hearsay).
1965 **E1/381.1** Doung Oeurn, T. 25 Jan. 2016, 09.23.36-09.25.30 and 09.30.16-09.32.18, p. 8, lines 14-21; p. 10, line 24-p. 11, line 4.

566. Appellant also fails to demonstrate any error in the TC's consideration of the annex to a CPA detailing an announcement in Angkor Yos village that *Angkar* needed to send Vietnamese back to Vietnam and that the CP applicant's family left as a result.[1966] The TC noted that the document "bears very limited probative value" but considered that it "corroborate[d] the existence of a pattern of displacements of Vietnamese in Prey Veng".[1967] Appellant misapplies the principle of corroboration[1968] which includes the use of similar incidents, in particular in the context of an overall national plan or pattern.[1969] Appellant fails to explain why this should not be the case, nor does he cite anything to support his erroneously narrow concept of corroboration.[1970] Even if the TC erred by legally characterising this evidence as an instance of deportation,[1971] the TC properly found that other instances of deportation of Vietnamese from Prey Veng province to Vietnam were established BRD.[1972]

567. Appellant fails to demonstrate any error in the TC's finding that there was a coercive environment in Prey Veng and that Vietnamese lacked any genuine choice in leaving.[1973] The TC found that the displacement of Vietnamese in Prey Veng had been ordered by the CPK and noted that this was consistent with evidence of events that had taken place elsewhere amid a nationwide policy to expel the Vietnamese.[1974] Such evidence was not, as Appellant asserts, general in scope.[1975] Rather, these events took place in life or death circumstances for the Vietnamese, as described by former CPK cadre Prak Khan during his testimony: "Those [Vietnamese] who had lived in Kampuchea before [1977] either had left for Vietnam or they had all been killed since 1975".[1976]

568. Appellant's claim that the TC's findings did not establish the intent to deport Vietnamese from Prey Veng is lacking in substance.[1977] Given the weight of findings demonstrating that these forced movements were conducted pursuant to CPK policy to remove the Vietnamese from Cambodia, Appellant's assertion should be dismissed.[1978]

1966 **F54** Appeal Brief, para. 978.
1967 **E465** Case 002/02 TJ, para. 3432.
1968 **F54** Appeal Brief, para. 979.
1969 *Contra* **F54** Appeal Brief, para. 979. *See* response to Ground 21.
1970 **F54** Appeal Brief, paras 979, 241-242.
1971 **F54** Appeal Brief, para. 978.
1972 *See* **E465** Case 002/02 TJ, para. 3505.
1973 **F54** Appeal Brief, paras 983-984.
1974 **E465** Case 002/02 TJ, paras 3433-3436.
1975 **F54** Appeal Brief, para. 984.
1976 **E1/424.1** Prak Khan, T. 28 Apr. 2016, 09.12.52-09.14.47, p. 6, line 25-p. 7, line 2.
1977 **F54** Appeal Brief, paras 985-986.
1978 **F54** Appeal Brief, para. 986.

569. Finally, the TC found that deportation had not been established in Svay Rieng,[1979] rendering Appellant's claim that the TC violated the principle of *in dubio pro reo* by noting the likelihood that deportations took place in Svay Rieng without foundation.[1980]

Grounds 103 and 104: Deportation of the Vietnamese from Tram Kak (actus reus)[1981]

570. **Grounds 103 and 104 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Vietnamese were expelled from TK and sent to Vietnam without their consent in 1975 and 1976.**

571. These grounds fail with regard to the alleged legal and factual errors as Appellant: (i) simply reiterates his erroneous claim regarding *saisine*;[1982] (ii) merely asserts but does not substantiate his claim that the TC's finding that Vietnamese crossed a national border was not adequately reasoned;[1983] (iii) fails to demonstrate that the totality of the evidence did not establish that Vietnamese in TK district crossing the Vietnamese border was the only reasonable inference;[1984] and (iv) fails to demonstrate that the TC distorted evidence and relied on torture-tainted evidence or evidence outside the scope of the case.[1985]

572. At the outset, Appellant quotes from different sections of the Judgment and wrongly presents these as the TC's definitive analysis of the deportation allegations. For example, Appellant takes the TC's factual conclusion in the general section on "Treatment of the Vietnamese" that "large numbers of Vietnamese were gathered up in TK district from late 1975 into 1976, with many expelled and/or disappearing",[1986] and misleadingly portrays that the TC was unable to find BRD that deportation or enforced disappearance took place yet made a legal finding leading to conviction, thereby violating the principle of *in dubio pro reo*.[1987]

573. The TC's actual legal findings on deportation are clear: large numbers of Vietnamese were gathered up in TK district from late 1975 into early 1976; this occurred in a coercive environment in which the Vietnamese people involved, who were lawfully present at the

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1979 **E465** Case 002/02 TJ, para. 3505.
1980 **F54** Appeal Brief, para. 982.
1981 Ground 103: **F54** Appeal Brief, *Errors in finding the deportation of Vietnamese*, paras 686-714; **F54.1.1** Appeal Brief Annex A, pp. 39-40 (EN), p. 36 (FR), pp. 55-56 (KH); Ground 104: **F54** Appeal Brief, *Errors in finding the deportation of Vietnamese*, paras 686-714; **F54.1.1** Appeal Brief Annex A, p. 40 (EN), p. 36 (FR), pp. 55-56 (KH).
1982 *See* response to Ground 41.
1983 **F54** Appeal Brief, para. 688.
1984 **F54** Appeal Brief, para. 688.
1985 **F54** Appeal Brief, para. 688.
1986 **E465** Case 002/02 TJ, para. 1125.
1987 **F54** Appeal Brief, para. 693.

time, had no genuine choice but to leave.[1988] The TC also found that there was an agreement between the DK and Vietnamese authorities to exchange persons, and Khmer Krom arrived in TK in return for Vietnamese people who left the district.[1989] Based on these and other findings, the TC reasonably concluded that Vietnamese from TK district were displaced across a national border without a lawful basis.[1990]

574. Appellant's suggestion that it was impossible to conclude that Vietnamese were deported without being able to determine what happened to "particular Vietnamese persons"[1991] is as incorrect as asserting that it is required to name individual mass killing victims.

575. Regarding witness testimony, Appellant improperly views the testimony of a number of witnesses in isolation – confining his analysis to whether these witnesses testified that Vietnamese had crossed a national border and disregarding that the TC instead relied on this evidence to establish that Vietnamese who were lawfully present in TK were rounded up in late 1975 and into early 1976.[1992]

576. For example, the TC did not use bad faith or distort Pech Chim's statements to conclude that the forcible movement of Vietnamese took place after April 1975.[1993] Appellant suggests that the TC concluded that the forcible movement of Vietnamese occurred in 1975 because TK District officials Khom and Chorn played a role in it, erroneously asserting that Pech Chim's evidence does not support this.[1994] In fact, Pech Chim was shown a document dated early May 1977 from Popel commune in TK District describing the exchange of Vietnamese for Khmer Krom and testified that "[t]he person in charge of this particular task was Khom who worked in collaboration with Chorn".[1995] Pech Chim's subsequent explanation of Chorn's duties clearly demonstrate that the period in question was after April 1975, as he refers to "evacuees" from Phnom Penh to TK.[1996]

577. Contrary to Appellant's claim, Ek Hoeun's testimony is not unclear.[1997] The TC noted that Ek Hoeun had "direct knowledge of *both* instructions to kill Vietnamese and instructions to move them to Vietnam as part of an exchange process".[1998] Equally,

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1988 **E465** Case 002/02 TJ, para. 1158.
1989 **E465** Case 002/02 TJ, paras 1158-1159.
1990 **E465** Case 002/02 TJ, para. 1159.
1991 **F54** Appeal Brief, para. 692.
1992 **E465** Case 002/02 TJ, para. 1157.
1993 *Contra* **F54** Appeal Brief, para. 698.
1994 **F54** Appeal Brief, para. 698.
1995 **E1/290.1** Pech Chim, T. 22 Apr. 2015, 10.41.14-10.45.34, p. 23, line 25-p. 24, line 21. *See also* p. 24, lines 19-21.
1996 **E1/290.1** Pech Chim, T. 22 Apr. 2015, 10.50.01-10.54.27, p. 26, line 24-p. 27, line 16, p. 28, lines 10-12.
1997 **F54** Appeal Brief, para. 700.
1998 **E465** Case 002/02 TJ, para. 1111 (emphasis added).

Appellant's characterisation of Chang Srey Mom's evidence as uncertain whether the people being gathered up in her commune in TK were Vietnamese or pretending to be Vietnamese, or whether they were sent to Vietnam, disregards the crucial point of this evidence.[1999] Chang Srey Mom testified that in 1976, the CPK "searched for Vietnamese because they said that if there were Vietnamese, they would be sent back to Vietnam",[2000] and "the unit chief would go from house to house to take down the biographies of the people and they said that for those who were connected with Vietnamese relatives or who were relatives to Vietnamese would be returned to Vietnam".[2001]

578. Appellant misapprehends the probative value of hearsay evidence in relation to Chou Koemlan.[2002] Though Chou Koemlan did not testify whether the Vietnamese family she had been told was being sent back to Vietnam[2003] was *in fact* returned to Vietnam,[2004] this evidence again demonstrates that the collection and transfer of Vietnamese from TK to Vietnam was well known.

579. Appellant's disregard of Riel Son's evidence without challenging the evidence that whole families of Vietnamese in his area disappeared[2005] further demonstrates Appellant's piecemeal approach to the assessment. Contrary to Appellant's suggestion, the TC did not infer solely from the evidence of such witnesses that the elements of deportation were established.[2006] Rather, the TC correctly analysed this evidence in the context of other evidence in the Case File, including the contemporaneous *RF*, which led to there being only one reasonable inference available.

580. With regard to the *RF*, the TC did not distort the meaning of the April 1976 publication, which declared that hundreds of thousands of foreigners had been "swept […] clean and expelled […] from our country".[2007] A plain reading of the document clearly demonstrates that the reference to "foreigners" is to the Vietnamese.[2008] Appellant simply reiterates the challenges contained in his final trial brief regarding the reliability of the expert testimony of Alexander Hinton.[2009] The TC expressly addressed Appellant's

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1999 **F54** Appeal Brief, para. 702.
2000 **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 11.03.08-11.05.23, p. 37, lines 3-5.
2001 **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 11.05.23-11.07.09, p. 37, line 24-p. 38, line 3.
2002 **F54** Appeal Brief, para. 703. *See* response to Ground 32 (Hearsay).
2003 **E1/253.1** Chou Koemlan, T. 27 Jan. 2015, 10.08.41-10.09.59 and 15.46.48-15.48.00, p. 25, lines 4-5; p. 91, lines 19-24.
2004 **E1/253.1** Chou Koemlan, T. 27 Jan. 2015, 10.08.41-10.09.59, p. 25, lines 11-12.
2005 **F54** Appeal Brief, para. 703.
2006 *Contra* **F54** Appeal Brief, para. 704.
2007 *Contra* **F54** Appeal Brief, para. 706.
2008 *Contra* **F54** Appeal Brief, para. 706. *See* **E3/759** *Revolutionary Flag*, Apr. 1976, EN 00517853.
2009 **F54** Appeal Brief, para. 707, fn. 1235.

challenges to the reliability of Alexander Hinton's expert testimony and concluded that it would "limit its use of [his] evidence to assessing the appropriate interpretation of established facts and placing them in context when necessary and with due caution".[2010] The TC followed that approach when it placed Hinton's expert testimony that the April 1976 *RF* related to Vietnamese living in Cambodia within the broader historical context, particularly the fact that the same language used to describe "foreigners" in the April 1976 *RF* was "commonly used in CPK rhetoric designating the Vietnamese".[2011] Appellant fails to acknowledge these other contemporaneous records, the contents of which defeat his argument. Additionally, Appellant does not substantiate his groundless claim that the TC only exercised caution regarding the *RF*s when there was exculpatory information therein.[2012]

581. Contrary to Appellant's claim, the TC did not rely only on findings relating to deportations in Prey Veng.[2013] Rather, the TC cited, *inter alia*, the evidence of former CPK cadre Toit Thoeurn, who escorted Vietnamese from Battambang to Vietnam; Heng Lai Heang, who saw Vietnamese taken away by vehicles in Kratie; Ven Van's account that about one hundred thousand Vietnamese were gathered in Pursat and sent back to Vietnam; and Choeung Yaing Chaet who testified that he was deported from Kampong Chhnang to Vietnam.[2014]

582. With regard to exchanges of Khmer Krom with Vietnam, Appellant merely claims that Khmer Krom from Vietnam who testified to being forcibly moved to TK under an exchange programme did not state that Vietnamese people from TK crossed the border into Vietnam.[2015] Appellant's argument appears to be that in this exchange of people between DK and Vietnam, DK received Khmer Krom from Vietnam and Vietnam received no Vietnamese in return.

583. Appellant dismisses contemporary TK records on the basis that he disputes their probative value.[2016] Thus, Appellant does not address the May 1977 report from Popel commune recording the number of Khmer Krom who came to live in the area and

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2010 **E465** Case 002/02 TJ, paras 107, 3364.
2011 **E465** Case 002/02 TJ, para. 3388. *See also* **E3/746** *Revolutionary Flag*, July 1978, EN 00428289; **E3/727** *Revolutionary Flag*, May-June 1978, EN 00185333; **E3/5720** Pol Pot, Public Statement, 5 Jan. 1979, EN S 00017564-65.
2012 **F54** Appeal Brief, para. 707.
2013 **F54** Appeal Brief, para. 708.
2014 **E465** Case 002/02 TJ, para. 3434.
2015 **F54** Appeal Brief, para. 710.
2016 **F54** Appeal Brief, para. 711; *see* response to Ground 36.

describing these people as "exchanged against Yuon".[2017] The TC noted that this document confirmed the testimony of Ry Pov that Khmer Krom had been sent to Popel commune as part of an exchange.[2018]

584. Further, Appellant erroneously asserts that the TC relied on torture-tainted evidence and contradicted its own previous findings.[2019] First, the TC clarified that the cited sentence from the KTC notebook was a "narrative description"[2020] and noted that such "objective information contained within confessions is not part of the statement and therefore not excluded".[2021] Second, Appellant incorrectly seeks to conflate this with the TC's objection to using parts of the same document during the testimony of a witness, which related specifically to the *substance* of the confession.[2022] He also erroneously claims, without explanation, that this extract from the KTC notebook of January 1976 does not support the evidence of Sann Lorn.[2023] However, Sann Lorn testified that it was Khmer Rouge policy to round up the Vietnamese in 1975[2024] and that he participated in the collection and transport of a "huge number" of Vietnamese from communes in TK in approximately early 1976.[2025]

585. Finally, Appellant's argument that all evidence relating to the Khmer Krom is outside the scope of Case 002/02[2026] ignores the TC's proper use of this evidence.[2027]

Ground 105: Error concerning the intent to forcibly transfer victims across a national border[2028]

586. **Ground 105 should be dismissed as Appellant fails to establish that the TC erred in fact in finding the intent to move Vietnamese from TK across a national border.**

587. This ground fails with regard to the alleged factual error as Appellant merely asserts that the TC used the same evidence to establish the *mens rea* to deport as it did to demonstrate

2017 *See* **E465** Case 002/02 TJ, para. 1123.
2018 **E465** Case 002/02 TJ, para. 1123.
2019 **F54** Appeal Brief, paras 712-713.
2020 **E465** Case 002/02 TJ, para. 1115.
2021 *See* **E465** Case 002/02 TJ, para. 76 *citing* **E350/8** TC Torture Evidence Decision, para. 49.
2022 **F54** Appeal Brief, para. 713. *See* **E1/300.1** Vong Sarun, T. 18 May 2015, 11.22.34-11.31.02, p. 43, line 1-p. 44, line 25.
2023 **F54** Appeal Brief, para. 701.
2024 **E1/384.1** Sann Lorn, T. 28 Jan. 2016, 14.21.05-14.25.06, p. 63, lines 16-25.
2025 *See* **E465** Case 002/02 TJ, paras 1114-1115.
2026 **F54** Appeal Brief, para. 714.
2027 *See* response to Ground 3.
2028 Ground 105: **F54** Appeal Brief, *Error concerning the intent to forcibly transfer victims across a national border*, paras 715-717; **F54.1.1** Appeal Brief Annex A, p. 40 (EN), p. 36 (FR), p. 56 (KH).

the *actus reus*.[2029] He fails to demonstrate any error in the TC's reliance on evidence demonstrating that: Vietnamese in TK had been rounded pursuant to instructions from CPK instructions, an exchange of people had taken place between the DK and Vietnam, and the CPK publicly acknowledged that Vietnamese had been deported at the time.[2030] The evidence, taken in totality, clearly demonstrates the intent to forcibly displace Vietnamese from TK across a national border.

588. Notably, given that Appellant challenges the finding that he committed genocide through killing, he asserts that the TC's findings demonstrate an intent to execute rather than displace the Vietnamese,[2031] apparently acknowledging the transformation of the policy over time.

iii. Enforced Disappearance of Vietnamese

Ground 111: Errors in finding the enforced disappearance of Vietnamese[2032]

589. **Ground 111 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Vietnamese were victims of enforced disappearance at TK.**

590. The ground fails as Appellant merely repeats erroneous claims regarding the *saisine*[2033] and misrepresents the findings.

591. Contrary to Appellant's suggestion, the finding that Vietnamese "were deported and/or disappeared" did not signify an inability to conclude BRD that Vietnamese were either disappeared or deported.[2034] Rather, the TC found that a large number of Vietnamese were rounded up in TK in 1975 and 1976 and that among those: (i) the evidence demonstrated that persons disappeared, (ii) the only reasonable inference in the context was that persons were deported, and (iii) persons deported were also victims of enforced disappearance given the circumstances in which these events occurred.[2035] Appellant's argument seemingly rests on the equally erroneous notions that the same evidence cannot support separate findings and that an individual cannot be the victim of both enforced disappearance and deportation.[2036] As the TC's findings occasion no element of

2029 **F54** Appeal Brief, para. 716.
2030 **E465** Case 002/02 TJ, para. 1158.
2031 **F54** Appeal Brief, para. 717.
2032 Ground 111: **F54** Appeal Brief, *Errors in finding the enforced disappearance of Vietnamese*, para. 756; **F54.1.1** Appeal Brief Annex A, p. 42 (EN), p. 38 (FR), p. 59 (KH).
2033 *See* response to Ground 84.
2034 *Contra* **F54** Appeal Brief, para. 756.
2035 **E465** Case 002/02 TJ, paras 1110-1125, 1201. *Contra* **F54** Appeal Brief, para. 756.
2036 *See* Approach to Evidence.

reasonable doubt, Appellant's *in dubio pro reo* argument necessarily fails.[2037]

592. Appellant wrongly asserts that the TC did not establish the constituent elements of the OIA of enforced disappearance in relation to the Vietnamese.[2038] The TC referred back to the evidence assessed in the deportation section demonstrating that Vietnamese were rounded up and disappeared.[2039] As those who were disappeared were obviously not available to testify, the evidence relied on by the TC clearly meets the legal elements of an intentional act or omission by the CPK that caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity and was of a similar gravity to other CAH.[2040]

Ground 112: The Chamber erred by finding that KK had been victims of enforced disappearance[2041]

593. **Ground 112 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Khmer Krom were victims of enforced disappearance at TK.**

594. The ground fails as Appellant misinterprets the TC's findings. Contrary to his assertion, the TC correctly considered evidence of the Khmer Krom.[2042]

595. Appellant was neither charged with nor convicted of enforced disappearance of the Khmer Krom as a specific group or sub-group of the Vietnamese at TK.[2043] Thus, in concluding that OIA through conduct characterised as enforced disappearances was established, the TC properly considered evidence that whole Khmer Krom families were disappeared in TK alongside the evidence that Vietnamese and other residents of the cooperatives were continuously disappeared during the regime.[2044]

2037 **F54** Appeal Brief, para. 756.
2038 **F54** Appeal Brief, para. 756.
2039 **E465** Case 002/02 TJ, para. 1201, fn. 4096.
2040 *See* **F36** Case 002/01 AJ, para. 580.
2041 Ground 112: **F54** Appeal Brief, *The Chamber erred by finding that KK had been victims of enforced disappearances*, para. 757; **F54.1.1** Appeal Brief Annex A, p. 42 (EN), p. 38 (FR), p. 59 (KH).
2042 **F54** Appeal Brief, para. 757, where Appellant claims the TC found itself seised of these facts, *see* response to Ground 3. *See also* **E465** Case 002/02 TJ, para. 816.
2043 *Contra* **F54** Appeal Brief, para. 757.
2044 **E465** Case 002/02 TJ, para. 1201, *contra* **F54** Appeal Brief, para. 757.

iv. Murder of Vietnamese[2045]

Ground 152: Erroneous finding regarding the murder of four Vietnamese families in Svay Rieng[2046]

596. **Ground 152 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Vietnamese were killed in Svay Rieng.**

597. This ground fails as Appellant erroneously relies on only parts of Sin Chhem's testimony, disregarding the context that the witness provided.[2047]

598. Though Sin Chhem did not witness the arrest or execution of the Vietnamese families,[2048] she testified that she: knew of the Vietnamese families in the area even prior to 1975;[2049] lived close to the Vietnamese families and worked in the rice fields with them;[2050] saw the Vietnamese with their hands tied behind their backs;[2051] was told about the disappearance and killing of Vietnamese by persons who lived next to the families and witnessed the arrests;[2052] was told by the commune chief that in mixed marriages Vietnamese wives and children were taken away and killed;[2053] saw the bodily remains of a family including two children in a pit close to the rice fields and was told they were killed the night before;[2054] and was told about Vietnamese being taken away and killed in other villages.[2055]

599. Further, Sin Chhem did not contradict herself regarding the timing of the arrest and killing of the Vietnamese in her commune; Appellant relies on parts of her WRI which he incorrectly characterises as trial testimony.[2056] In fact, Sin Chhem's testimony was clear that the Svay Yea commune chief, who replaced the witness' husband when he was killed in late 1977,[2057] collected the Vietnamese families.[2058]

2045 Each of Appellant's arguments regarding *saisine* for killings fail, *see* response to Ground 60.
2046 Ground 152: **F54** Appeal Brief, *Erroneous finding regarding the murder of four Vietnamese families in Svay Rieng*, paras 987-992; **F54.1.1** Appeal Brief Annex A, p. 53 (EN), pp. 48-49 (FR), p. 76 (KH).
2047 **F54** Appeal Brief, paras 987, 990.
2048 **E465** Case 002/02 TJ, para. 3453.
2049 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 09.30.28-09.34.49, p. 9, lines 10-18.
2050 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 10.42.56-10.45.15 and 14.39.54-15.01.22, p. 27, lines 1-4; p. 71, lines 7-11.
2051 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 15.17.07-15.19.27, p. 80, lines 4-6.
2052 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 15.59.08-16.00.44, p. 97, lines 3-10.
2053 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 10.47.50-10.51.30, p. 29, lines 6-24.
2054 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 15.17.07-15.19.27, p. 79, lines 14-18.
2055 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 15.17.07-15.19.27, p. 79, line 25-p. 80, line 6.
2056 **F54** Appeal Brief, para. 989, fns 1823-1824.
2057 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, p. 17, lines 6-12; p. 18, lines 21-22.
2058 **E1/367.1** Sin Chhem, T. 14 Dec. 2015, 10.42.56-10.46.05, p. 27, lines 15-18, 24-25.

Ground 128: Murder and extermination of six Vietnamese nationals [2059]

600. **Ground 128 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that six Vietnamese were executed at AuKg.**

601. The ground fails as Appellant makes a number of erroneous assertions regarding the TC's use of and reliance on the evidence of Chhaom Se.

602. Contrary to Appellant's claim, the TC did not base its finding solely on Chhaom Se's WRI.[2060] The TC explained that it relied on the Case 002/01 testimony of Chhaom Se, the head of AuKg, regarding substance that was open to examination by the Parties.[2061]

603. Appellant mispresents the relevance of the questions that the TC permitted to be asked to Chhaom Se.[2062] The questions at that time were known to the Defence to relate to, *inter alia*, "the policies regarding enemies. And [...] the power to decide on the enemies' fate -- should they be released, should they be executed, should they be detained".[2063] Moreover, the execution of six ethnic Vietnamese at AuKg upon the order of Sao Saroeun was specifically charged in the Closing Order against Appellant based on, *inter alia*, Chhaom Se's WRI to the OCIJ.[2064] Thus, there is no question that Appellant was aware of the relevance and significance of Chhaom Se's testimony that "regarding the group of six people, I receive[d] instructions from Sao Saroeun for them to be executed".[2065] Consequently, Appellant's suggestion that his decision not to examine Chhaom Se on this specific issue renders the testimony of no more probative value than a WRI is erroneous.[2066]

Ground 155: Erroneous finding of murder as regards Vietnamese at Wat Khsach[2067]

604. **Ground 155 should be dismissed as Appellant fails to establish that the TC erred in finding that Vietnamese were killed at Wat Khsach.**

605. The ground fails with regard to the alleged error, the type of which Appellant does not

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2059 Ground 128: **F54** Appeal Brief, *Murder and extermination of six Vietnamese nationals*, paras 842-847; **F54.1.1** Appeal Brief Annex A, pp. 46-47 (EN), pp. 42-43 (FR), p. 66 (KH).
2060 **F54** Appeal Brief, paras 842-843.
2061 **E465** Case 002/02 TJ, para. 2860.
2062 Within the Case 002/01 proceeding, *see* **F54** Appeal Brief, para. 845.
2063 **E1/159.1** Chhaom Se, T. 11 Jan. 2013, 15.18.44-15.23.43, p. 92, line 3-p. 93, line 9. *See* **E465** Case 002/02 TJ, para. 2860.
2064 **D427** Closing Order, para. 622, fn. 2697. *Contra* **F54** Appeal Brief, para. 846.
2065 **E1/159.1** Chhaom Se, T. 11 Jan. 2013, 15.53.51-15.55.51, p. 104, lines 13-14. *Contra* **F54** Appeal Brief, para. 846.
2066 **F54** Appeal Brief, para. 847.
2067 Ground 155: **F54** Appeal Brief, *Erroneous finding of murder as regards Vietnamese at Wat Khsach,* paras 1006-1013; **F54.1.1** Appeal Brief Annex A, p. 54 (EN), p. 49 (FR), p. 77 (KH).

articulate, as Appellant fails to demonstrate any error in the findings that a mass execution of Vietnamese took place at Wat Khsach on the orders of the upper echelon.[2068]

606. Appellant's erroneous claims regarding the specific killings of Yeay Hay and Ta Khut,[2069] members of Chum's family,[2070] and villagers from Chi Kraeng District[2071] fail to undermine the testimony of three witnesses to a mass execution of Vietnamese people at Wat Ksach in mid-to-late 1978.[2072] Y Vun, Sean Song, and Um Suonn testified to the key details regarding the occurrence of the mass execution specifically targeting Vietnamese in 1978, that Vietnamese living locally and from outside the area were killed, and that no Vietnamese remained in the area afterwards.[2073] Appellant fails to demonstrate that the TC erred or acted unreasonably in relying on these testimonies to conclude that "Vietnamese civilians were brought and killed *en masse* in late 1978 at Wat Khsach due to their perceived ethnicity".[2074]

607. Additionally, Appellant's erroneous interpretation of hearsay evidence[2075] does not demonstrate any error in the TC's reliance on the testimony of Sean Song and Y Vun that the executions of Vietnamese had occurred pursuant to an order from the upper echelon.[2076] Sean Song confirmed before the TC his previous statement to the OCIJ that he was told by the village chief that there was an order from a higher echelon to kill the Vietnamese,[2077] while Y Vun testified that he heard from villagers that the village chief had received his orders to kill from the upper level.[2078] Appellant's limited analysis also fails to take account of the hierarchical structure in which CPK orders were enforced and the CPK's Vietnamese policy at the time of the executions.[2079]

Ground 156: Erroneous finding of murder as regards Vietnamese in Sector 505 (Kratie)[2080]

608. **Ground 156 should be dismissed as Appellant fails to establish that the TC erred in finding that Vietnamese were killed in Sector 505 (Kratie).**

2068 **F54** Appeal Brief, para. 1006.
2069 **F54** Appeal Brief, paras 1007-1008.
2070 **F54** Appeal Brief, paras 1009-1010.
2071 **F54** Appeal Brief, paras 1011-1012.
2072 *See* **E465** Case 002/02 TJ, para. 3477.
2073 **E465** Case 002/02 TJ, paras 3477-3481.
2074 **E465** Case 002/02 TJ, para. 3495.
2075 *See* response to Ground 32 (Hearsay).
2076 **F54** Appeal Brief, para. 1013.
2077 **E1/358.1** Sean Song, T. 28 Oct. 2015, 10.00.08-10.01.20, p. 24, line 19-p. 25, line 5.
2078 **E1/368.1** Y Vun, T. 15 Dec. 2015, 14.07.00-14.08.50, p. 59, lines 3-12.
2079 *See* **E465** Case 002/02 TJ, paras 373, 391, 483, 3377-3417.
2080 Ground 156: **F54** Appeal Brief, *Erroneous finding of murder as regards Vietnamese in Sector 505 (Kratie)*, paras 1014-1017; **F54.1.1** Appeal Brief Annex A, p. 54 (EN), pp. 49-50 (FR), pp. 77-78 (KH).

609. The ground fails with regard to the alleged error, the type of which Appellant does not articulate, as Appellant makes several erroneous claims regarding the evidence of a CP.

610. First, Appellant errs by arguing that Uch Sunlay's testimony about the killing of his wife, children, and other family members has intrinsically little value because Uch Sunlay, as a CP, was biased.[2081] As a victim of this crime, he was well-placed to report on it.[2082]

611. Second, Appellant fails to demonstrate that no reasonable trier of fact could have relied on the parts of Uch Sunlay's testimony that involved hearsay to reach the finding that his family members and other Vietnamese persons were killed.[2083] The TC's reasonable and cautious approach to the hearsay evidence is demonstrated by its decision to not rely on his testimony regarding a separate incident where Vietnamese were targeted.[2084]

612. Contrary to Appellant's suggestion that the TC erred with regard to the identity of Uch Sunlay's family members who were killed,[2085] the TC cited Uch Sunlay's testimony in which he detailed the 13 members of his family including, in addition to his own wife and children, his sister-in-law and her children, and the children of a younger sibling.[2086] While the TC may have erred by including Uch Sunlay's parents-in-law in the total without establishing their deaths,[2087] Appellant fails to demonstrate that this error invalidated the Judgment, in whole or part, or occasioned an actual miscarriage of justice.[2088] Uch Sunlay's testimony detailed that the executions of his wife's siblings and their children took place on the island of Kaoh Trong.[2089] The TC's findings thus demonstrate that at least 11 of Uch Sunlay's family members were killed.[2090]

Ground 154: Erroneous finding of murder as regards Vietnamese in the Western Zone[2091]

613. **Ground 154 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Vietnamese were killed in the West Zone.**

614. The ground fails as Appellant fails to properly assess Prak Doeun's evidence. Contrary to Appellant's claim, Prak Doeun's testimony about the killing of his wife and child did

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2081 **E465** Case 002/02 TJ, para. 1014.
2082 *See* response to Ground 34.
2083 **F54** Appeal Brief, para. 1014. *See* response to Ground 32 (Hearsay).
2084 **E465** Case 002/02 TJ, para. 3486. *Contra* **F54** Appeal Brief, para. 1014.
2085 **F54** Appeal Brief, para. 1015.
2086 **E465** Case 002/02 TJ, para. 3483 *citing* **E1/394.1** Uch Sunlay, T. 1 Mar. 2016, 15.30.12-15.32.11, p. 92, lines 4-15.
2087 *Compare* **E465** Case 002/02 TJ, paras 3483, 3486 and 3488.
2088 *See* Standard of Review (General Standard).
2089 **E1/395.1** Uch Sunlay, T. 2 Mar. 2016, 09.33.38-09.37.07, p. 15, line 3-p. 16, line 9.
2090 **E465** Case 002/02 TJ, paras 3483-3488, *contra* **F54** Appeal Brief, paras 1016-1017.
2091 Ground 154: **F54** Appeal Brief, *Erroneous finding of murder as regards Vietnamese in the Western Zone*, paras 1003-1005; **F54.1.1** Appeal Brief Annex A, pp. 53-54 (EN), p. 49 (FR), pp. 76-77 (KH).

not require corroboration.[2092] Appellant again fails to view evidence in its totality and within the context of events. Prak Doeun did not testify that unit chief Hoem had not witnessed the killings.[2093] Hoem, who was in the area of the executions at the time, detailed how and why Prak Doeun's Vietnamese wife and their child had been killed and blamed Prak Doeun for marrying a Vietnamese woman.[2094] Further, Prak Doeun gave direct evidence on the dangerous situation that existed for Vietnamese at the time.[2095]

615. The TC's reference to Prak Doeun's "children" being executed on Ta Mov island appears to be a typographical error,[2096] as an earlier discussion notes "Prak Doeun, his wife, his mother-in-law, and one of his children" were on the island[2097] and subsequently refers to "[t]he rest of Prak Doeun's children [being] sent to different places".[2098] Thus, while the TC may have erred regarding the number of Prak Doeun's children found BRD to have been killed, Appellant fails to demonstrate that the error invalidated the Judgment, in whole or part.[2099] The TC properly established and found Appellant responsible for the death of one of Prak Doeun's children.[2100]

Ground 153: Erroneous findings regarding the murder of Vietnamese at sea[2101]

616. **Ground 153 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Vietnamese were killed in DK waters.**

617. The ground fails, as Appellant's claims regarding the TC's reliance on contemporaneous CPK records, and its findings that victims were civilians and, specific killings were intentional, are all unmerited.[2102]

618. First, the TC noted that contemporaneous records were available to the Parties upon request "to check the authenticity of the original and the accuracy of the electronic copies"[2103] and were admitted "[f]ollowing the opportunity for public, adversarial debate

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2092 **F54** Appeal Brief, para. 1004. *See* response to Ground 21.
2093 *Contra* **F54** Appeal Brief, para. 1004, fn. 1849.
2094 **E1/361.1** Prak Doeun, T. 2 Dec. 2015, 14.28.51-14.31.20, 15.21.36-15.28.02, p. 73, lines 10-15; p. 86, line 22-p. 88, line 5; **E1/362.1** Prak Doeun, T. 3 Dec. 2015, 10.49.49-10.52.25, p. 36, lines 19-25.
2095 *See* **E1/361.1** Prak Doeun, T. 2 Dec. 2015, 13.36.27-13.43.40, 13.59.48-14.01.32, 14.05.45-14.07.50, 14.11.05-14.12.59, p. 52, line 6-p. 54, line 15; p. 61, lines 12-16; p. 64, lines 2-12; p. 66, lines 11-14.
2096 **E465** Case 002/02 TJ, para. 3471.
2097 **E465** Case 002/02 TJ, para. 3466.
2098 **E465** Case 002/02 TJ, para. 3467.
2099 *See* Standard of Review (General Standard).
2100 *Contra* **F54** Appeal Brief, para. 1005.
2101 Ground 153: **F54** Appeal Brief, *Erroneous findings regarding the murder of Vietnamese at sea*, paras 993-1002; **F54.1.1** Appeal Brief Annex A, p. 53 (EN), p. 49 (FR), p. 76 (KH).
2102 **F54** Appeal Brief, para. 996.
2103 **E465** Case 002/02 TJ, para. 57.

through [...] submissions".[2104] Appellant's general argument regarding an entire category of documents without any specific argument as to why, in this instance, a Division 164 report cannot be relied upon should be dismissed.[2105] The report refers to the sinking of one boat, not boats, so speculation as to the actions of other boats is unwarranted.[2106]

619. Second, Appellant's assertion that the sinking of this boat was connected to a conflict with Vietnam is meritless.[2107] The report in question regarding "maritime" matters refers to three incidents involving the sinking or capturing of Vietnamese and Chinese motor-boats, with reference to passengers "young and old, male and female".[2108] There is not a single reference to anything that would indicate a connection to hostilities. Contrary to Appellant's claim, it is not reasonable to conclude that the Vietnamese on board the sunken 22CC motorboat were soldiers or armed fishermen taking part in hostilities.[2109]

620. Third, Appellant erroneously argues that no reasonable trier of fact could have found an intention to kill two people in the 20 March incident described in the Division 164 report.[2110] The report clearly states that Vietnamese of various ages were tied up on the small and shaky boat, when two people fell in to the water and were not recovered.[2111] The circumstances and the omission to rescue clearly meet the definition of willingly entered conduct likely to lead to the death of the victims and for which the perpetrator, at minimum, accepted or was reconciled with the possibility of the fatal consequence.[2112]

v. Extermination of Vietnamese[2113]

Ground 157: Extermination of Vietnamese[2114]

621. **Ground 157 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that extermination of the Vietnamese was established.**

622. This ground fails with regard to the alleged errors,[2115] as Appellant fails to establish that

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2104 **E465** Case 002/02 TJ, para. 56.
2105 **F54** Appeal Brief, paras 997, 320-323.
2106 *See* response to Ground 15.
2107 **F54** Appeal Brief, para. 1001.
2108 **E3/997** Report from Division 164, 20 Mar. 1978, EN 00233649.
2109 **F54** Appeal Brief, para. 1001.
2110 **F54** Appeal Brief, para. 1002.
2111 **E3/997** Report from Division 164, 20 Mar. 1978, EN 00233649.
2112 **E465** Case 002/02 TJ, para. 650.
2113 Each of Appellant's arguments regarding *saisine* for killings fail, *see* response to Ground 60.
2114 Ground 157: **F54** Appeal Brief, *Extermination of Vietnamese*, paras 1018-1027; **F54.1.1** Appeal Brief Annex A, p. 54 (EN), p. 50 (FR), p. 78 (KH).
2115 Appellant fails to articulate which of his claims are errors of law and which are errors of fact.

the TC erred regarding: the number of killings being sufficient to reach the threshold of extermination; killings in different locations being part of the same murder operation; and the estimated number of deaths.

623. First, Appellant's claim that the number of deaths did not reach the necessary magnitude for the crime of extermination is unsupported.[2116] Appellant acknowledges there is no minimum threshold for the number of deaths required to characterise killings as extermination.[2117] Indeed, the SCC has noted extermination in situations involving less than 60 killings.[2118] Moreover, the TC stated that the killing of 60 Vietnamese was "almost certainly an underestimation of the actual situation" and recalled that the findings of extermination at AuKg and S-21 involved hundreds of Vietnamese.[2119]

624. Second, Appellant fails to demonstrate that the killings of Vietnamese at various locations were isolated and unrelated.[2120] Appellant merely argues that the killings took place at different times and in different locations[2121] and relies on his erroneous claim that the Vietnamese were not specifically targeted because they were Vietnamese.[2122] The applicable law on extermination, which Appellant did not contest, permits the aggregation of separate incidents,[2123] and requires consideration of victim selection and whether killings were aimed at a collective group or individual victims.[2124] Here, the TC established that each of the separate killings occurred because the victims were Vietnamese, and that all incidents took place in the context of a nationwide policy to kill the Vietnamese.[2125] The TC thus reasonably concluded that there was "overwhelming evidence that these killings were all part of the same murder operation".[2126]

625. Third, contrary to Appellant's erroneous claim that the TC had no basis for its assessment of the number of Vietnamese killed,[2127] the TC explained the rationale for its (conservative) estimates of two persons per family and five persons per boat in the specific instances of killings established BRD.[2128] Appellant merely disagrees with the

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2116 **F54** Appeal Brief, paras 1019-1020.
2117 **F54** Appeal Brief, para. 1020.
2118 **F36** Case 002/01 AJ, para. 551.
2119 **E465** Case 002/02 TJ, para. 3499.
2120 **F54** Appeal Brief, paras 1023-1025.
2121 **F54** Appeal Brief, paras 1023-1024.
2122 **F54** Appeal Brief, para. 1022. *See* response to Ground 185.
2123 **E465** Case 002/02 TJ, para. 656.
2124 **F36** Case 002/01 AJ, para. 551.
2125 **E465** Case 002/02 TJ, para. 3500.
2126 **E465** Case 002/02 TJ, para. 3500.
2127 **F54** Appeal Brief, paras 1026-1027.
2128 **E465** Case 002/02 TJ, para. 3499, fn. 11787.

TC's finding regarding the number of Vietnamese killed and the underlying reason for their killings.[2129]

vi. Persecution of Vietnamese

Ground 158: Persecution on racial grounds [2130]

626. **Ground 158 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Vietnamese were persecuted on racial grounds in Prey Veng and Svay Rieng.**

627. The ground fails as Appellant does not demonstrate any error in the findings that (i) the Vietnamese were a sufficiently identifiable group, (ii) that they were persecuted by acts of deportation, arrest, and murder, (iii) that these acts constituted *de facto* discrimination, and (iv) that the Vietnamese were intentionally targeted in Prey Veng and Svay Rieng.[2131]

628. With regard to identification of the Vietnamese group, Appellant's assertion that the "Vietnamese living in Cambodia" were not sufficiently identifiable as a racial group is unsupported.[2132] Appellant does not clarify whether he is alleging a legal or factual error in the TC's characterisation of the group,[2133] but challenges neither the TC's articulation of the law nor that the Vietnamese living in Cambodia had a particular distinct identity.[2134] His argument focuses on a single footnote referring to a section of the Judgment detailing the terms "CIA, KGB, and Yuon agents" in the context of the CPK enemy policy to erroneously claim that the TC included Cambodians within the racial group of Vietnamese living in Cambodia.[2135] In doing so, Appellant ignores the TC's extensive discussion of the Vietnamese group when assessing the evidence of a targeting policy.[2136] Tellingly, Appellant's claim that the TC systematically failed to differentiate between Vietnamese civilians in Cambodia, those in Vietnam, Vietnamese soldiers, and agents of the Yuon is not supported by a single reference to the Judgment.[2137]

629. Appellant fails to demonstrate any error in the TC's assessment of the "One v. 30"

2129 **F54** Appeal Brief, paras 1019-1027.
2130 Ground 158: **F54** Appeal Brief, *Persecution on racial grounds*, paras 1028-1050; **F54.1.1** Appeal Brief Annex A, p. 55 (EN), p. 50 (FR), p. 78 (KH).
2131 **F54** Appeal Brief, para. 1028.
2132 *Contra* **F54** Appeal Brief, para. 1029.
2133 **F54** Appeal Brief, para. 1029.
2134 *See* **F54** Appeal Brief, para. 1029.
2135 **F54** Appeal Brief, para. 1029.
2136 *See* **E465** Case 002/02 TJ, paras 3382-3417.
2137 **F54** Appeal Brief, para. 1031.

speech,[2138] and his claim that Pol Pot's call to destroy Vietnamese civilians somehow excluded Vietnamese in Prey Veng and Svay Rieng is unsupported and without merit.[2139]

630. With respect to persecution through acts of deportation, arrests, and murders, Appellant fails to undermine the TC's findings regarding underlying acts of persecution committed against Vietnamese in Prey Veng and Svay Rieng.[2140] As detailed, Appellant did not demonstrate any error in the TC's findings that Vietnamese were (i) deported from Prey Veng in 1975 and 1976[2141] and (ii) murdered in Svay Rieng in 1978.[2142]

631. Further, Appellant misstates the TC's finding with regard to arrests in Prey Veng between 1977 and 1979.[2143] The TC's finding that killings could not be established to the requisite legal standard did not prevent it from relying on the same evidence to establish "transfers or arrests of Vietnamese individuals who were then taken away and never returned".[2144] Appellant also omits relevant findings when erroneously asserting that the TC did not find any arrests took place in Svay Rieng between 1977 and 1979.[2145] For example, the TC held that "the arrest in 1978 [...] followed by the disappearance of the four Vietnamese families [...] were the result of the systematic implementation in" Svay Rieng of the "nationwide policy to kill Vietnamese living in Cambodia at the time".[2146]

632. With regard to *de facto* discrimination, Appellant erroneously asserts that the TC did not give any reason why or how the Vietnamese victims of deportations, arrests, and murders in Prey Veng and Svay Rieng were targeted.[2147] Appellant ignores the finding that these crimes occurred in the context of "the systematic targeting of Vietnamese individuals due to their perceived race".[2148] Moreover, his suggestion that there may have been other reasons why Vietnamese were arrested not only ignores the evidence but also fails to demonstrate why the deportation and murder of Vietnamese should not be considered acts of *de facto* discrimination.[2149]

633. Regarding the intentional targeting of Vietnamese in Prey Veng and Svay Rieng, in addition to his general failure to undermine the TC's finding on the creation of lists

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2138 *See* response to Ground 185.
2139 **F54** Appeal Brief, para. 1030.
2140 **F54** Appeal Brief, paras 1033-1036.
2141 *See* response to Ground 185; *contra* **F54** Appeal Brief, para. 1033.
2142 *See* response to Ground 152; *contra* **F54** Appeal Brief, para. 1033.
2143 **F54** Appeal Brief, para. 1034.
2144 **E465** Case 002/02 TJ, para. 3451. *Contra* **F54** Appeal Brief, para. 1034.
2145 **F54** Appeal Brief, para. 1035.
2146 **E465** Case 002/02 TJ, para. 3453. *See also* para. 3512.
2147 **F54** Appeal Brief, para. 1037.
2148 **E465** Case 002/02 TJ, para. 3513.
2149 **F54** Appeal Brief, paras 1038-1039.

identifying Vietnamese,[2150] Appellant erroneously suggests that the identification of Vietnamese by lists do not apply to Prey Veng and Svay Rieng,[2151] thereby mispresenting the TC's findings.[2152] The section of the Judgment analysing how the CPK identified Vietnamese in order to target them referred to the evidence of Sao Sak, who testified that "they may have done some statistics about the ethnicity of the villagers [in Prey Veng], that's why people in the higher ranking, in the *Angkar,* they knew something about the ethnicity of the people in the village",[2153] as well as Sieng Chanthy, who testified that the cooperative chief in her area in Svay Rieng "knew clearly who was who in the village [...] [and] knew it very well that my grandparents were ethnically Vietnamese".[2154] Moreover, contrary to Appellant's claim, the creation of lists in other parts of Cambodia is relevant to assessing the CPK's intent to persecute the Vietnamese in Prey Veng and Svay Rieng.[2155] Appellant's piecemeal approach fails to view the evidence in totality and erroneously disregards the findings on the CPK plan to target the Vietnamese nationwide.

634. Appellant also fails to demonstrate any error in the TC's findings on matrilineal targeting of the Vietnamese.[2156] Appellant implausibly asserts that various witnesses who testified to events across Cambodia all came up with the same personal deduction that the CPK considered that ethnicity passed through the mother.[2157] Appellant's erroneous approach to the assessment of evidence is demonstrated in his effort to discredit the knowledge of Doung Oeun, Sin Chhem, and Lach Kry on matrilineal targeting.[2158] However, each testified to personal knowledge and/or experience of the CPK taking away Vietnamese mothers and their children in mixed marriages.[2159] Additionally, the testimony that "some other people who were half-blood survived" does not refute matrilineal targeting,[2160] as the witness further testified that "if the mother was Vietnamese the mother would be arrested and smashed and later on the half-blood children were arrested and then half-blood grandchildren were also arrested".[2161] Further contrary to Appellant's erroneous

2150 *See* response to Ground 185.
2151 **F54** Appeal Brief, para. 1040.
2152 **F54** Appeal Brief, para. 1040.
2153 **E465** Case 002/02 TJ, para. 3420, fn. 11531. *Contra* **F54** Appeal Brief, para. 1041.
2154 **E465** Case 002/02 TJ, para. 3420, fn. 11531.
2155 **F54** Appeal Brief, para. 1042.
2156 **F54** Appeal Brief, para. 1043.
2157 **F54** Appeal Brief, para. 1043.
2158 **F54** Appeal Brief, para. 1044.
2159 **E465** Case 002/02 TJ, paras 3424-3425.
2160 *Contra* **F54** Appeal Brief, para. 1045.
2161 **E465** Case 002/02 TJ, para. 3424, fn. 11547.

suggestion,[2162] Ruos Nhim's request to Office 870 asking what to do regarding the "issue" of "Yuons with Khmer spouses and the half-breed [Khmer-Yuon]?" in May 1978[2163] demonstrates that cadres considered Vietnamese mixed families as something that required resolution, such as a decision "to take them out".[2164]

635. Appellant misleadingly refers solely to the TC's conclusion on *mens rea* when suggesting that it was "impossible" for him to know which publications in the *RF* and speeches of leading CPK officials the TC was relying upon.[2165] In fact, the TC detailed specific *RF* publications and speeches when assessing the evidence of a policy targeting the Vietnamese, as well as how these publications and speeches related to the Vietnamese living in Cambodia.[2166] The TC correctly explained how these documents and speeches established a nationwide policy to target the Vietnamese, refuting Appellant's claim that such evidence is irrelevant to Prey Veng and Svay Rieng.[2167] Appellant also suggests that the TC failed to take the conflict with Vietnam into account when interpreting statements of the DK, yet he acknowledges instances in which it did.[2168] In short, he simply disagrees with the TC's conclusion and fails to demonstrate any error.

Ground 110: Errors in finding persecution of Vietnamese people on racial grounds [2169]

636. **Ground 110 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that Vietnamese were persecuted on racial grounds in TK.**

637. The ground fails with regard to the alleged legal and factual errors as, in addition to the invalid reiteration of *saisine* breaches,[2170] Appellant (i) simply states that the *actus reus* of persecution has not been established by repeating his erroneous claim that deportations of Vietnamese from TK in 1975 and 1976 were not established;[2171] and (ii) wrongly asserts that the TC had no evidence of any intent to discriminate the Vietnamese on the basis of their race in TK in 1975 and 1976.

638. Appellant's claim that he had to guess what evidence the TC relied on to establish the

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2162 **F54** Appeal Brief, para. 1047.
2163 **E3/863** DK Report, 17 May 1978, EN 00321962 *cited* in **E465** Case 002/02 TJ, para. 3426.
2164 **E3/863** DK Report, 17 May 1978, EN 00321962.
2165 **F54** Appeal Brief, para. 1049, *referring* only to **E465** Case 002/02 TJ, para. 3513.
2166 *See* **E465** Case 002/02 TJ, paras 3382-3417.
2167 **F54** Appeal Brief, para. 1049.
2168 **F54** Appeal Brief, para. 1050.
2169 Ground 110: **F54** Appeal Brief, *Errors in finding persecution of Vietnamese people on racial grounds*, paras 748-755; **F54.1.1** Appeal Brief Annex A, p. 41 (EN), p. 38 (FR), pp. 58-59 (KH).
2170 *See* response to Grounds 41, 56.
2171 **F54** Appeal Brief, paras 749-750. *See* response to Grounds 103 & 104 (Deportation of the Vietnamese from Tram Kak (*actus reus*)), 105.

mens rea of persecution is misleading.[2172] The concluding paragraph of the relevant section of the Judgment cited by Appellant comes after an extensive analysis of the treatment of the Vietnamese in TK.[2173] This included testimony regarding: TK district receiving reports on the numbers of Vietnamese involved in implementing the return of the Vietnamese in the area to Vietnam;[2174] instructions from the Zone secretary regarding the treatment of the Vietnamese;[2175] direct involvement in an operation to transport a "huge number" of Vietnamese from TK, during which commune chiefs in each area told the people that they were being sent back to Vietnam;[2176] and lists kept at commune offices who were of Vietnamese or Khmer Krom descent.[2177] The TC also detailed its reliance on the April 1976 *RF*,[2178] which described the Vietnamese in negative terms and referred to their expulsion.[2179]

Ground 126: Persecution on racial grounds[2180]

639. **Ground 126 should be dismissed as Appellant fails to establish that the TC erred in finding that Vietnamese were persecuted at S-21.**

640. The ground fails with regard to the alleged error, the type of which Appellant does not articulate, as Appellant's arguments regarding the TC's interpretation of evidence are unmerited.

641. Appellant incorrectly claims that the TC assimilated different groups when referring to the Vietnamese and only found that Vietnamese nationals were detained at S-21.[2181] First, the TC found that Vietnamese from within Cambodia, including families trying to flee the country and children from Svay Rieng, the Southwest Zone, and Kampong Som, were detained at S-21.[2182] Second, Appellant misstates the law in asserting that the TC erred by including Vietnamese from Vietnam in the group persecuted on racial grounds at S-21.[2183]

2172 **F54** Appeal Brief, para. 751.
2173 **E465** Case 002/02 TJ, paras 1110-1125.
2174 **E465** Case 002/02 TJ, para. 1110.
2175 **E465** Case 002/02 TJ, paras 1110-1111.
2176 **E465** Case 002/02 TJ, para. 1113.
2177 **E465** Case 002/02 TJ, para. 1122.
2178 **E465** Case 002/02 TJ, para. 1118.
2179 *See* response to Grounds 103 & 104 (Deportation of the Vietnamese from Tram Kak (actus reus)).
2180 Ground 126: **F54** Appeal Brief, *Persecution on racial grounds*, paras 828-835; **F54.1.1** Appeal Brief Annex A, p. 46 (EN), p. 42 (FR), pp. 65-66.
2181 **F54** Appeal Brief, para. 830.
2182 **E465** Case 002/02 TJ, paras 2465, 2478, 2481.
2183 *See* response to Ground 108, an act is discriminatory where a victim is targeted because of the victim's membership in a group *defined by the perpetrator*. *See also* **E465** Case 002/02 TJ, para. 714.

642. Further, his claim that the TC relied to a large extent on the matrilineal theory of ethnicity when identifying the Vietnamese at S-21 is wrong.[2184] Rather, the TC relied on, *inter alia*, testimony from former S-21 guards that they were taught at study sessions that Vietnamese were the "hereditary enemy".[2185]

643. Appellant erroneously argues that persecution did not take place because the Vietnamese were treated the same as other detainees,[2186] disregarding evidence that the Vietnamese were brought to S-21 to be detained, tortured, and executed *because* they were Vietnamese. That there were other victims of similar appalling treatment does not change that the Vietnamese were targeted and discriminated against because of their race.[2187] Moreover, that Vietnamese were treated differently is shown by the fact that Duch was usually informed about the arrival of Vietnamese detainees, that their "confessions" were recorded and broadcast on the radio and/or published in DK documents,[2188] and that the Vietnamese prisoners were singled out for harsher interrogation methods.[2189]

644. Further, Appellant's claims that the Vietnamese were treated as "soldiers"[2190] or "spies"[2191] rather than being considered part of the Vietnamese group wilfully ignores the totality of the evidence analysed by the TC such as (i) Duch's testimony that Vietnamese civilians were forced to confess they were spies and (ii) while Vietnamese soldiers were brought to S-21 after conflict broke out with Vietnam, Vietnamese civilians were detained at different times.[2192] Appellant also avoids detailing how his assertions that Vietnamese at S-21 were "soldiers" or "spies" explains the execution of Vietnamese children there.[2193]

645. Finally, Appellant mispresents the Case 001 TC and SCC Judgments, erroneously claiming that the TC found and the SCC upheld that persecution of Vietnamese at S-21 was purely on political grounds.[2194] The reality is that the Case 001 Indictment charged Duch with political persecution of detainees and, thus he could not have been convicted of persecution of the Vietnamese on racial grounds.[2195] In any event, factual findings are

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2184 **F54** Appeal Brief, para. 830.
2185 **E465** Case 002/02 TJ, para. 2469.
2186 **F54** Appeal Brief, para. 832.
2187 *Contra* **F54** Appeal Brief, paras 831-832. *See also* response to Ground 108.
2188 *See* **E465** Case 002/02 TJ, para. 2462.
2189 **E465** Case 002/02 TJ, para. 2469.
2190 **F54** Appeal Brief, para. 831.
2191 **F54** Appeal Brief, para. 832.
2192 *See* **E465** Case 002/02 TJ, paras 2460-2484.
2193 *See* **E465** Case 002/02 TJ, paras 2478-2479.
2194 **F54** Appeal Brief, paras 833-834.
2195 *See* Case 001-**E188** *Duch* TJ, para. 11, fn. 15.

unique to each case and the TC is not obliged to follow findings made by *any* Chamber in *any* other case.[2196] The assertion that the Case 002/02 TC should have taken this "reasoning" into account[2197] is thus erroneous.[2198]

Ground 130: Persecution on racial grounds[2199]

646. **Ground 130 should be dismissed as Appellant fails to establish that the TC erred in finding that Vietnamese were persecuted at AuKg.**

647. The ground fails with regard to the alleged error, the type of which Appellant does not articulate, as Appellant merely repeats his erroneous claim that the TC erred in finding that Vietnamese were murdered at the security centre;[2200] and fails to demonstrate any error in the TC's finding that the six Vietnamese civilians executed at AuKg were killed on the basis of their perceived race.

648. Contrary to Appellant's assertion, the TC's findings on the CPK's reasons for arresting and executing Vietnamese civilians were not the same as those for targeting perceived political enemies.[2201] Appellant misinterprets the TC's reference to the arrest and execution at S-21 of Vietnamese spies and perceived Thieu-Ky soldiers to mean that the TC was equating these killings (which the TC found to amount to political persecution) with the situation of the six Vietnamese civilians.[2202] The TC, however, was distinguishing the different contexts of these separate instances of killing.[2203] Appellant erroneously conflates the findings that the Vietnamese were deemed an "enemy" and targeted because of their perceived race, with findings that other groups were also considered "enemies" and targeted based on political grounds.[2204]

649. Further, Appellant fails to demonstrate that the TC erred in considering the Vietnamese victims as civilians. Appellant selectively quotes from Chhaom Se's WRI,[2205]

2196 Regarding Appellant's misinterpretation of the Chamber's statement in Case 001 that "[a]s the revolution wore on, […] individuals were indiscriminately apprehended, mistreated and eliminated", *see* response to Grounds 68, 72, 75, 76, 77, 124, and 134: *Saisine* for persecution on political grounds: three groups.

2197 **F54** Appeal Brief, para. 835.

2198 Appellant also misrepresents a statement from Duch as the Case 001 TC's reasoning. **F54** Appeal Brief, para. 833 *citing* Case 001-**E188** *Duch* TJ, para. 386, which states "*the Accused indicated* that the CPK policy concerning Vietnamese nationals, as well as religious and other minorities, was to regard all such individuals as 'spies' acting against the Party" (emphasis added).

2199 Ground 130: **F54** Appeal Brief, *Persecution on racial grounds*, paras 859-861; **F54.1.1** Appeal Brief Annex A, p. 47 (EN), p. 43 (FR), p. 67 (KH).

2200 *See* response to Ground 128.

2201 **F54** Appeal Brief, para. 860.

2202 **F54** Appeal Brief, para. 860.

2203 *See* **E465** Case 002/02 TJ, paras 2982-2993.

2204 *See* **E465** Case 002/02 TJ, paras 2983, 2985, 2996. *See also* response to Ground 184.

2205 **F54** Appeal Brief, para. 861.

mentioning that the six Vietnamese were arrested at the Au Ya Dav Village battlefield but omitting that Chhaom Se described these six Vietnamese as "civilians".[2206]

vii. Genocide of Vietnamese

Ground 159: Genocide[2207]

650. **Ground 159 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that the crime of genocide by killing members of the Vietnamese group was established.**

651. The ground fails with regard to the alleged legal and factual errors challenging the *actus reus* and *mens rea* of genocide.

652. At the outset, Appellant merely repeats his erroneous claims regarding *saisine*[2208] and the establishment of killings of Vietnamese at AuKg, Svay Rieng, Kratie, Kampong Chhnang, Wat Khsach, and at sea.[2209] Contrary to Appellant's flawed claim that the TC did not legally characterise the deaths of Vietnamese at S-21,[2210] the TC clearly made factual findings on the killing of Vietnamese at S-21[2211] and the legal characterisation section does not make a distinction between the types of victims.[2212]

653. Appellant erroneously argues that the Vietnamese victims of killings at AuKg, S-21, and at sea were not part of the protected Vietnamese group for the purposes of the crime of genocide.[2213] The TC's conception of the ethnic, national, and racial group of Vietnamese living in Cambodia as the protected group clearly does not exclude Vietnamese who entered Cambodia from Vietnam and were killed in Cambodia.[2214]

654. With regard to the *mens rea*, Appellant's suggestion that the TC didn't specify whether the intent was to destroy the Vietnamese "in whole or in part" is similarly unmerited.[2215] There is no ambiguity in the TC's finding that the evidence established "the specific intent to destroy the Vietnamese group, as such".[2216] Moreover, Appellant erroneously asserts that the number of killings of Vietnamese that were proved BRD is insufficient to

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2206 **E3/405** Chhaom Se WRI, EN 00406215.
2207 Ground 159: **F54** Appeal Brief, *Genocide*, paras 1051-1097; **F54.1.1** Appeal Brief Annex A, p. 55 (EN), p. 50 (FR), pp. 78-79 (KH).
2208 **F54** Appeal Brief, para. 1051. *See* response to Ground 60.
2209 **F54** Appeal Brief, paras 1052-1053. *See* response to Grounds 128, 152, 153, 154, 155, 156.
2210 **F54** Appeal Brief, para. 1052.
2211 **E465** Case 002/02 TJ, paras 2460-2471, 2480.
2212 **E465** Case 002/02 TJ, paras 2560-2569. *See also* para. 2577.
2213 **F54** Appeal Brief, paras 1055-1057.
2214 **E465** Case 002/02 TJ, para. 3419.
2215 **F54** Appeal Brief, para. 1059.
2216 **E465** Case 002/02 TJ, para. 3518.

prove an intent to destroy a substantial part of the group.[2217] Appellant is improperly conflating *actus reus* and *mens rea*. There is no numeric threshold of victims required to establish genocide,[2218] and specific intent is established by reference to the evidence as a whole, including, but by no means limited to, the killings underlying the *actus reus*.[2219] For the same reason, Appellant's claim that the TC needed demographic data to establish the crime is incorrect.[2220]

655. Appellant mischaracterises the TC's findings by suggesting that it relied primarily, if not solely, on the existence of a policy targeting the Vietnamese to establish intent.[2221] Along with the repetitive and baseless claims regarding the policy,[2222] Appellant mistakenly asserts that the TC's findings on the existence of a policy to target the Vietnamese related to a different group than the Vietnamese targeted for destruction.[2223]

656. In relation to the underlying basis for the TC's conclusion that genocide occurred, Appellant makes a series of unsupported assertions that the TC distorted the evidence.[2224] For example, Appellant wrongly claims that the TC did not support the finding that ethnic Vietnamese living in Cambodia received attention due to the deterioration of relations between the CPK and Vietnam after the 1973 Paris Peace Accords.[2225] However, the TC relied on, *inter alia*, a *RF* which described Khmer Rouge forces "expelling the ethnic Vietnamese" and others during fighting in Banan in 1973.[2226]

657. Appellant simply reiterates his erroneous claim regarding the interpretation of the April 1976 *RF*.[2227] Further, the TC did not interpret this document by looking at *RF*s from 1978 and 1979,[2228] but highlighted the continuity of the CPK's usage of the same derogatory terms to describe the Vietnamese over time.[2229]

658. Contrary to Appellant's mischaracterisation,[2230] the TC relied on evidence of Son Sen

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2217 **F54** Appeal Brief, paras 1059-1063.
2218 **E465** Case 002/02 TJ, para. 796; *Karadžić* AJ, para. 23 (no numerical requirement to establish the *actus reus* of genocide). As to *mens rea*, as pointed out in the jurisprudence Appellant himself cites, "the numeric size of the targeted part of the group is […] not […] the ending point of the inquiry." *See* **F54** Appeal Brief, para. 1061 *citing Krstić* AJ, para. 12.
2219 **E465** Case 002/02 TJ, paras 801-803.
2220 **F54** Appeal Brief, para. 1064.
2221 **F54** Appeal Brief, para. 1065.
2222 **F54** Appeal Brief, paras 1065-1066. *See* response to Ground 185.
2223 **F54** Appeal Brief, para. 1066. *See also* response to Ground 184.
2224 **F54** Appeal Brief, paras 1068-1078.
2225 **F54** Appeal Brief, paras 1068-1069.
2226 **E465** Case 002/02 TJ, para. 3384 *citing* **E3/25** *Revolutionary Flag*, Dec. 1976-Jan. 1977, EN 00491422.
2227 **F54** Appeal Brief, paras 1070-1071. *See* response to Grounds 103 & 104 (Deportation of the Vietnamese from Tram Kak (actus reus)).
2228 *Contra* **F54** Appeal Brief, para. 1072.
2229 **E465** Case 002/02 TJ, para. 3388, fn. 11423.
2230 **F54** Appeal Brief, para. 1073.

stating, in relation to uncovering enemies, that the Vietnamese had been trying to attack *internally* as well as externally and had been driven from Cambodia.[2231] Further, Appellant refers to one of the many testimonies relied on by the TC regarding the Vietnamese being described as enemies and erroneously claims this related to the Vietnamese state and not ethnic Vietnamese in Cambodia.[2232] However Ou Dan's testimony not only referred to Vietnam's ambition to annex Cambodia but that "they sent spy agents in order to invade our Democratic Kampuchea territory".[2233]

659. Appellant's claims regarding the alleged inconsistencies in Ek Hen's testimony and statements have been addressed,[2234] with Appellant failing to undermine the probative value of Ek Hen's evidence that she attended a training at which Appellant stated that the Khmer needed to unite and would be free of the Vietnamese or Yuon.[2235] Further, Appellant merely claims, without support, that Ieng Sary's notes referring to enemies having their roots pulled out could not refer to ethnic Vietnamese,[2236] ignoring evidence that this phrase was used to describe the killing of Vietnamese families.[2237]

660. Appellant mischaracterises the TC's findings to wrongly assert that Vietnamese "agents" only referred to Khmer DK members.[2238] Similarly, his claim that "infiltrated" "enemies" referred to DK members and not ethnic Vietnamese is contradicted by the evidence relied upon by the TC.[2239] Appellant's reliance on Meas Voeun's testimony in this regard is puzzling, given that Meas Voeun testified that all Vietnamese people regardless of their status or age were "considered [as] enemies".[2240] Appellant's suggestion that, unless anti-Vietnamese rhetoric explicitly mentioned ethnic Vietnamese, such evidence should be considered to refer to the military conflict, is without foundation.[2241]

661. In addition to repeating his erroneous claims regarding the significance of the armed conflict with Vietnam,[2242] the use of lists used to identify Vietnamese, and the CPK's

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2231 **E465** Case 002/02 TJ, para. 3794.
2232 **F54** Appeal Brief, para. 1074.
2233 **E465** Case 002/02 TJ, para. 3390, fn. 11436.
2234 **F51/1** Co-Prosecutors' Response to Khieu Samphan's Request to Admit Additional Evidence, 24 Oct. 2019, paras 23-28. *See also* response to Ground 20.
2235 **F54** Appeal Brief, para. 1075. *See* **E465** Case 002/02 TJ, para. 3390, fn. 11437.
2236 **F54** Appeal Brief, para. 1076.
2237 *See e.g.* **E465** Case 002/02 TJ, para. 3425. *See also* fn. 11546 *citing* **E3/9801** Saoy Yen WRI, EN 01111933; fn. 11547 *citing* **E1/395.1** Uch Sunlay, T. 2 Mar. 2016, 09.14.44-09.18.00, p. 7, line 1-p. 8, line 3.
2238 **F54** Appeal Brief, paras 1074, 1076. *See also* paras 1086-1087.
2239 **F54** Appeal Brief, para. 1077. *See* **E465** Case 002/02 TJ, paras 1307, 3466.
2240 **E1/387.1** Meas Voeun, T. 3 Feb. 2016, 09.54.58-09.58.15, p. 24, lines 4-16. *See also* **E319/23.3.44** Pak Sok WRI, EN 00977535.
2241 **F54** Appeal Brief, para. 1078.
2242 *See also* response to Grounds 179, 185.

targeting of Vietnamese based on a matrilineal theory of ethnicity,[2243] Appellant fails to substantiate his claim that contemporary Foreign Broadcast Information Service ("FBIS") and Summary of World Broadcasts ("SWB") documents relied upon by the TC are inauthentic and their contents cannot be attributed to the CPK.[2244] The TC explained the source and importance of these documents while noting that they would only be relied upon where sufficiently corroborated.[2245] In this instance, the TC reasonably concluded that these contemporary records of broadcasts from Phnom Penh mirrored the form and substance of other CPK rhetoric regarding Vietnamese being enemies and exterminated from Cambodia.[2246] Similarly, Appellant's claims regarding the probative value of the recording of his April 1978 speech in a contemporary SWB document is meritless,[2247] while his erroneous assertion that the content of his speeches and Pol Pot's "One v. 30" speech can only be considered in a military light is addressed above.[2248]

662. Again without merit, Appellant claims that the CPK's call to defend the Khmer "race" from the Yuon in *RF* and *RY* magazines was intended to galvanise Cambodian troops.[2249] Appellant's attempt to pass off repeated incitements to destroy the Vietnamese – which translated into civilians of all ages being targeted and killed throughout Cambodia – as mere wartime propaganda strains credibility.[2250]

663. Regarding telegrams and evidence he argues is out of the scope of the case, Appellant makes a series of misleading claims.[2251] First, the TC expressly noted that certain telegrams recorded deaths of civilians and soldiers, or referred primarily to Vietnamese armed forces.[2252] Second, Appellant's claims that the telegrams the TC relied on only related to a military context is undermined by (i) Ruos Nhim's request to Office 870 for guidance on mixed Khmer-Vietnamese families and (ii) the West Zone report stating that it had followed the Party's line of screening and sweeping out "Yuon aliens", and had killed 100 Vietnamese people "small and big young and old".[2253] Further, Appellant fails to substantiate his claim that the reference to the Vietnamese as the "hereditary enemy"

2243 **F54** Appeal Brief, para. 1096. *See* response to Ground 158.
2244 **F54** Appeal Brief, para. 1079.
2245 **E465** Case 002/02 TJ, paras 469-472.
2246 **E465** Case 002/02 TJ, para. 3398.
2247 **F54** Appeal Brief, para. 1080.
2248 *See* response to Ground 185; *contra* **F54** Appeal Brief, paras 1081, 1083-1085.
2249 **F54** Appeal Brief, para. 1088.
2250 **F54** Appeal Brief, para. 1089.
2251 **F54** Appeal Brief, paras 1090-1093.
2252 *Contra* **F54** Appeal Brief, para. 1090. *See* **E465** Case 002/02 TJ, paras 3408, 3411.
2253 **E465** Case 002/02 TJ, paras 3409-3410. *Contra* **F54** Appeal Brief, paras 1092-1093.

and "the national enemy from the beginning up through the present, and [into] the protracted future" in the 2 Jan. 1979 Declaration is limited to Vietnam's military forces.[2254]

664. Lastly, Appellant erroneously claims that Heng Lai Heang, who joined the Khmer Rouge in 1971 and was a commune committee member in Kratie until 1977,[2255] did not know about CPK policy.[2256] Appellant's claim that the witness' testimony lacked objectivity because she lost family members during the regime is regrettable.[2257] Appellant also erroneously claims that the TC ignored testimony of a former DK soldier that there was no policy to execute civilians.[2258] Appellant omits that the witness in question, Meas Voeun, who also served as security for Appellant, testified: "we were instructed that Vietnamese had to be smashed because they did not return to their country."[2259] Though he attempted to revise this testimony the following morning, the witness gave no credible explanation for the sudden change in his account. Nonetheless, Pak Sok also testified that at trainings in Division 164 after 1976: "We were instructed to kill [Vietnamese], even if it was a baby, because they are our hereditary enemy, so we must kill them."[2260]

D. REGULATION OF MARRIAGE

665. The TC correctly found that the CAH of OIA through conduct characterised as forced marriage and rape within the context of forced marriage were committed pursuant to a CPK policy to regulate marriage[2261] which was intrinsically linked to the common purpose of rapidly implementing a socialist revolution.[2262] Appellant's 16 grounds[2263] regarding the regulation of marriage fail, as they adopt a piecemeal approach to the evidence and ignore the climate of fear and coercive circumstances under which these marriages took place, which rendered genuine consent impossible. In particular, Appellant's claims focus on the fact that consent was a principle of CPK marriage regulations and fail to consider the totality of evidence that indicates this was an empty formality.[2264] Appellant also continually attempts to draw parallels between the

2254 **F54** Appeal Brief, para. 1094 *citing* **E465** Case 002/02 TJ, para. 3412.
2255 **E465** Case 002/02 TJ, para. 3414.
2256 **F54** Appeal Brief, para. 1095.
2257 **F54** Appeal Brief, para. 1095.
2258 **F54** Appeal Brief, para. 1095.
2259 **E1/386.1** Meas Voeun, T. 2 Feb. 2016, 15.57.30-15.58.47, p. 97, line 17-p. 98, line 1 (emphasis added).
2260 **E1/369.1** Pak Sok, T. 16 Dec. 2015, 13.36.35-13.38.32, p. 49, lines 12-15.
2261 **E465** Case 002/02 TJ, paras 3686-3701.
2262 **E465** Case 002/02 TJ, paras 4026-4067.
2263 Grounds 160-169, 171-174, 244.
2264 Grounds 162, 163, 165, 167-169

regulation of marriage during the DK regime and traditional arranged marriages, leading to numerous errors in his analysis of the nature and impact of the crimes.[2265]

Ground 160: Errors concerning the legality of forced marriages as OIA between 1975 and 1979[2266]

666. **Ground 160 should be dismissed as Appellant fails to establish that the TC committed any error of law when confirming that forced marriage as an OIA respects the principle of legality.**[2267]

667. This ground is predicated on a range of false assumptions and overlooks the wealth of confirmation in international law that, in 1975, forced marriage violated the basic human right to consensually marry and establish a family. As previously explained,[2268] Appellant's contentions that the TC was required to find (i) specific prohibitions of forced marriage in international law as at 1975;[2269] and (ii) that forced marriage had been criminalised and was clearly defined in national or international law by 1975[2270] are erroneous. The TC was correct to follow the SCC's clear jurisprudence that it was necessary only to find that the conduct violated a "basic right of the victims and is of similar nature and gravity as other enumerated [CAH]".[2271] As noted previously, Appellant concedes that it was foreseeable in 1975 that conduct of similar nature and gravity as the enumerated CAH could result in criminal prosecution for OIA.[2272]

668. As to "formal unlawfulness", the TC could not have more clearly discharged its mandate to identify a "basic right" infringed by forced marriage when it found that the right to marry freely is embedded in the Universal Declaration of Human Rights ("UDHR").[2273] Appellant fails to explain why this most fundamental of human rights instruments[2274]—adopted by the United Nations ("UN") General Assembly without

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2265 Grounds 163, 167, 173.
2266 Ground 160: **F54** Appeal Brief, *Errors Concerning the Legality of Forced Marriages as OIA between 1975 and 1979*, paras 1098-1116; **F54.1.1** Appeal Brief Annex A, p. 55 (EN), p. 51 (FR), p. 79 (KH).
2267 **F54** Appeal Brief, paras 1098-1116, 1131-1149.
2268 *See* response to Grounds 85, 86, 97, 98.
2269 **F54** Appeal Brief, paras 1098, 1100-1103, 1108-1111, 1116, 1131, 1149.
2270 **F54** Appeal Brief, paras 1099, 1112-1114, 1116, 1132-1147.
2271 **F36** Case 002/01 AJ, para. 586. *See further* **F36** Case 002/01 AJ, paras 578, 580, 584-585.
2272 *See* response to Ground 97.
2273 **E465** Case 002/01 TJ, para. 743 *citing* UDHR, art. 16(2).
2274 Whilst the UDHR is not a binding treaty, UN member states are called upon to publicise and disseminate it. Cambodia became a member State on 14 Dec. 1955.

dissent[2275]—does not suffice, or what more "rigorous"[2276] investigation the TC was required to undertake. Appellant's suggestion that a single instrument requires corroboration[2277] is illogical and unsubstantiated. The SCC itself referred to the UDHR when illustrating how its "formal unlawfulness" criterion could be fulfilled.[2278]

669. In any event, there is a wealth of international legislation demonstrating that Appellant errs in his contention that the UDHR was the only instrument that made "express reference to the institution of marriage" prior to the DK period.[2279] On 12 June 1957, Cambodia acceded to the Supplementary Convention on the Abolition of Slavery, which calls on states parties to abolish or abandon practices whereby a woman is promised or given in marriage without the right to refuse.[2280] In 1962, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages confirmed that "[n]o marriage shall be legally entered into without the full and free consent of both parties."[2281]

670. Whilst referring to other ICCPR provisions,[2282] Appellant ignores that, in December 1966, near-identical terms to those found in the UDHR also appeared in the ICCPR[2283] and ICESCR,[2284] which came into force in the early months of the DK regime. Then in 1967, the Declaration on the Elimination of Discrimination Against Women—adopted unanimously by the UN General Assembly on 7 November 1967—declared that "[w]omen shall have the same right as men to free choice of a spouse and to enter into marriage only with their free and full consent".[2285] The Convention on the Elimination of All Forms of Discrimination against Women, which similarly demands free and full

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2275 The UDHR was adopted by 48 votes with 8 abstentions. *See* Official Records of the Hundred and Eighty-Third Plenary Meeting of the General Assembly, 10 Dec. 1948, A/PV.183, p. 933.

2276 **F54** Appeal Brief, paras 1103-1104.

2277 **F54** Appeal Brief, para. 1104.

2278 **F36** Case 002/01 AJ, para. 584.

2279 **F54** Appeal Brief, paras 1108, 1141.

2280 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force 30 Apr. 1957), art. 1(c).

2281 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (entered into force 9 Dec. 1964) (the Preamble of the Convention recalls art. 16 of the UDHR, and art. 1 states that "[n]o marriage shall be legally entered into without the full and free consent of both parties").

2282 **F54** Appeal Brief, para. 1108 *citing* ICCPR, art. 17.

2283 ICCPR, art. 23(3) ("[n]o marriage shall be entered into without the free and full consent of the intending spouses"). The Covenant entered into force on 23 Mar. 1976, and by 17 Apr. 1975 it had 28 states parties and 25 signatories.

2284 ICESCR, art. 10(1) ("Marriage must be entered into with the free consent of the intending spouses"). The Covenant entered into force 3 Jan. 1976, and by Apr. 1975, had 25 states parties and 28 signatories.

2285 Declaration on the Elimination of Discrimination against Women (voting record 111-0-0 non-recorded), art. 6(2)(a). *See also* art. 11(1)-(2).

consent to marriage,[2286] was under negotiation throughout the DK period,[2287] before being opened for signature in December 1979 and ratified by Ieng Sary in October 1980.[2288]

671. By 1975, regional instruments also recognised the importance of consent to marriage.[2289] Whilst there is no specific mention of marriage,[2290] the 1899[2291] and 1907[2292] Hague Regulations, and GC IV[2293] all demand respect for family rights.

672. Furthermore, though not required to ensure compliance with the legality principle in light of the wealth of international law, the gravity of the conduct and the foreseeability of criminal prosecution for forced marriage are further underpinned by a survey of national law in 1975. Contrary to Appellant's submissions,[2294] criminalisation of forced marriage in national laws is not a uniquely recent phenomenon. Before the Khmer Rouge began its forced marriage campaign, states across the globe, including the ASEAN countries[2295] of Singapore and the Philippines,[2296] had begun criminalising the practice.[2297] Moreover, abducting or detaining a woman for the purposes of marriage was criminalised throughout Asia,[2298] as well as in Europe,[2299] Africa,[2300] South America,[2301] and

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2286 Convention on the Elimination of All Forms of Discrimination against Women, art. 16.

2287 *See* Convention on the Elimination of All Forms of Discrimination against Women: Procedural History. Available at https://legal.un.org/avl/pdf/ha/cedaw/cedaw_ph_e.pdf.

2288 *See* 1249 UNTS 89.

2289 ACHR, art. 17(3) (entered into force 18 July 1978) ("No marriage shall be entered into without the free and full consent of the intending spouses."). *See also* ECHR (entered into force 3 Sept. 1953), arts 8, 12.

2290 **F54** Appeal Brief, para. 1111.

2291 1899 Convention on War on Land, Annex: Regulations, art. 46.

2292 1907 Convention on War on Land, Annex: Regulations, art. 46.

2293 GC IV, art. 27.

2294 **F54** Appeal Brief, paras 1137-1141.

2295 *Contra* **F54** Appeal Brief, paras 1133-1135.

2296 **Singapore:** Women's Charter, 15 Sept. 1961, art. 36; **Philippines:** The Revised Penal Code, 8 Dec. 1930, art. 350.

2297 **Bulgaria:** Criminal Code, 1 May 1968, art. 177(1); **Ghana:** Criminal Code, 1960, s. 109; **Norway:** The General Civil Penal Code, 22 May 1902 No. 10, s. 222; **Russian SFSR:** Criminal Code of the Russian Soviet Federative Socialist Republic, published in *Soverskaya Yustitsiya* (Soviet Justice), No. 17, Dec. 1960 (entered into force 1 Jan. 1961), art. 233. *See also* **Afghanistan:** Penal Code, 21 Sept. 1976, art. 517(1).

2298 **India:** Penal Code, 6 Oct. 1860, art. 366; **Singapore:** Penal Code, 17 Sept. 1872, art. 366; **Indonesia:** Penal Code of Indonesia, 1915 (with revisions to 1976), art. 332; **Japan:** Penal Code, 1907, arts 225, 226-2(3); **Bangladesh:** The Penal Code, 6 Oct. 1860, art. 366; **Pakistan:** Pakistan Penal Code, 6 Oct. 1860, s. 365B; **South Korea:** Korean Criminal Code, 3 Oct. 1953, art. 291; **Malaysia:** Penal Code, 1936, s. 366; **Myanmar (Burma):** The Penal Code (India Act XLV of 1860), 1 May 1861, art. 366; **Sri Lanka:** Penal Code, 1 Jan. 1885, art. 357.

2299 **Bulgaria:** Criminal Code, 1 May 1968, art. 177(2); **Italy:** The Italian Penal Code, 18 Oct. 1930, art. 522; **Austria:** The Austrian Penal Act, 1852 & 1945, arts 76, 96 (provision added in 1953); **Greece:** Penal Code 1 Jan. 1951, arts 325, 327(1) (provision added in 1960).

2300 **Botswana:** Penal Code, 10 June 1964, s. 144; **Uganda:** Penal Code Act, 15 June 1950, s. 126; **Nigeria:** Criminal Code Act, 1 June 1916, s. 361; **Tanzania:** Penal Code, 28 Sept. 1945, s. 133; **Malawi:** Penal Code, 1 Apr. 1930, s. 135.

2301 **Colombia:** Penal Code of the Republic of Colombia, 24 Apr. 1936 (as at 1967), art. 349.

Oceania.[2302]

673. Finally, Appellant misapprehends the purpose of the TC's reliance on the jurisprudence of the SCSL and ICC establishing that forced marriage could constitute an OIA.[2303] The TC did not assert that these cases represent international law in 1975. Rather, they constituted part of its diligent survey of all relevant law and jurisprudence to establish whether, *in principle*, forced marriage may be of similar nature and gravity to the enumerated CAH. The TC was very clear that this was not a substitute for finding whether marriage practice *during the DK regime* met that standard,[2304] a largely factual assessment it undertook in considerable detail.[2305]

Grounds 171 and 172: Rape within forced marriage as an OIA[2306]

674. **Grounds 171 and 172 should be dismissed as Appellant fails to establish that the TC erred in law when confirming that conduct constituting rape committed in the context of forced marriage as an OIA respects the principle of legality.[2307]**

675. These grounds must fail since conduct constituting rape in *any* context egregiously violates basic human rights; it is an utter affront to human dignity and freedom. Appellant's attempts to characterise "conjugal rape" as a non-criminal exception overlook not only the fundamentally debasing nature of the act of forcing an individual, or couple, into sexual intercourse without their consent, but also that the marital relationship with which Appellant seeks to legitimise the act of rape was itself forced.

676. Again,[2308] the TC was not required to find either (i) specific prohibitions of "rape in the context of forced marriages" in international law as at 1975;[2309] or (ii) any "constitutive elements" for conduct underlying an OIA.[2310] The test is whether conduct violates a "basic right […] and is of similar nature and gravity as other enumerated [CAH]".[2311]

2302 **Papua New Guinea:** Criminal Code Act, 1974, art. 350.
2303 **F54** Appeal Brief, paras 1105-1106, *referring to* **E465** Case 002/02 TJ, paras 744-747, *in turn referring to Brima* AJ, paras 182, 186, 192, 195-196, 200, *Sesay* AJ, paras 735-736, *Ongwen* Confirmation of Charges, paras 88-91, 93-94.
2304 **E465** Case 002/02 TJ, paras 746, 749. *See further* **F36** Case 002/01 AJ, paras 580, 586.
2305 **E465** Case 002/02 TJ, paras 727, 740-749, 3536-3694.
2306 Grounds 171 and 172: **F54** Appeal Brief, *"Errors on the Legality of Rapes Committed in the Context of Marriage as OIAs between 1975 and 1979" and "Errors in the Examination of the Criterion of Similar Nature and Gravity" (Part I)*, paras 1281-1300; **F54.1.1** Appeal Brief Annex A, p. 59 (EN), p. 54 (FR), pp. 84-85 (KH).
2307 **F54** Appeal Brief, paras 1281-1300.
2308 *See* response to Grounds 85, 86, 97, 98.
2309 **F54** Appeal Brief, paras 1281-1282, 1284-1285.
2310 **F54** Appeal Brief, paras 1291-1300.
2311 **F36** Case 002/01 AJ, para. 586. *See further* **F36** Case 002/01 AJ, paras 578, 580, 584-585.

677. There is no question that rape violates "basic rights" of victims protected under international law, or that it is of similar nature and gravity to the enumerated CAH. As Appellant concedes,[2312] rape, as well as other sexual violence, is prohibited by a host of human rights instruments applicable either before or during the DK period, including the 1863 Lieber Code,[2313] the 1949 GCs,[2314] and the 1977 Additional Protocols I and II.[2315] The 1948 judgment of the IMTFE convicted defendants for war crimes for the Rape of Nanking during which soldiers committed at least 20,000 rapes.[2316]

678. That forcing individuals into sexual intercourse without their full and free consent is contrary to basic human rights was also established before 1975 in the prohibition of enforced prostitution in the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[2317] and GC IV.[2318] This is confirmed by its enumeration in the statutes of the ICC and SCSL.[2319] Indeed, the *Kupreškić* Trial Chamber stated that enforced prostitution is "indisputably a serious attack on human dignity pursuant to most international instruments on human rights".[2320]

679. As early as 1945, rape was listed as an enumerated act in CCL No. 10,[2321] and is now found as a discrete CAH in the statutes of all the international criminal tribunals.[2322] This Chamber has previously confirmed that rape may also constitute torture, an enumerated CAH, where the elements of torture are established.[2323]

680. Contrary to Appellant's submission,[2324] the nature and gravity of the conduct are not diminished by the fact that this non-consensual sexual intercourse took place in the context of marriage, and most particularly a forced marriage; it is no less of an attack on

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2312 **F54** Appeal Brief, para. 1284.
2313 Lieber Code, art. 44.
2314 GC IV, art. 27-2.
2315 Additional Protocol I, art. 76(1); Additional Protocol II, art. 4(2)(e) ("Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and *in any place whatsoever* […] (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" (emphasis added)).
2316 IMTFE Judgment, pp. 494-497, 563-564, 572-573.
2317 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Lake Success, New York, 21 Mar. 1950, 96 UNTS 271 (entered into force 25 July 1951).
2318 GC IV, art. 27-2.
2319 Rome Statute, art. 7(1)(g); SCSL Statute, art. 2(g).
2320 *Kupreškić* TJ, para. 566.
2321 CCL No. 10, art. II(1)(c).
2322 **ICTY:** ICTY Statute, art. 5(g); *Kunarac* AJ, para. 179; **ICTR:** ICTR Statute, art. 3(g); *Akayesu* TJ, para. 596; **SCSL:** SCSL Statute, art. 2(g); *Sesay* TJ, para. 144; **ICC:** Rome Statute, art. 7(1)(g).
2323 Case 001-**F28** *Duch* AJ, paras 207-208, 211; Case 001-**E188** *Duch* TJ, paras 355, 366; *Akayesu* TJ, para. 687.
2324 **F54** Appeal Brief, paras 1282, 1284, 1288, 1291-1300.

the victim's personal integrity and honour. Indeed, the SCC,[2325] like the ICTY Appeals Chamber,[2326] has noted that certain acts, including rape, are considered *by their nature* to constitute severe pain and suffering. Appellant refers to the ECtHR judgment in *S.W. v. United Kingdom*,[2327] yet he overlooks the clarity with which the Court expressed its revulsion at the idea of marital immunity for rape, and confirmed the foreseeability of a criminal conviction for conjugal rape, even in the absence of an express prohibition:

> The essentially debasing character of rape is so manifest that the result [...] that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment [...]. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.[2328]

681. In any event, Appellant errs in equating "rape in the context of forced marriages" and "conjugal rape". During DK, the only reason victims found themselves in a conjugal relationship was because they had just been the victims of forced marriage. Indeed, the ultimate objective of the forced marriages was to increase the DK population.[2329] ICL does not allow perpetrators to be the masters of their own impunity. As the TC held, "it is a general principle that a perpetrator cannot rely on the conditions created by their own unlawful conduct to justify certain conduct."[2330]

682. This is borne out by the jurisprudence of this Court, the ICC and SCSL. In its decision on an appeal against the Case 002 Closing Order, and thus *in reference to rape within the context of forced marriage*, the PTC described the conduct as "abhorrent and deeply shocking to any reasonable human being" and a "gross violation of the victim's physical integrity".[2331] It went on to confirm that facts characterised by the CIJs as the CAH of rape can additionally be categorised as the CAH of OIA.[2332] The ICC Pre-Trial Chamber

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2325 Case 001-**F28** *Duch* AJ, para. 207, *upholding* Case 001-**E188** *Duch* TJ, para. 355.
2326 *Kunarac* AJ, para. 150. *See also Furundžija* TJ, para. 183.
2327 **F54** Appeal Brief, para. 1299 *citing S.W. v. The UK.*
2328 *S.W. v. The UK*, para. 44.
2329 *See* response to Ground 166.
2330 **E465** Case 002/01 TJ, fn. 2075; **E313** Case 002/01 TJ, para. 450 (undisturbed on appeal; *see* **F36** Case 002/01 AJ, para. 645); *Stakić* AJ, para. 287.
2331 **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, para. 150.
2332 **D427/1/30** PTC Second IS Closing Order Decision, para. 372; **D427/2/15** & **D427/3/15** PTC NC and IT Closing Order Decision, para. 154. *See further* Case 004/1-**D308/3** IC Closing Order (Reasons), para. 59.

also considered coerced sexual intercourse within forced marriages to constitute rape.[2333] The SCSL Appeals Chamber characterised it as both the war crime of outrages upon personal dignity,[2334] and the OIA of sexual slavery.[2335]

683. Finally, as Appellant concedes, it is universally recognised that marriages entered into without consent are either void or voidable, but he errs in his contention that this evolution has occurred since 1975.[2336] The Co-Prosecutors submit that, in recognition of the fundamental harm to human dignity caused by non-consensual marriage, it was a general principle of law by 1975 that marriages entered into without consent, or through coercion, were either void or voidable. Forced marriage is contrary to universal principles long shared by common law and civil law systems alike, as well as laws of the Catholic Church[2337] and Islamic law,[2338] and can be seen in civil laws across Asia,[2339] Africa,[2340] Europe,[2341] the Americas,[2342] and Oceania.[2343] It was thus foreseeable that marriages of the type enforced throughout the DK regime did not constitute legal marriages. In that

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2333 *Ongwen* Confirmation of Charges, paras 111-112, 114-115, 136-139. At para. 137 ("[Women and girls] were distributed to LRA fighters as so-called "wives" with no choice on their part and were regularly raped by their so-called "husbands" for protracted periods of time.").

2334 *Brima* AJ, paras 181-202.

2335 *Sesay* AJ, paras 736-740. *See especially*, para. 736 (having just found that women were victims of forced marriage, the Chamber continued: "'given the violent, hostile and coercive environment in which these women suddenly found themselves [...] the sexual relations with the rebels [...] could not [be], and was, in [the] circumstances, not consensual because of the state of uncertainty and subjugation in which they lived in captivity.' Such captivity in itself would have vitiated consent in the circumstances under consideration").

2336 **F54** Appeal Brief, para. 1138.

2337 Code of Canon Law, 1917, art. 1087 (Unofficial translation: "Also invalid is a marriage contracted as a result of force or serious fear inflicted from outside and unjustly, when one is forced to choose marriage in order to be free from it.").

2338 The Holy Qur'an, verse 4:20: ("It is not lawful for you to inherit women against their will"). Some countries expressly state in their Constitution that Sharia is the principle source of legislation. *See e.g.* Constitution of the Arab Republic of Egypt, 1971, art. 2; Syrian Arab Republic Constitution, 13 Mar. 1973, art. 3(2); Constitution of the United Arab Emirates, 18 July 1971, art. 7.

2339 **Thailand:** Civil and Commercial Code, 1934, ss 1445(4), 1491; **India:** The Hindu Marriage Act, 18 May 1955, s. 12(1)(c); The Special Marriage Act 1954, s. 25(iii). Muslim marriages are governed by Sharia law, which deems marriages entered under coercion to be null and void. **Iraq:** Personal Status Law, 30 Dec. 1959, art. 6.

2340 **Tunisia:** Code of Personal Status, 1956, arts 3, 9; **Nigeria:** Matrimonial Causes Act, 17 Mar. 1970, s. 3(1)(d)(i); **Tanzania:** The Law of Marriage Act, 1971, s. 38(1)(e); **Kenya:** Matrimonial Causes Act, 1 Jan. 1941, s. 14 (provision added 1952).

2341 **France:** French Civil Code, art. 146 (since 27 Mar. 1803); **Belgium:** Belgian Civil Code, art. 146 (since 21 Mar. 1804); **Germany and Austria:** Law on Marriage and Divorce, 1 Aug. 1938, art. 39(1) (Unofficial translation: "A spouse can request that the marriage be terminated if s/he was compelled to agree to the marriage by threat."); **England and Wales:** Matrimonial Causes Act, 23 May 1973, s. 12(1)(c); **Spain:** Civil Code, 1889, art. 101; **Russian SFSR:** Law of the Russian Soviet Federated Socialist Republic on the Adoption of the RSFSR Code on Marriage and the Family, 1 Nov. 1969, arts 15, 43.

2342 **Brazil:** Civil Code of the United States of Brazil, 1 Jan. 1916, arts 183, 209; **Mexico:** Federal Civil Code, 1928, art. 245; **Chile:** Civil Marriage Law, 10 Jan. 1884, arts 32-33; **Peru:** Civil Code, 1936, art. 148; **Costa Rica:** Family Code, 5 Feb. 1974, art. 15(1); **Cuba:** Family Code, 14 Feb. 1975, art. 45(2).

2343 **Australia:** Matrimonial Causes Act, 16 Dec. 1959, s. 18(d)(i).

respect, Appellant also errs in his contention that pre-1975 Cambodian law does not require the consent of the intending spouses.[2344] Appellant overlooks[2345] that the 1920 Civil Code was replaced before the Khmer Rouge period and that the Code applicable at least between 1953 and 1970, states at article 114 that "marriage is the solemn contract that is made by a man and a woman with consent to live together as husband and wife."[2346]

Ground 162: The Absence of Consent in Domestic Law[2347]

684. **Ground 162 should be dismissed as Appellant fails to demonstrate any error in law or fact in the finding that arranged marriage in Cambodian culture pre-DK regime was based on mutual trust between parents and children, nor does he show that this led to a consequential error of establishing forced marriage as an OIA because it did not reach the same degree of gravity as the enumerated CAH.**

685. Appellant fails to establish legal or factual error by the TC's reference to a socio-anthropological notion that pre-DK marriages were based on "mutual confidence between parents and children" instead of the 1920 Civil Code.[2348] Nor does he establish the TC failed to consider the impact of supposed pre-DK pressures regarding consent, thus leading to its allegedly biased failure to consider exculpatory evidence relevant to assessing the gravity of the crime.[2349] This attempt to conflate marriage practices before and during the DK period disregards the overtly coercive circumstances that prevailed when the CPK was in power. Refusing a marriage proposed by the CPK could result in threats of violence, being subjected to various dangerous accusations, being sent for

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2344 **F54** Appeal Brief, para. 1113 *citing* Civil Code 1920.

2345 **F54** Appeal Brief, para. 1113.

2346 Civil Code, 1953-1970, art. 114. *See also* Marriage Law, 26 July 1989, art. 4 ("a man and a woman reaching the age required by law […] can choose their marriage. One cannot force another to get married").

2347 Ground 162: **F54** Appeal Brief, *The Absence of Consent in Domestic Law,* paras 1119-1130, 1150-1155; **F54.1.1** Appeal Brief Annex A, p. 56 (EN), pp. 51-52 (FR), p. 80 (KH).

2348 **F54** Appeal Brief, paras 1119-1121 *impugning* **E465** Case 002/02 TJ, para. 3688. He further argues that the 1920 Civil Code required parental consent to effectuate a legally valid marriage, placing prospective couples under constraints which made it "difficult to believe" they could freely refuse a proposed marriage during the DK period. *See* **F54** Appeal Brief, paras 1122-1123 *citing* his paras 1113-1114, which in turn cite *Civil Code of Cambodia* (1920), arts 125 ("Should one of the parties wishing to marry be a minor, the consent of parental authority holders or guardian shall be obtained."), 133 ("Adult fiancés are equally required to obtain for their marriage the consent of the same persons as for minors"). *Note* Appellant overlooks that the 1920 Civil Code was replaced before the Khmer Rouge period and that the Code applicable, at least between 1953 and 1970, states at article 114 that "marriage is the solemn contract that is made by a man and a woman with consent to live together as husband and wife." *See also* response to Grounds 171 and 172.

2349 **F54** Appeal Brief, paras 1124-1130, 1154.

reeducation, being moved to another location, or being killed.[2350] As rightly noted by the TC, "it is hardly conceivable that all these revolutionary measures could, somehow, be compared with parents' behaviour toward their children".[2351] Further, there was no evidence that the consent legally given by "a functional, caring family system was voluntarily transferred to the Party".[2352] Indeed, circumstances similar to those of the DK period have been characterised in other cases as "almost universally coercive", rendering genuine consent impossible.[2353] Because of these dramatically different marriage practices, the TC correctly found that pressures in traditional, pre-DK marriages were irrelevant to the issue of consent *during the DK period.*[2354] Appellant also fails to rebut the strong presumption of judicial impartiality necessary to demonstrate actual bias.[2355] He therefore fails to substantiate any error.

686. In light of the above, Appellant does not demonstrate that the TC's gravity determination should be invalidated because of pre-DK practice.[2356] His remaining factual arguments are addressed elsewhere in this Response where he has particularised his claims.[2357]

Ground 165: Errors on the contents of the regulation of marriage under DK[2358]

687. **Ground 165 should be dismissed as Appellant fails to establish that the TC made a factual error by not concluding that consent to marriage was an essential principle**

2350 **E465** Case 002/02 TJ, para. 3688. *See e.g.* **E465** Case 002/02 TJ, paras 3620-3622, 3624-3625 and all citations therein. The TC only heard the evidence of two individuals who refused to marry without detrimental consequences, finding that "these situations were exceptional and may be explained by the specific circumstances." The overwhelming majority of the evidence showed that people could not refuse to marry without serious consequences.

2351 **E465** Case 002/02 TJ, para. 3689.

2352 **E465** Case 002/02 TJ, para. 3688.

2353 *Kunarac* AJ, paras 130-132 (The circumstances that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible). Regarding cases of forced marriages specifically, s*ee e.g. Sesay* TJ, paras 1468-1470 (many women were forced into marriage by means of threats, intimidation, manipulation and other forms of duress which were predicated on the victims' fear and their desperate situation); *Brima* TJ, para. 712 ("no consent could be inferred given the environment of violence and coercion").

2354 **E465** Case 002/02 TJ, para. 3688 (emphasis added). *Contra* **F54** Appeal Brief, paras 1123-1124. As a result of these starkly contrasting contexts, the TC was under no "obligation" to define constraint as it related to the pre-DK period "in order to understand the context in which the offence [was] situated". Appellant further fails to show that the TC did not take Kasumi Nakagawa's evidence of women's decision-making power into consideration, but as this related to marriage practice pre-DK, it was irrelevant to the issue of consent during the DK era. *See* **E465** Case 002/02 TJ, para. 268 showing that the TC considered her pre-DK evidence.

2355 *See* response to Ground 4 re. Appellant's burden of proof to demonstrate actual bias.

2356 *Contra* **F54** Appeal Brief, paras 1126, 1154.

2357 *See* response to Ground 165 (re. the existence of a CPK policy of consent and national representativeness of the evidence).

2358 Ground 165: **F54** Appeal Brief, *Errors on the contents of the regulation of marriage under DK,* paras 1191-1215; **F54.1.1** Appeal Brief Annex A, p. 57 (EN), p. 52 (FR), pp. 81-82 (KH).

of CPK policy.

688. Contrary to Appellant's contention that the TC incorrectly interpreted and hid contemporaneous documentary evidence that confirmed consent was part of the marriage principles of the Party,[2359] the TC considered the CPK's policy of consent as evinced in the 12 moral principles[2360] and examined testimonies describing cases in which individuals were able to choose their partners.[2361] While this evidence *did* indicate that consent was one of the marriage principles, the TC also had before it a wealth of evidence showing that in practice, adherence to *Angkar's* directive was given precedence over personal choice.[2362] It was the role of *Angkar* to make a thorough assessment of all matches and that decision was to be followed.[2363] As a result, not all marriages proposed by individuals, or even those matched by authorities, were approved, and they were only granted if they were found to be consistent with the collective interest.[2364] Indeed, individuals were not able to reject marriage proposals, rendering the principle of consent in CPK policy an empty formality.[2365] It cannot therefore be said that the TC "dismissed" the principle or demonstrated partiality in its assessment of the evidence.[2366] Rather, the TC weighed all of the evidence before it to find that consent was not prioritised in

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2359 **F54** Appeal Brief, paras 1193, 1212.

2360 *See* **E465** Case 002/02 TJ, para. 3542 (The *RY* issue stated that marriage was based on two principles of the party: "First, both parties agree. Second, the collective agrees, and then it's done").

2361 **E465** Case 002/02 TJ, paras 3599-3600. *Contra* **F54** Appeal Brief, para. 1193.

2362 **E465** Case 002/02 TJ, paras 3544-3545 and all citations therein (various issues of *RY* indicated that *Angkar's* decision prevailed while personal sentiments were "contrary to the correct ideological stance"), fns 11927 (a resolution adopted at a mass meeting at which Appellant spoke on 17 April 1975 included the pledge "to subordinate resolutely all personal and family interests to the collective interests of the nation, class, people and revolution"), 11929 (*citing* various editions of *RY*, including a pledge by youth to prioritise the Party's interests and "not be bothered with or become entangled with miscellaneous issues surrounding our individual persons").

2363 **E465** Case 002/02 TJ, para. 3541 ("In terms of choosing a spouse, individuals were to respect the organisational discipline absolutely.").

2364 **E465** Case 002/02 TJ, paras 3541, 3543 *citing* **E3/775** *Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building,* 2 June 1975, EN 00417943 ("Organization discipline must be absolutely respected. In the matter of building a family, no matter the outcome of the Organization's and the collective's assessments and decisions, they must be absolutely respected. Do not have hard feeling. Do not be disappointed. This is because only the Organization and the collective are able to make a thorough assessment from every aspect.").

2365 The inability of individuals to refuse a marriage without severe consequences (*see* response to Ground 169) makes it clear that the *RY* issues and speeches were by no means mere "reminders" or "invitations" for young cadres to think carefully and be prudent about their choice of spouse (*contra* **F54** Appeal Brief, paras 1213-14), nor were they "new concept[s] of relations between men and women introduced by the revolutionary ideology [… demonstrating] an intention to give women a different role than the one traditionally allocated to them, in other words, only through marriage" (*contra* **F54** Appeal Brief, para. 1212).

2366 *See* response to Ground 4 re. Appellant's burden of proof to demonstrate actual bias. *Contra* **F54** Appeal Brief, para. 1211.

practice.[2367]

689. Next, Appellant erroneously argues that the TC deliberately concealed portions of witness evidence showing consent was part of the CPK's marriage policy.[2368] This argument, repeated in numerous grounds,[2369] ignores that the TC has the discretion to accept and reject portions of a witness' testimony based on a holistic view of the evidence before it.[2370] Moreover, the various witnesses identified by Appellant as confirming the importance of consent also testified to a pervasive climate of fear in which genuine consent for many was impossible,[2371] corroborating the TC's finding.

690. Appellant also wrongly asserts that former cadres who testified to the DK policy of consent had their testimonies unreasonably rejected by the TC because they tended to minimise their responsibility.[2372] It is clear that the TC did not reject their evidence solely

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2367 **E465** Case 002/02 TJ, para. 3548.

2368 **F54** Appeal Brief, para. 1193.

2369 *See* response to Grounds 165, 166, 167, 170, 173.

2370 *See Setako* AJ, para. 31; *Ngirabatware* AJ, para. 97; *Karera* AJ, para. 21.

2371 **E1/113.1** Em Oeun, T. 23 Aug. 2012, 15.53.21-15.57.58, p. 104, line 4-p. 105, line 3 (including this testimony: "they actually suppressed us to get married and they actually arranged that marriage for me, and I had to get married to someone whom I did not love at all. [...] And I protested, but then they punished me; they transfer[red] me to work in the worksite instead of working in the hospital. [...] eventually, I decided that I had to get married. Otherwise, my life would be in serious risk."). *See also* **E1/76.1** Ny Kan, T. 28 May 2012, 15.34.00-15.35.39, p. 88, lines 15-24 (Ny Kan, cited by Appellant as supporting the idea that consent was one of the 12 moral principles, in fact makes no reference to the 12 principles whatsoever and simply states moral conduct was "that people must not womanise, or steal other people's property"); **E1/346.1** Sen Srun, T. 14 Sept. 2015, 11.51.40-11.53.00, p. 57, lines 21-25 ("My circumstance was rather specific comparing to others. *For other couples, they did not consent to the marriage.* However, in my case, my wife was actually – my wife's family side actually consented to the marriage as my parents actually sought their agreement beforehand." (emphasis added)); **E1/394.1** Sieng Chanthy, T. 1 Mar. 2016, 10.50.01-10.52.03, p. 39, lines 8-13 ("She told me that my sister was proposed to get married, and I said that she should not get married. And I did not want to join the marriage. And my mother said, 'You should go and attend the ceremony. Otherwise, you would be taken away and killed'. And that was what my mother told me."); **E1/387.1** In Yoeung, T. 3 Feb. 2016, 14.16.00-14.18.24, p. 77, lines 1-8 ("People wanted to get married because they wanted to return to the cooperatives. In the cooperatives, the work was lighter. For instance, they transported bags of rice, so people wanted to get married in order to be transferred back to the cooperative"); **E1/465.1** Seng Soeun, T. 29 Aug. 2016, 10.03.20-10.06.50, p. 24, line 17-p. 25, line 8 ("Q: The investigator then asked you a question again: 'Did people always have to agree to these arranged marriages?' And you answered: 'Some couples were not happy, while some were. And those who were unhappy did not dare to refuse.' And finally, the investigator puts this last question to you: 'Why did they not dare to refuse?' And you answered: 'They were afraid of being killed by the Khmer Rouge regime.' So, is this something that you remember today? Do you remember that some of the people did not dare refuse to get married because they were afraid that the Khmer Rouge regime would kill them? A: That prior statement of mine is correct because that's what happened, and that's what they did during the regime. If they loved one another, that's fine. However, if someone protested about that, the person would disappear."); **E1/469.1** Nop Ngim, T. 5 Sept. 2016, 11.17.09-11.19.05, p. 54, lines 20-22 ("At that time, only when they fell in love with one another, then we would organize the marriage for them. It was not like when we were in our unit when we were force to get married."); **E1/464.1** Yos Phal, T. 25 Aug. 2016, 11.08.57-11.11.10, p. 38, lines 24-25.

2372 **F54** Appeal Brief, para 1194. Appellant relies on assurances of non-prosecution to support his argument that the cadres' testimony was weighted incorrectly, but such reliance does not demonstrate any error of law (*see* response to Ground 25). This argument is repeated throughout Appellant's submissions relating to forced marriage. *See* response to Grounds 166, 169, 174.

on this basis. The TC's analysis expressly found that "the general climate of fear created by the authorities and/or threats against the individuals led them to obey *Angkar* and did not allow them to object to an order to marry. Therefore, *despite the evidence provided by cadre* that, in accordance with the CPK policy, future spouses had to consent to be married, [...] the consent given was not genuine."[2373] Appellant simply asks the SCC to reinterpret facts already considered by the TC.[2374] Moreover, the cadres Appellant cites were *themselves* victims of forced marriage, and rather than confirming that consent was a principle that was strictly followed, they simply asserted that their experience of undesired marriage was not shared by others.[2375]

691. Appellant's arguments regarding other witnesses also fail. The TC's decision to deny François Ponchaud's appearance at the Case 002/02 trial was well grounded in law and recalled that the witness testified in Case 002/01 on various topics including forced marriage, which remained part of the evidence available in Case 002/02.[2376] The claim that the TC erroneously failed to draw the necessary conclusions from expert testimony is shown elsewhere in this Response to lack merit.[2377]

Alleged failure to take into account the "representativeness" of evidence

692. Appellant adopts what he generally terms a "statistical approach" to argue that the TC relied too heavily on CP evidence from the marriage segment of the trial and failed to recognise evidence from other segments which, he alleges, if taken properly into account would have shown that consent was a CPK principle.[2378] This "statistical approach" is reiterated across his brief, repeatedly arguing that the TC did not assess the totality of the evidence before reaching its various conclusions, thereby showing TC bias.[2379] However,

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2373 **E465** Case 002/02 TJ, para. 3623 (emphasis added).

2374 *See e.g.* **E465** Case 002/02 TJ, paras 3586-3591 (showing the TC considered the evidence of former cadres in relation to the weddings of combatants, cadres, and disabled soldiers who were consulted on their marriage, but found that this was a result of their special status; the general practice was that individuals had no choice as to whom they would marry), 3617 (the TC considered Pech Chim's evidence that consent was necessary for a wedding to be organised, but he also admitted that "there was a gap in this practice").

2375 As directly stated by Appellant, this was the case for Nop Ngim and Seng Soeun, both high-ranking cadres, *see* **F54** Appeal Brief, para. 1197.

2376 *Contra* **F54** Appeal Brief, para. 1195. *See* response to Ground 25. *See also* **E1/179.1** François Ponchaud, T. 10 Apr. 2013, 13.44.06-13.48.24, p. 73, line 18-p. 74, line 13.

2377 *See* response to Ground 37. *Contra* **F54** Appeal Brief, para. 1209.

2378 **F54** Appeal Brief, paras 1196-1208.

2379 *See* **F54** Appeal Brief, paras 1177-1188 (arguing that the CP evidence on the impact of forced marriages was not sufficiently grave to constitute a CAH, nor was it representative of the entire country: Appellant contends that evidence on the case file outside of the marriage segment demonstrates a notable difference from the stories of victims of forced marriage. He points to the TK, 1JD, TTD segments of the trial, as well as "other segments of Case 002/02", Case 002/01 transcripts, and WRIs supporting the Closing Order and

the approach is premised on numerous false assumptions and is replete with errors, invalidating the very conclusions it is alleged to support. Appellant's numerous claims are centrally addressed here rather than throughout the section in order to provide clarity and avoid repetition.

693. The most obvious error running through Appellant's analysis is his false distinction between marriages "arranged" by authorities and forced marriages.[2380] As discussed above, many of the individuals categorised by Appellant as "consenting" to marriage in reality did not.[2381] Any pattern derived from his flawed categorisation is therefore erroneous by design. Furthermore, it is only logical that testimony given in the forced marriage segment would contain a larger number of victims of the policy who were able to testify in greater detail to the objectives, details, and impact of the policy, as that was the main reason they were called.[2382] Indeed, the SCC has held that CPs "will often be particularly well-placed to report on the events that form the basis of the allegation".[2383] The TC correctly took CP evidence into account when making factual findings, and was even permitted to consider any CP testimony relating to guilt of the accused.[2384]

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from Cases 003 and 004, alleging they all show that marriages were not forced but "arranged", and suffering could not be demonstrated), 1196-1208 (arguing that the TC overlooked "other experiences" of marriage, such as arranged marriages, and wrongfully dismissed the testimony of former cadres who confirmed consent was a CPK policy. He points to the TK, 1JD, TTD and "other" segments of the trial, alleging they show consent was a CPK principle), 1273-1278 (arguing the totality of evidence did not demonstrate a nationwide policy of forced marriage: Appellant claims the TC erred by failing to consider the differences in application of the policy when the evidence was viewed as a whole. He considers various segments of the trial to conclude instances of forced marriage were few. For example, when reviewing the testimonies in 002/02 outside the marriage segment, he finds only 19% of marriages were forced. Similarly, his analysis of WRIs supporting the Closing Order finds 34% of marriages were forced), 1325-1340 (arguing the level of suffering required for CAH was not met in relation to rape in the context of forced marriage: Appellant challenges both the evidence within the marriage segment and in other trial segments arguing that neither the factual elements nor the finding that the suffering endured was comparable to other CAHs was established. He repeats claims that the majority of weddings were not forced and few witnesses testified to harm), 1356-1360 (re. the nationwide practice of monitoring the consummation of marriages: Appellant argues that while 79% of individuals in the trial segment dedicated to marriage testified to being monitored, only 16% from others testified to the same. He also analyses WRIs supporting the Closing Order and from Cases 002/01, 003 and 004 and concludes that no national practice can be established).

2380 *See* **F54** Appeal Brief, paras 1182-1183, 1201-1204, 1275, 1277. *See also* response to Grounds 163, 167.

2381 *See e.g.* **F54.1.2** Annex B1, in which Appellant identifies witness Kong Uth's marriage as "not forced". However, Kong Uth clearly stated, "I did not dare to refuse the marriage and if I dared to do so I would be accused of opposing them. I would be accused of being against *Angkar*" (*see* **E1/322.1** Kong Uth, T. 25 June 2015, 10.59.10-11.01.51, p. 34, lines 19-21). Similarly, **F54.1.7** Annex B6 categorises In Yoeung as having an "arranged" marriage. However, it is clear her consent was the result of the coercive environment. She agreed to marry to be able to leave her mobile unit where conditions were extremely poor and there was not enough food to eat (*see* **E1/387.1** In Yoeung, T. 3 Feb. 2016, 14.16.00-14.18.24, p. 77, lines 1-8).

2382 *Contra* **F54** Appeal Brief, paras 1200, 1203 (arguing that 100% of individuals who testified in the forced marriage segment were victims of forced marriage, in comparison with TK and TTD segments in which the number of forced marriages "falls drastically").

2383 **F36** Case 002/01 AJ, para. 312.

2384 **F36** Case 002/01 AJ, para. 312. *Contra* **F54** Appeal Brief, para. 1195.

694. Throughout his analysis, Appellant consistently and incorrectly presumes that because some relationships evolved over the years to include love and affection,[2385] or because some individuals did not explicitly state that their marriage or sexual relations in the context of their marriage caused them to suffer,[2386] forced marriages cannot be seen to have caused the level of suffering required for the CAH of OIA. However, as shown in response to Grounds 163 and 173, these assertions are erroneous. Thus, counting instances in other segments of the trial in which witnesses and CPs testified that relationships developed, or witnesses called to testify about other matters failed to explicitly state that their spouse suffered as a result of intercourse,[2387] or the fact that some women did not consider themselves to have been raped,[2388] does little to undermine the TC's findings on the suffering that resulted from forced marriage and its consummation.

695. Finally, when the "statistical approach" was applied to the Case 003 and 004 WRIs to show that 65% of marriages were forced, Appellant merely asserted, unsubstantiated, that investigators used leading questions so little probative value could be attached to the statements.[2389] When a similar but much more particularised challenge to many of the same WRIs was raised in another case, the PTC conducted a thorough review and found no such improprieties.[2390] For all of these reasons, Appellant's analysis lacks merit.

Ground 168: Errors in the transmission of marriage regulations[2391]

696. **Ground 168 should be dismissed as Appellant fails to establish that the TC erred in fact by relying on evidence concerning the communication of information between upper and lower Party ranks to establish the existence of a forced marriage policy.**

697. Appellant erroneously argues that the TC "knowingly set aside" testimony regarding consent to marriage from witnesses and CPs who also testified about instructions from higher authorities on the organisation of marriage.[2392] He wrongly contends that the TC's

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2385 **F54**Appeal Brief, paras 1178, 1180, 1182, 1186-1187.

2386 **F54** Appeal Brief, paras 1178, 1181, 1183, 1185-1187.

2387 **F54** Appeal Brief, para. 1329.

2388 **F54** Appeal Brief, para. 1372.

2389 **F54** Appeal Brief, para. 1277.

2390 The PTC assessed a request to annul impugned sections of WRIs allegedly affected by bias or appearance of bias, including through the use of leading questions by investigators. Out of 386 alleged shortcomings, no error was found. *See* Case 004/2-**D338/1/5** PTC Three Investigators Decision, paras 10, 18, 20 (a presumption of reliability attaches to investigative action which requires a high threshold to rebut), 21-22.

2391 Ground 168: **F54** Appeal Brief, *Errors in the transmission of marriage regulations,* paras 1245-1247; **F54.1.1** Appeal Brief Annex A, p. 58 (EN), p. 53 (FR), p. 83 (KH).

2392 **F54** Appeal Brief, paras 1245-1246.

allegedly selective approach to this evidence requires reversal of the finding regarding instructions from higher authorities and the more general finding that forced marriages were part of an organised CPK policy.[2393] Rather than demonstrating a "biased" or "opportunistic" assessment, Appellant's argument merely shows that the TC properly exercised its discretion to accept and reject certain aspects of witness testimony based on a holistic view of the evidence before it.[2394] As noted previously, the TC took evidence of consent into account such as the cited witnesses provided,[2395] but it also took into account their testimony (and the testimony of many others) regarding the climate of fear, the need to conform to the Party line, and the role played by the upper echelon in authorising weddings which were then conducted by local authorities.[2396] The TC's findings were reasonably based on the evidence, and Appellant shows no error.

698. Appellant misrepresents the TC's findings when he argues that it cited only two reports from the lower echelons to support the conclusion that there was an instruction to arrange forced marriages that originated from, and was endorsed by, CPK leadership.[2397] The only finding that these two reports solely supported accurately found that "reports relating to marriages were communicated to the upper echelon".[2398] The broader finding regarding the CPK leadership's instruction and endorsement was solidly supported by ample evidence beyond the reports. Numerous witnesses and CPs recalled that the upper echelon issued marriage instructions that were communicated downward, while details regarding their organisation were left to the lower levels and any proposed matches had to be authorised by the upper level.[2399] Both impugned findings were therefore reasonable.

2393 **F54** Appeal Brief, paras 1245-1246 *impugning* **E465** Case 002/02 TJ, paras 3564-3667, 3690-3693.

2394 *See Setako* AJ, para. 31; *Ngirabatware* AJ, para. 97; *Karera* AJ, para. 21. *Contra* **F54** Appeal Brief, para. 1246.

2395 *See also* response to Ground 165; **E465** Case 002/02 TJ, paras 3617, 3619, 3623.

2396 **E465** Case 002/02 TJ, paras 3603-3609. *See also* evidence from Appellant's cited witnesses: **E1/476.1** Heng Lai Heang, T. 19 Sept. 2016, 11.14.31-11.20.36, p. 39, line 9-p. 40, line 9 (out of fear, civilians had to follow the party line/instructions, including in cases of marriage); **E1/465.1** Seng Soeun, T. 29 Aug. 2016, 10.03.20-10.06.50, p. 24, line 11-p. 25, line 8 (confirming prior statement that if individuals refused to get married, they would disappear; those who protested could also be killed); **E1/466.1** Seng Soeun, T. 30 Aug. 2016, 11.20.38-11.23.48, p. 50, line 23-p. 51, line 21 (no measure was taken to determine consent prior to the ceremony, and many of the prospective spouses had little to no notice that they would be married); **E1/310.1** Sou Soeurn, T. 4 June 2015, 15.23.58-15.26.33, p. 86, lines 2-11 (instructions surrounding marriages came from the upper echelon and were handed down through the ranks).

2397 **F54** Appeal Brief, para. 1247 *impugning* **E465** Case 002/02 TJ, paras 3568, 3693.

2398 **E465** Case 002/02 TJ, para. 3568.

2399 **E465** Case 002/02 TJ, paras 3564-3576, 3592-3598, 3693.

Ground 169: Errors concerning conditions outside the regulations[2400]

699. **Ground 169 should be dismissed as Appellant fails to establish that the TC erred in its assessment of the evidence or its findings on the organisation of marriages.**

700. Appellant misleadingly argues that requiring the approval of a higher authority for all marriages was a common practice in other countries and not evidence of an effort to arrange marriages without the consent of both prospective spouses.[2401] Unlike in other countries, however, the individual consent requirement during the DK regime was an empty formality.[2402] While prospective spouses were required by local cadres to "agree" to the marriage at the wedding ceremony, this did not and could not signify genuine agreement due to the prevailing coercive nature of the regime.[2403] Moreover, as discussed elsewhere, the only agreement that mattered was that of the CPK's upper echelon: *Angkar*'s directive was final whether an individual genuinely consented or not.[2404]

701. Contrary to Appellant's next contention, the TC's factual finding that "[i]n the majority of cases, during the wedding ceremony parents of individuals were not involved" is supported by ample evidence that parents were not allowed to play a traditional role or often *any* role in the marriage of their children.[2405] The fact that Appellant identifies a few cases in which parents were present at the ceremony does not show error, as such examples are compatible with the TC's finding, which used "majority" to acknowledge that in some cases, parents attended the wedding.[2406]

702. Appellant asserts without merit that the TC should not have drawn general conclusions from the evidence of Ek Hoeun and Sou Sotheavy because they were extreme cases of

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2400 Ground 169: **F54** Appeal Brief, *Errors concerning conditions outside the regulations,* paras 1248-1258; **F54.1.1** Appeal Brief Annex A, p. 58 (EN), p. 53 (FR), p. 84 (KH).

2401 **F54** Appeal Brief, paras 1249-1250 *impugning* **E465** Case 002/02 TJ, paras 3598, 3602, 3693. *See also* his paras 1252-1253 stating that the "real revolution" was the DK regime's prioritisation of individual marital consent over that of parental consent.

2402 *Contra* **F54** Appeal Brief, para. 1257 ("As elsewhere, obtaining consent was an important aspect of the validity of the marriage.").

2403 *See e.g.* **E465** Case 002/02 TJ, paras 3614-3615 (individuals were not consulted before marriage), 3619 (witnesses described weddings as forced or involuntary), 3620 (many consented out of fear), 3621-3622 (use of threats by authorities, including threat of death), 3623 (the general climate of fear did not allow objection), 3624 (threats carried out), 3625 (finding that "genuine consent was impossible"), 3673-3674 (TK coercive practices), 3676 (TTD coercive practices), 3677-3678 (1JD coercive practices).

2404 *See* response to Ground 165.

2405 **F54** Appeal Brief, paras 1251-1254 *impugning* **E465** Case 002/02 TJ, paras 3690-3691, 3693 (quoted finding at para. 3691). *See e.g.* **E465** Case 002/02 TJ, paras 3572-3580 (the authorities were responsible for screening and matching biographies, a role traditionally played by parents), 3612 (evidence that parents were "neither consulted nor informed" of their children's weddings), 3639, 3681 (individuals expressed unhappiness resulting from their parents' absence).

2406 *Contra* **F54** Appeal Brief, para. 1254, Appellant fails to demonstrate that the TC systematically rejected the testimony of former cadres. *See also* **E465** Case 002/02 TJ, paras 3612-3613.

group marriage.[2407] Even if extreme, they were not unique, and they were merely used to illustrate the scale that was reached. The TC also had before it extensive witness and CP evidence showing that collective ceremonies were used in such a widespread and systematic way that it disproves Appellant's argument that a few local officials merely exercised their discretion for practicality.[2408] Pech Chim's explanation that collective marriages were arranged because "more and more people wanted to marry" is similarly belied by extensive evidence of couples being informed of their marriages either at the time they arrived at the ceremony or shortly before, so it was reasonable and within the TC's discretion to omit his explanation.[2409]

703. Lastly, Appellant erroneously argues that considering the lack of uniformity in undertakings at the marriage ceremonies, no reasonable trier of fact could have concluded that the CPK issued specific instructions on how to perform marriages.[2410] The TC noted variations in practice throughout the zones, but a holistic assessment of the evidence clearly established a commonality in the fundamental features of the ceremonies.[2411] Appellant's remaining claim also fails to demonstrate error.[2412]

Ground 167: Errors with respect to the implementation of marriage regulations[2413]

704. **Ground 167 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that marriages were arranged by authorities in accordance with instructions from above, and that both men and women were forced to marry.**

705. Appellant wrongly argues that the TC ignored CPK policy documents which reminded cadres of the necessity to consider the "needs of the people in their charge" and the Party

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2407 **F54** Appeal Brief, para. 1255 *impugning* **E465** Case 002/02 TJ, paras 3631-3632, 3691.

2408 *See e.g.* **E465** Case 002/02 TJ, paras 3631-3632 and all citations therein, 3587-3588, 3597 (re. a collective ceremony organised at the instruction of Southwest Zone Secretary Ta Mok). *See also* Annexes I1-I4 to **E457/6/1** Co-Prosecutors' Closing Brief (further demonstrating the widespread practice of collective ceremonies).

2409 *See e.g.* **E465** Case 002/02 TJ, paras 3614-3616. *Contra* **F54** Appeal Brief, para. 1255.

2410 **F54** Appeal Brief, paras 1256-1257 *impugning* **E465** Case 002/02 TJ, paras 3548, 3633-3635.

2411 *See e.g.* **E465** Case 002/02 TJ, paras 3626-3629, 3631, 3633-3635 (commitments were usually expressed, authorities attended), 3636-3638 (absence of Khmer traditions), 3639-3640 (family usually not present), 3690-3691.

2412 Appellant's claim in **F54** Appeal Brief, para 1248 *impugning* **E465** Case 002/02 TJ, para. 3693 is unsubstantiated and misrepresents the finding. The TC did not find that the use of threats to force people to marry was a "recommendation of CPK policy" but rather, "Authorities used threats to force individuals to marry and were involved in wedding ceremonies and in implementing the monitoring process." As for his objection in his para. 1258 *impugning* **E465** Case 002/02 TJ, paras 3625, 3690-3691, Appellant merely shows he does not agree without developing his claim.

2413 Ground 167: **F54** Appeal Brief, *Errors with respect to the implementation of marriage regulations,* paras 1243, 1271-1280; **F54.1.1** Appeal Brief Annex A, p. 58 (EN), p. 53 (FR), pp. 82-83 (KH).

line was not applied correctly.[2414] While the "needs of the people" was indeed part of the CPK statute, documents and speeches before the TC clearly showed that the policy of forced marriage that was to be implemented from the top down was for the benefit of the revolution, not the people.[2415] The CPK first published its policy on family building in the February 1974 issue of *RY* and republished it in June 1975, reflecting the importance it placed on full implementation of the policy throughout the country.[2416] A subsequent *RY* issue set out the principles on which marriage was based, and further CPK publications provided guidance on how individuals should select their spouses in order to be "consistent with the collective interest".[2417] A resolution adopted at a mass meeting at which Appellant spoke contained a general pledge to "subordinate resolutely all personal and family interests to the collective interests of the nation".[2418] Although there were minor regional variations in implementation, Appellant's argument that local authorities did not apply the Party line correctly is misleading. The practices of matching, organising, and conducting marriages were so similar across the country that they established patterns that clearly demonstrated forced marriage was a part of a centralised CPK policy.[2419] Appellant's remaining arguments, discussed elsewhere in this Response, are also without merit.[2420]

Ground 166: Distortion of the evidence about the other alleged objectives[2421]

706. **Ground 166 should be dismissed as Appellant fails to establish that the TC erred or was biased in its assessment of the evidence relating to the objectives of the forced marriage policy.**

707. Appellant baselessly alleges a series of errors to challenge the TC's finding that the CPK had a forced marriage policy that controlled sexual relations so as to increase the

2414 **F54** Appeal Brief, paras 1243, 1271-1272 *impugning* **E465** Case 002/02 TJ, paras 3690-3691.

2415 **E465** Case 002/02 TJ, paras 3540-3548.

2416 *See* **E465** Case 002/02 TJ, para. 3540 (outlining the contents of the *RY* issue that set out revolutionary views on family building, considering matters of family as being inseparable from the entire nation).

2417 **E465** Case 002/02 TJ, paras 3542-3543.

2418 **E465** Case 002/02 TJ, para. 3548, fn. 11927.

2419 *See* **E465** Case 002/02 TJ, paras 3629-3640 (common practices included organised collective ceremonies, the absence of Khmer tradition, and lack of parental presence). *See also* response to Ground 169.

2420 For Appellant's remaining arguments in **F54** Appeal Brief, paras 1273-1280, *see* response to Grounds 165 (his paras 1273-1278 re. claim that the TC did not take into account all of the evidence on the case file), 37 (his para. 1279 re. the TC's treatment of the forced marriage experts' evidence), 168 (his para. 1280 re. evidence relied upon to conclude that the CPK intended to implement the marriage regulations).

2421 Ground 166: **F54** Appeal Brief, *Errors on the Objectives of the CPK*, paras 1216-1242; **F54.1.1** Appeal Brief Annex A, p. 57 (EN), pp. 52-53 (FR), p. 82 (KH).

population.[2422] However, his claims present no substantiation capable of demonstrating that the TC reached a conclusion no reasonable trier of fact could have made.

708. **The CPK's control of relationships:** Appellant challenges the TC's finding that the CPK's marriage policy controlled male-female sexual interactions both before and after marriage.[2423] He erroneously argues that the TC should have found that the CPK's control before marriage was in line with Khmer tradition that prohibited sexual relations outside of marriage.[2424] This attempt to again conflate DK marriage practices with pre-DK marriage practices ignores evidence of an environment in which individuals lived under constant fear of fatal consequences for their actions. Not only were male-female interactions—even non-sexual ones—outside of marriage considered a distraction from the goal of rebuilding the nation, but they were also considered a moral offence that could be punished by reeducation or even execution.[2425] This can in no way be deemed a "continuity" of Khmer tradition.

709. Appellant similarly misrepresents the evidence when challenging the TC's findings on divorce. Contrary to his claims,[2426] the TC took into account Pol Pot's interview stating divorce was a possibility, but this was countered by the context in which the statement was given, exposing it as propaganda.[2427] It was also contravened by credible evidence describing a pervasive climate of fear in which individuals could not express dissatisfaction with their selected spouse, making clear that divorce was impossible.[2428]

710. **The objective of population growth:** Appellant fails to demonstrate the TC erred in finding that one of the objectives behind regulating marriage was to encourage population

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2422 **F54** Appeal Brief, para. 1216 *impugning* **E465** Case 002/02 TJ, paras 3549-3563.

2423 **F54** Appeal Brief, para. 1217 *impugning* **E465** Case 002/02 TJ, paras 3559-3563, 3662-3663, 3669.

2424 **F54** Appeal Brief, para. 1218. Appellant also misleadingly accuses the TC of concealing evidence of the Party's moral principles and negating them as merely in "defence of the revolution". However, one of the very Judgment paragraphs he impugns directly contradicts his claim, as it discusses the *RY*'s description of the 12 precepts as the "laws and rules of the Party" and notes that violating females would impact male-female morality, the "clean and pure tradition of the people", *and* the revolution. *See* **E465** Case 002/02 TJ, para. 3560 (emphasis added).

2425 **E465** Case 002/02 TJ, paras 3562-3563 and all citations therein. Appellant also challenges the finding that moral offences were reported to the Party Centre, arguing "Party Centre" is vague and creates an artificial connection between Appellant and the facts (*see* **F54** Appeal Brief, para. 1219). This claim is addressed in response to Ground 190.

2426 **F54** Appeal Brief, para. 1220 *impugning* **E465** Case 002/02 TJ, para. 3669.

2427 **E465** Case 002/02 TJ, paras 3666-3668 (During his interview with the visiting delegation of the Belgium-Kampuchea Association, Pol Pot stated, "neither of the parties concerned need to go to court". No courts existed at the time, allowing the TC to conclude it was misleading).

2428 *See e.g.* **E465** Case 002/02 TJ, para. 3668 (individuals were required to hide that they did not get along with or love each other. The fear of being reprimanded, sent for reeducation, or killed meant people did not dare to seek a divorce). *Contra* **F54** Appeal Brief, para. 1220.

growth.[2429] Contrary to his claim, the finding on spousal visitation did not contradict this finding,[2430] it simply demonstrated that the goal of increasing the population had to co-exist alongside the goal of rapidly building the nation's infrastructure. To achieve both goals, the Party exercised absolute control so that neither goal suffered. It did this by closely monitoring newlywed couples to ensure they consummated their unions in the short time they had together,[2431] and it instituted a system of short visitations for further relations that would serve the aim of population growth while not detracting from production.[2432] Appellant demonstrates no error in the TC's holistic assessment.

711. **The TC's assessment of the evidence:** Appellant wrongly claims that the TC's analysis of CPK documents and speeches erroneously omitted mention of the CPK's wish to achieve the objective of population growth by improving living conditions and the health of the population.[2433] As discussed elsewhere in this Response, the CPK's actions spoke louder than its stated "wishes", as ample evidence demonstrated that the Party repeatedly sacrificed the welfare of the people in order to give priority to revolutionary goals.[2434] This held true for the goal of population growth as well which, as a whole, inflicted suffering on those subjected to it in such a widespread and systematic way that it could only be explained by a centralised policy supported at the highest levels.[2435] Finally, Appellant wrongly suggests that the only reason CPs suffered from the objective of population growth was because of the lack of care and medication available for pregnant women.[2436] While this was no doubt a source of suffering, it unfairly ignores the full context upon which the TC rightly based its findings.[2437] His remaining claims regarding

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2429 **F54** Appeal Brief, paras 1221-1222 *impugning* **E465** Case 002/02 TJ, paras 3558, 3662-3664, 3690-3691, 3696-3698.

2430 **E465** Case 002/02 TJ, para. 3663. *Contra* **F54** Appeal Brief, para. 1222.

2431 *See e.g.* **E465** Case 002/02 TJ, paras 3641-3647, 3654, 3656-3657, 3660-3662.

2432 *See e.g.* **E465** Case 002/02 TJ, paras 3662-3665. *See also* **E3/20** Elizbeth Becker, *When the War was Over*, EN 00237929 (describing this balancing that sometimes seemed "schizophrenic").

2433 **F54** Appeal Brief, paras 1223-1224 *impugning* **E465** Case 002/02 TJ, paras 3549-3955.

2434 *See e.g.* response to Grounds 181, 183 (Appellant claimed that one of the objectives of the establishment and operation of cooperatives and worksites was to improve the people's living standard, but this was belied by, *inter alia*, the Party's exportation of large quantities of rice to generate capital despite food shortages at home, and the imposition of inhumane conditions despite the toll they took on the workers).

2435 **E465** Case 002/02 TJ, paras 279, 296, 317, 321, 3631, 3690. *Contra* **F54** Appeal Brief, para. 1224 (claiming the TC ignored evidence of "cadres who neglected their mission to [...] to serve the population").

2436 **F54** Appeal Brief, para. 1232.

2437 *See e.g.* **E465** Case 002/02 TJ, paras 3679-3682 (re. the impact of forced marriage) 3683-3685 (re. the impact of forced sexual intercourse), 4452 (re. the trauma that CPs suffered as a result of forced sexual intercourse in the context of forced marriage - *see particularly* Say Naroeun, whose evidence makes clear that her suffering did not purely result from a lack of medical attention as Appellant suggests). *See further* evidence that this lack of appropriate care for pregnant women was in part of the CPK's own making: **E465** Case 002/02 TJ, paras 1312-1319 (re. the CPK's approach to healthcare, including its ideological stance

the testimony of former cadres and alleged over-reliance on CP evidence from the marriage segment of the trial are shown elsewhere in this Response to lack merit.[2438]

The credibility of Civil Party Chea Deap

712. Appellant fails to show that the TC erred in finding the testimony of Chea Deap credible, especially in establishing Khieu Samphan's personal involvement with forced marriage.[2439] His claim that the TC's reliance on her statement "breached all rules of evidence" is directly contradicted by established jurisprudence that a finder of fact can rely on a single witness to support a finding, even without corroboration.[2440] The SCC has also clearly held that the TC may rely on CP testimony to make determinations of guilt.[2441]

713. As to his more specific claims, Appellant's argument that Chea Deap's incriminating evidence was of a "belated nature" cites no legal basis to support the suggestion that the Prosecution was required to explain why only her later statement included such information.[2442] Most importantly, the CP was extensively questioned on this issue during trial and explained that she could not recall who helped her fill in the first two forms and whether she had mentioned seeing Appellant at the meetings or not, but if she had completed the forms herself, she would have included the information as she did when she worked with her lawyer in 2014.[2443] The TC judged her demeanour and the plausibility of her explanation, finding her to be credible under intense scrutiny rather than someone trying to implicate Appellant at all costs, as his argument seems to suggest.[2444] Similarly, the attack on her identification evidence fails, as it deliberately refuses to acknowledge the difference between "meeting" someone personally and "seeing" someone and being told who they are, which allows for recognition

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to refuse medical aid from foreign countries other than China out of fear that it would have unacceptable conditions), 3913 (medical professionals were replaced by laypeople without qualifications or training).

2438 *See* response to Ground 165, *contra* **F54** Appeal Brief, paras 1225-1232. The fact that marriages were regulated nationwide (*see* **E465** Case 002/02 TJ, para. 3670) belies any further claim that the TC overlooked testimony stating that the cadres responsible were neglecting their mission to serve the population (**F54** Appeal Brief, para. 1224).

2439 **F54** Appeal Brief, paras 1233-1242 *impugning* **E465** Case 002/02 TJ, paras 3557, 3569, 3570 (fn. 11980), 4247.

2440 *Nahimana* AJ, para. 949 (also noting that trial judges are "in the best position to assess the credibility of a witness and the reliability of the evidence adduced"). *Contra* **F54** Appeal Brief, paras 1233-1234.

2441 **F36** Case 002/01 AJ, para. 313. *Contra* **F54** Appeal Brief, para. 1235 (referencing the fact that as a CP she was not required to take an oath).

2442 **F54** Appeal Brief, para. 1234.

2443 *See* **E1/467.1** Chea Deap, T. 31 Aug. 2016, 11.19.29-11.46.55, p. 56, line 9-p. 68, line 14, *particularly* p. 66, line 5-p. 67, line 9.

2444 **E465** Case 002/02 TJ, para. 3569. *Contra* **F54** Appeal Brief, para. 1234.

thereafter.[2445]

714. Appellant's remaining arguments also lack merit. For example, his complaint regarding Chea Deap's evidence on the training session at Borei Keila disregards that there is no finding in which the TC relied on her evidence on this point.[2446] He also seems to suggest that documents stating CPK ideals must be taken at face value and in isolation, whereas the TC properly assessed the evidence holistically before making its finding that marrying age varied in practice.[2447] Appellant's alleged contradictions with the evidence of other Ministry officials are belied by the evidence.[2448] Finally, Chea Deap's evidence of Appellant's training session at Wat Ounalom was corroborated in part by Ruos Suy and Norodom Sihanouk and sufficiently analysed by the TC.[2449] In short, none of Appellant's challenges fail to discredit the TC's reliance on Chea Deap's evidence.

Ground 170: Use of threat and the context of coercion in the country[2450]

715. **Ground 170 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that people had no choice in marriage.**

2445 *Contra* **F54** Appeal Brief, para. 1236, fn. 2337.

2446 *Contra* **F54** Appeal Brief, para. 1237. *Note* that the TC relies on Chea Deap's evidence regarding the meeting at Ounalom Pagoda, not Borei Keila in which she alleged Hu Nim and Hou Youn were tried. Rather than casting doubt on the TC's approach, this demonstrates the care with which the TC exercised its discretion to accept portions of witness evidence it found reliable and reject aspects it did not, without articulating every step of its reasoning. *See* Standard of Review (Reasoned Decision). *See also* **E465** Case 002/02 TJ, para. 307 fn. 1904 for evidence corroborative of her evidence.

2447 Appellant's argument that the evidence went against "the spirit and recommendations contained in the official CPK publication" is similar to other arguments in his brief, *e.g.* in regard to DK Constitution provisions and stated motives behind CPK policies that were implemented through the commission of crimes (*see e.g.* response to Grounds 179, 181, 183). *See further* the extensive evidence upon which the TC based its "marrying age" finding in **E465** Case 002/02 TJ, paras 3581-3584, which took into account evidence that Appellant stated that younger women should not get married too early, but the weight of the evidence showed that ages varied from 16 to 60. *Contra* **F54** Appeal Brief, para. 1238.

2448 Appellant alleges that Chea Deap contradicted evidence from other Ministry officials. However, Phan Him's evidence merely stated that she personally was not aware of instructions that 100 couples had to be married per month, not that such instructions were not given. *See* **E1/467.1** Phan Him, T. 31 Aug. 2016, 15.01.08-15.04.09, p. 99, line 9-p. 100, line 7. *See also* her evidence that she was herself forced to marry in a ceremony with 20 other couples (**E1/467.1** Phan Him, T. 31 Aug. 2016, 14.21.44-14.25.27, p. 91, line 14-p. 92, line 9; 15.07.21-15.09.51, p. 103, lines 1-5). Beit Boeum testified that for ordinary people, "If *Angkar* organised them to get married, they had to get married." (*see* **E1/502.1** Beit Boeum, T. 28 Nov. 2016, 11.21.57-11.24.06, p. 41, lines 3-4), making it clear that even at the ministerial level, officials were either participating in or aware that such weddings were taking place. *Contra* **F54** Appeal Brief, para. 1239 ("deviations from the marriage regulations were essentially taking place in the remote areas of Phnom Penh"). The TC also had before it other evidence of training sessions and meetings that made evident that the goal of marriages was to increase the population. *See e.g.* **E465** Case 002/02 TJ, para. 3556.

2449 The TC is entitled to rely on out-of-court evidence and Appellant fails to demonstrate any error in the reliance on Ruos Suy's evidence in this regard (*see* response to Ground 30) *contra* **F54** Appeal Brief, para 1240. *See also* **E465** Case 002/02 TJ, paras 3569-3571, 3586, 4248.

2450 Ground 170: **F54** Appeal Brief, *Use of threat and context of coercion in the country,* paras 1259-1270; **F54.1.1** Appeal Brief Annex A, pp. 58-59 (EN), p. 54 (FR), p. 84 (KH).

716. The weight of the evidence clearly shows that a prevailing climate of fear negated genuine consent during the DK regime.[2451] Nonetheless, Appellant argues that the TC's findings were based on an erroneous examination of the evidence.[2452] He challenges the general representativeness of the evidence of individuals unable to refuse proposals without negative consequences,[2453] dealt with elsewhere in this Response,[2454] as well as the testimony of specific individuals, dealt with below.

Misrepresentation of the testimony of Mom Vun

717. Appellant wrongly argues that the epitome of misrepresentation of evidence was the TC's finding that the rape outside marriage alleged by CP Mom Vun was the result of her refusal to marry.[2455] This argument fails, as Appellant is asking the SCC to substitute its assessment for that of the TC without demonstrating any error. He does not show that the Prosecution put words into the CP's mouth, as Mom Vun linked her rape to her refusal to be married prior to any questioning by the Prosecution.[2456] Furthermore, the fact that the CP did not know of other events similar to her own is of no relevance and does not diminish the validity of her testimony.[2457]

Alleged errors regarding findings on the weddings of disabled soldiers and cadres

718. Appellant also wrongly challenges the TC's finding that weddings of disabled soldiers or cadres who had the privilege of choosing their spouses did not involve genuine consent.[2458] He erroneously claims the TC relied on "generalities" to conclude that the duty to serve the nation and unconditional respect for the discipline of *Angkar* precluded disabled soldiers' ability to freely consent.[2459] First, Appellant incorrectly challenges reliance on an "unspecified speech" by Appellant.[2460] Contrary to his assertions, this speech is not "unspecified", as the Judgment is clear in its reference to a speech given at

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2451 **E465** Case 002/02 TJ, paras 3621-3622 (use of threats by authorities, including threat of death), 3623 (the general climate of fear did not allow objection), 3624 (threats carried out), 3625 (finding that "genuine consent was impossible"), 3673-3674 (TK coercive practices), 3676 (TTD coercive practices), 3677-3678 (1JD coercive practices).

2452 **E465** Case 002/02 TJ, para. 1259.

2453 **F54** Appeal Brief, paras 1260-1261.

2454 *See* response to Ground 165.

2455 **F54** Appeal Brief, paras 1262-1263 *impugning* **E465** Case 002/02 TJ, paras 3621 (fn. 12094), 3658, 3690.

2456 **E1/475.1** Mom Vun, T. 16 Sept. 2016, 11.18.38-11.23.04, p. 48, line 21-p. 50, line 18. *Contra* **F54** Appeal Brief, para. 1263.

2457 *Contra* **F54** Appeal Brief, para. 1263.

2458 **F54** Appeal Brief, paras 1265-1267 *impugning* **E465** Case 002/02 TJ, paras 3586-3590.

2459 **F54** Appeal Brief, para. 1264.

2460 **F54** Appeal Brief, para. 1265.

a meeting chaired by Appellant in which he "instructed that all ministries had to arrange marriages".[2461] Second, Appellant challenges reliance on Norodom Sihanouk's book as corroborating evidence.[2462] On the contrary, the TC was indeed aware of its evidentiary value and considered this in the Judgment.[2463] Additional trial testimony and various *RY* issues, unmentioned by Appellant, were also considered by the TC, making it clear that females were expected to sacrifice themselves for "patriotic" reasons and for the benefit of the revolution, and that this instruction came from the highest levels.[2464]

719. Appellant further alleges that the TC set aside testimony contrary to its findings.[2465] Closer inspection of the evidence put forward by Appellant in support of this claim, however, proves again that Appellant is simply asking the SCC to interpret evidence differently. In some cases, Appellant provides an alternate reading that no reasonable trier of fact could entertain,[2466] such as his assertion that Sou Sotheavy stated that the marriage of disabled soldiers was not forced.[2467] He conveniently omits the fact that Sou Sotheavy testified that none of the women involved in these ceremonies dared refuse.[2468] In light of ample evidence of the potentially severe consequences of refusal,[2469] it was reasonable for the TC to exercise its discretion to accept some parts of a witness' testimony and reject others without articulating every step of its reasoning in making this assessment.[2470]

720. Appellant adopts the same selective and flawed approach to challenge the evidence concerning the weddings of male cadres who were either able to choose their wives or were consulted when matched, arguing that the TC erred in its finding that women were

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2461 **E465** Case 002/02 TJ, para. 3569.

2462 **F54** Appeal Brief, para. 1266.

2463 When discussing this book elsewhere, the TC acknowledged that Appellant did not have the opportunity to challenge the statements made in the book, which "diminishes the weight to be accorded to them" (*see* **E465** Case 002/02 TJ, para. 3401).

2464 *See e.g.* **E465** Case 002/02 TJ, paras 3586-3589 (Ta Mok established a policy requiring the Youth Handicap Unit to bring in women (normal civilians from pepper plantations in Kampot) to marry disabled soldiers. Two resulting ceremonies are described by various witnesses).

2465 **F54** Appeal Brief, para. 1266.

2466 **F54** Appeal Brief, para. 1266 (Nop Ngim is misquoted by Appellant, who argues she consented to the marriage because she was "quite senior or mature". A fuller reading of the testimony shows Nop Ngim explained that her age made running away riskier (*see* **E1/469.1** Nop Ngim, T. 5 Sept. 2016, 15.48.30-15.50.44, p. 114, lines 10-14).

2467 **F54** Appeal Brief, para. 1269.

2468 **E1/462.1** Sou Sotheavy, T. 23 Aug. 2016, 15.48.43-15.49.56, p. 96, lines 2-4 ("I saw the disable[d] soldiers coming to get married. It was not a -- it was not forced. The women were asked to get married to those disable[d] soldiers and none of them dare[d] to refuse").

2469 *See* response to Ground 165.

2470 *See* Standard of Review (Reasoned Decision).

forced to marry without being asked for their consent.[2471] The evidence put forward by Appellant does little to demonstrate any error, as it only serves to demonstrate that women in these cases did not and could not freely consent.[2472]

Alleged errors in the TC's assessment of evidence regarding marriage refusals

721. Appellant argues without merit that the TC erred in its assessment of evidence to conclude that cases of refusal without prejudicial consequences were an exception.[2473] Specifically, he challenges the interpretation of the testimony of Em Phoeung and Sun Vuth, who were able to refuse their marriages. However, the evidence put forward by Appellant does not support this conclusion and is simply an alternate explanation of the facts. Indeed, in the case of Sun Vuth, Appellant's narrative directly contradicts the evidence, as he clearly stated "others could not protest" and "whatever *Angkar* appointed us to do, we must follow".[2474] Appellant clearly confuses the ability to delay forced marriage with the ability to refuse it altogether, a privilege that the totality of the evidence makes clear did not exist.[2475]

Ground 161: Errors in examining the criterion of the nature and gravity similar to that of the other listed CAH[2476]

722. **Ground 161 should be dismissed as Appellant fails to establish that the TC erred in finding the *actus reus* of OIA in the form of forced marriages was established.**

723. Appellant wrongly claims that the TC conducted an incomplete analysis of the evidence which led it to commit numerous errors, including that forced marriage was not a crime

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2471 **F54** Appeal Brief, para. 1268 *impugning* **E465** Case 002/02 TJ, para. 3591.

2472 *Contra* **F54** Appeal Brief, para. 1268, fns 2416 (Appellant fails to view Prak Yut's testimony in its entirety. When confronted with her contradictory accounts of her marriage, she clarified, "It had to be him. And in Sector 35, he was overall in charge, and if I did not follow his instructions, it meant that I disrespected him. Loving him or not, I had to follow his instruction". *See* **E1/378.1** Prak Yut, T. 19 Jan. 2016, 11.20.00-11.22.00, p. 44, lines 13-25. In relation to Cheam Kim's testimony, Appellant wrongly contends her marriage was "arranged" not forced (*see* response to Ground 165)), 2417 (**E1/502.1** Beit Boeum, T. 28 Nov. 2016, 11.19.05-11.21.57, p. 40, lines 15-25 stating that "Men made a proposal to us and even if we disliked them, we had to accept them," and "if we continued to make such a refusal, then we would be accused of being an enemy").

2473 **F54** Appeal Brief, para. 1269 *impugning* **E465** Case 002/02 TJ, para. 3625.

2474 **E1/411.1** Sun Vuth, T. 30 Mar. 2016, 14.40.12-14.41.34, p. 79, lines 4-11.

2475 **E465** Case 002/02 TJ, paras 3621-3622 (use of threats by authorities, including threat of death), 3623 (the general climate of fear did not allow objection), 3624 (threats carried out), 3625 (finding that "genuine consent was impossible"), 3673-3674 (TK coercive practices), 3676 (TTD coercive practices), 3677-3678 (1JD coercive practices).

2476 Ground 161: **F54** Appeal Brief, *Errors in examining the criterion of the nature and gravity similar to that of the other listed CAH,* para. 1118; **F54.1.1** Appeal Brief Annex A, p. 59 (EN), p. 51 (FR), pp. 80-81 (KH).

before, after, or at the time of the facts.[2477] As discussed elsewhere in this Response, the TC fully discharged its mandate to analyse forced marriage as an OIA,[2478] correctly following the SCC's clear jurisprudence that it was necessary only to find that the conduct violated a "basic right of the victims and [was] of similar nature and gravity as other enumerated [CAH]".[2479] In keeping with these steps, the TC found that forced marriage violated the right to marry freely that was embedded in the UDHR,[2480] then undertook a detailed factual assessment to determine whether marriage practice during the DK regime was of similar nature and gravity to the enumerated CAH.[2481] No more was required. Appellant's further erroneous claim that the TC tried to cover up these alleged errors by creating an artificial distinction between arranged marriages and forced marriages, is also discredited elsewhere.[2482] Appellant therefore fails to demonstrate that the TC incorrectly assessed the evidence to find that the nature and gravity of this conduct, being similar to other CAH, enabled characterisation of the *actus reus* of OIA.

Ground 163: Errors in the analysis of the suffering endured in these marriages[2483]

724. **Ground 163 should be dismissed as Appellant fails to establish that the TC made an error when it found that the factual allegations of OIA through forced marriages were as grave as the enumerated CAH.**

725. Appellant argues without merit that a reasonable analysis of the evidence concerning the way in which marriages were held would not allow the TC to conclude that the general suffering was as grave as that caused by the enumerated CAH.[2484] His claim overlooks the fact that the seriousness of an act is assessed on a case-by-case basis,[2485] while the facts must be assessed for their gravity holistically.[2486] Indeed, the TC correctly recognised this in its finding that forced marriage "*cumulatively* caused serious mental or physical suffering or injury or constituted a serious attack on the human dignity of the

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2477 **F54** Appeal Brief, para. 1118.
2478 *See* response to Grounds 85, 97, 98, 160.
2479 *See* response to Ground 160 *citing* **F36** Case 002/01 AJ, para. 586.
2480 **E465** Case 002/01 TJ, para. 743 *citing* UDHR, art. 16(2).
2481 **E465** Case 002/02 TJ, paras 727, 740-749, 3536-3694.
2482 **F54** Appeal Brief, para. 1118. *See* response to Ground 162.
2483 Ground 163: **F54** Appeal Brief, *Errors in the analysis of the suffering endured in these marriages,* paras 1156-1188; **F54.1.1** Appeal Brief Annex A, p. 56 (EN), p. 52 (FR).
2484 **F54** Appeal Brief, para. 1163 *impugning* **E465** Case 002/02 TJ, para. 3681.
2485 Case 001-**E188** *Duch* TJ, para. 369; **E313** Case 002/01 TJ, para. 438; Case 004-**D257/1/8** PTC Forced Marriage Annulment Considerations, International Judges' Opinion, para. 16; *Kordić & Čerkez* AJ, para. 117; *Lukić & Lukić* TJ, para. 961.
2486 **F36** Case 002/01 AJ, para. 590.

victims"[2487] and "considered holistically [...] this conduct is of similar gravity as other enumerated crimes against humanity".[2488] There is no requirement that the victim suffer long-term effects, although this may be relevant to the seriousness of the acts.[2489]

726. The TC's holistic gravity assessment clearly demonstrated that men and women who were forced into marriage during the DK regime suffered physical and mental trauma that still lingers.[2490] Victims reported weeping and shaking with fear at ceremonies and recalled the painful sorrow, anger, and disappointment they felt but could not freely express.[2491] Some were young and not ready to marry.[2492] Others were forced to remarry while still grieving the loss of their former partners.[2493] The emotional pain caused by the absence of tradition and individuals' parents at ceremonies was also great. Some believed it meant their marriages could not be happy or were unprotected spiritually.[2494] Forced to have sexual intercourse with someone they did not know or love, particularly in such rapid succession after being forced to marry, also had serious and long-lasting effects.[2495] Many victims still hold a deep sense of shame or self-blame and harbour fears that they or their children will suffer discrimination as a result of their forced marriages.[2496]

727. In light of such evidence, Appellant's argument that suffering was not sufficiently grave given that some individuals grew to love each other adopts an overly narrow view of the evidence.[2497] For example, claiming Va Limhun cannot be seen to have suffered because she grew to love her spouse ignores the trauma as well as the cumulative impact it had.[2498] Indeed, she made evident that she was fearful she would be killed if she were to refuse,[2499] and feelings that later developed do not invalidate the psychological impact she

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2487 **E465** Case 002/02 TJ, para. 3691 (emphasis added).
2488 **E465** Case 002/02 TJ, para. 3692.
2489 Case 001-**E188** *Duch* TJ, para. 369; **E313** Case 002/01 TJ, para. 439; *Vasiljević* AJ, para. 165; *Lukić & Lukić* TJ, para. 961, fn. 2887.
2490 **E465** Case 002/02 TJ, paras 3679-3682, 3692.
2491 **E465** Case 002/02 TJ, para. 3679 and all citations therein. *See also* **E3/9614** Theresa De Langis *et al.*, *Like Ghost Changes Body*, EN 01037075 ("Disappointment is the prevailing emotional response [...] at having lost the opportunity to exert control over a major life decision such as marriage and to not have that life decision validated and legitimized by family and ancestors.").
2492 *See e.g.* **E465** Case 002/02 TJ, fn. 12274 (Pen Sochan, Em Oeun, Nget Chat), para. 3583. *See also* **E1/466.1** Chea Deap, T. 30 Aug. 2016, 15.12.05-15.13.40, p. 92, lines 18-20.
2493 **E465** Case 002/02 TJ, para. 3680 and all citations therein.
2494 **E465** Case 002/02 TJ, para. 3681 and all citations therein.
2495 **E465** Case 002/02 TJ, paras 3683-3685, 3691-3692.
2496 *See e.g.* **E457/6/1** Co-Prosecutors' Closing Brief in Case 002/02, para. 624 and the evidence cited therein.
2497 **F54** Appeal Brief, para.1164.
2498 **F54** Appeal Brief, para. 1164, fn. 2163.
2499 **E3/9756** Va Limhun WRI, EN 01046942-43 ("My hand-holding ceremony was held a few days after Chhen had informed me. I dared not refuse his order because he had warned me that I would be killed like my older brothers if I refused.").

experienced at the time of the events or that lingered afterward.[2500]

728. Appellant's failure to take into account the evidence as a whole is further exemplified by his arguments concerning the fact that "disappointment" cannot be read as causing serious mental harm with lasting effects.[2501] When the testimony of the witnesses referred to by Appellant are taken as a whole, it is clear the disappointment they described was long-lived but also only one facet of the impact. Indeed, Mom Vun also testified to being raped, an incident she believed to be linked to her refusal to be married.[2502] Ling Lrysov was subjected to fear, threats and coercion to marry,[2503] as was Khin Vat.[2504]

729. In addition to failing to take into account the evidence as a whole, Appellant also misrepresents it. He argues Meas Saman did not suffer as a result of her forced marriage because it did not cause issues during her second marriage, and he absurdly alleges that her CPA "petitioned for her [first] husband to be executed in reparation for her suffering", thereby indicating that she considered him, and not the regime, to be responsible for her suffering.[2505] This is entirely false. Despite differences between the English and French translations, both versions of the CPA clearly indicate that she sought reparation for the trauma resulting from the execution of the husband to whom she was forcibly married.[2506] This in no way demonstrates that she finds him to be the "main perpetrator" of her suffering. In fact, it suggests the opposite.

Alleged errors in the TC's assessment of Civil Party evidence

730. Appellant wrongly argues that the TC failed to consider the "diversity of CP experiences and feelings" evident in the nuances and contradictions in the evidence.[2507] However, he presents no argument capable of challenging the TC's findings and instead offers nothing more than alternate, often unreasonable, interpretations of the same facts. For example,

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2500 *Contra* **F54** Appeal Brief, paras 1171, 1174 (the testimonies of Suon Yim, Sum Pet, Yos Phal, and Kul Ben are similarly erroneously challenged by Appellant).

2501 **F54** Appeal Brief, para. 1164.

2502 **E1/475.1** Mom Vun, T. 16 Sept. 2016, 11.18.38-11.23.04, p. 49, lines 3-21.

2503 **E1/334.1** Yi Laisov, T. 20 Aug. 2015, 14.06.57-14.09.02, p. 59, lines 14-15 ("I was told that if I refused to go back to my village and get married, my family, the whole family would be killed.").

2504 **E1/325.1** Khin Vat, T. 29 July 2015, 15.38.30-15.40.38, p. 90, line 18-p. 91, line 5 ("I was somehow forced to get married […] I was told that if I was to refuse the marriage, *Angkar* would not be responsible […] My husband advised me not to say anything as he would not harm me although I did not love him, and that I would be dead if I happened tell anyone that I did not love him […] I then forced myself to accept him as my husband").

2505 **F54** Appeal Brief, para. 1164, fn. 2163.

2506 **E3/6190** Meas Saran CPA, EN 01330356 ("Physical injury: […] My husband and younger sister died from starvation or were killed for committing no offense).

2507 **F54** Appeal Brief, paras 1166-1168 *impugning* **E465** Case 002/02 TJ, para. 3679.

he argues the TC did not highlight the fact that Om Yoeurn reunited with her husband after the DK regime.[2508] However, the CP made clear that her initial decision to marry her husband was not her own, he raped her after they were married, and she reunited with him because of family pressure.[2509] Appellant's assertion that the TC ignored the fact that Nget Chat and Chea Deap did not say that their marriage caused them greatest suffering[2510] is also without merit; there is no requirement that the suffering must be graver than that of other crimes of which they were victims. All that is required is a determination of whether marriage practice during the DK regime was of similar nature and gravity to the enumerated CAH.[2511]

731. Appellant further incorrectly argues that the TC erred in fact and law by using the testimony of Sou Sotheavy to "support general findings about the impact of forced marriage", arguing that she "suffered most due to her position as a transgender woman" as a result of Khmer culture and not the DK regime.[2512] However, it cannot be argued that the TC relied on the testimony of Sou Sotheavy alone. The TC cited at least five other pieces of testimony to find that "many [individuals] recalled that they wept and that they were upset, disappointed and fearful during their wedding ceremonies."[2513] Her experience was not the exception.

732. Appellant's alleged "flagrant contradictions" do not withstand scrutiny or call Em Oeun's evidence into question. For example, he erroneously argues that Em Oeun was not a victim of forced marriage, and due to multiple inconsistencies, his testimony was of low probative value.[2514] The fact that the CP was able to choose his wedding date does little to undermine the rest of his testimony in which he clearly recounted that his marriage was forced and caused suffering.[2515]

733. With regard to Mom Vun, Appellant again fails to present evidence capable of

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2508 **F54** Appeal Brief, para. 1169.

2509 *See e.g.* **E1/461.1** Om Yoeurn, T. 22 Aug. 2016, 15.41.00-15.49.16 p. 94, line 16-p. 97, line 5 (the CP was told she had to get married and refused because she already had a child, but she was told if she did not marry, "action would be taken" against her; she did not protest because she had observed other people who had protested or refused to marry had disappeared), 15.54.28-15.56.05, p. 98, line 25-p. 99, line 13 (discussing why she did not want to marry her husband); **E1/462.1** Om Yoeurn, T. 23 Aug. 2016, 09.31.58-09.34.14, p. 12, lines 10-19 (her parents, parents-in-law and village elders urged her to accept her husband and they reunited), 09.37.21-09.38.46, p. 14, line 21-p. 15, line 6 (rape by her husband).

2510 **F54** Appeal Brief, para. 1169.

2511 *See* response to Ground 161.

2512 **F54** Appeal Brief, para. 1170 *impugning* **E465** Case 002/02 TJ, para. 3679.

2513 *See* **E465** Case 002/02 TJ, para. 3679.

2514 **F54** Appeal Brief, para. 1172.

2515 *See e.g.* **E1/113.1** Em Oeun, T. 23 Aug. 2012, 15.53.21-15.57.58, p. 103, line 21-p. 105, line 3, 15.59.41-16.06.27, p. 106, line 7-p. 107, line 25.

challenging the TC's findings on her credibility,[2516] repeating the same claims he previously raised that the TC expressly considered and rejected.[2517] As to Po Dina, the fact that she ultimately did not remarry during the DK regime does not invalidate the TC's reliance on her evidence.[2518] As the TC noted, Po Dina testified that she lost her husband, child and parents and then refused to remarry, which resulted in a serious beating and imprisonment.[2519] Clearly, this described the difficult emotions she had at the prospect of having to remarry against her will while still grieving the loss of her husband, which is what the TC found.[2520] Appellant's other arguments also fail, as addressed elsewhere in this Response.[2521]

Ground 164: Errors on the regulation of marriage and its implementation[2522]

734. **Ground 164 should be dismissed as Appellant fails to articulate any error in the TC's finding that the *mens rea* for the CAH of OIA through conduct characterised as forced marriage was established.**

735. It is unclear what Appellant intends to allege in this ground, as Annex A disputes the Chamber's finding regarding the *mens rea* for the CAH of OIA through forced marriage,[2523] while his brief repeats erroneous claims regarding the *actus reus*.[2524] Indeed, Appellant fails to advance any substantive argument in claiming that he did not possess the requisite *mens rea*, simply stating that "the Chamber committed a number of errors in finding on the culpable intent of Appellant to commit these crimes" without providing citations to evidence or legal authorities.[2525] Appellant has failed to articulate any error, let alone substantiate it, and this ground should be dismissed.

2516 **F54** Appeal Brief, para. 1173 *impugning* **E465** Case 002/02 TJ, paras 3649, 3680.

2517 **E465** Case 002/02 TJ, paras 3648-3649 *read in conjunction with* **F54** Appeal Brief, fn. 2184. The TC correctly found that Appellant had the opportunity to confront Mom Vun on credibility issues in court, clarified that it placed greater weight on in-court testimony than on CPAs, and noted that inconsistencies are common with respect to the details of events which occurred more than 30 years ago.

2518 **F54** Appeal Brief, para. 1173 *impugning* **E465** Case 002/02 TJ, para. 3680.

2519 **E465** Case 002/02 TJ, fn. 12279.

2520 **E465** Case 002/02 TJ, para. 3680.

2521 *See* response to Grounds 165 (re. consent being a part of CPK policy and national representativeness of the evidence as argued in **F54** Appeal Brief, paras 1157-1158, 1176-1188), 162 (re. Appellant's attempt to conflate traditional marriage practices with regulation of marriage under DK as argued in **F54** Appeal Brief, paras 1159-1162).

2522 Ground 164: **F54** Appeal Brief, *Errors on the regulation of marriage and its implementation*, paras 1189-1190; **F54.1.1** Appeal Brief Annex A, p. 57 (EN), p. 52 (FR), p. 81 (KH).

2523 **F54.1.1** Appeal Brief Annex A, p. 57 (EN) noting that the challenged finding is whether the intentional behaviour considered by the TC constitutes the *mens rea* for the crime.

2524 **F54** Appeal Brief, para. 1189 *citing* paras 658-665.

2525 **F54** Appeal Brief, para. 1189. Appellant further fails to refer to any other portion of his brief which could serve to substantiate this claim.

Ground 174: Errors relating to the monitoring of the consummation of marriage[2526]

736. **Ground 174 should be dismissed as Appellant fails to establish that the TC erred in its findings that consummation of marriage took place under coercion as a result of monitoring measures imposed, leading to the rape of at least one individual.**

737. Appellant wrongly argues that a comprehensive examination of the evidence would not have allowed the TC to conclude BRD that couples were commonly monitored to ensure that their marriages were consummated.[2527] Specifically, he furnishes a number of arguments that allegedly prove that the TC based its findings on the experience of CPs from the marriage segment, misinterpreted their testimony, overlooked other evidence, and failed to consider whether their accounts were representative of the evidence as a whole. Each of these arguments are examined in turn below, however, from the outset it is important to note that the overarching argument is misleading, as the TC's findings included evidence from the marriage segment as well as the testimony of at least 10 individuals from other segments of the trial.[2528]

The purpose of monitoring

738. Appellant furnishes no evidence capable of supporting his argument that it could not be established that the purpose of monitoring was to ensure newlyweds consummated their marriages.[2529] Contrary to his claim, evidence from Om Yoeurn, Preap Sokhoeurn, Chum Samoeurn, Meas Laihour, Heng Lai Heang and Chang Srey Mom does not demonstrate a "diversity of experiences", it explicitly links the militia patrols to forced consummation.[2530] His further assertion that the effect that such monitoring had on

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2526 Ground 174: **F54** Appeal Brief, *Errors relating to the monitoring of the consummation of marriage,* paras 1341-1398; **F54.1.1** Appeal Brief Annex A, pp. 59-60 (EN), p. 55 (FR), p. 86 (KH).

2527 **F54** Appeal Brief, para. 1343 *impugning* **E465** Case 002/02 TJ, paras 3644, 3659.

2528 **E465** Case 002/02 TJ, paras 3645-3661, fns 12186-12228. *See also* response to Ground 165.

2529 **F54** Appeal Brief, para. 1345 *impugning* **E465** Case 002/02 TJ, paras 3641-3644.

2530 **E1/462.1** Om Yoeurn, T. 23 Aug. 2016, 09.18.26-09.20.29, p. 8, lines 1-6 ("At night time, the guards monitored us. And if we did not consummate our marriage, then measures would be taken."); **E1/487.1** Preap Sokhoeurn, T. 20 Oct. 2016, 14.31.22-14.33.00, p. 85, lines 18-24 ("After we got marri[ed], we were constantly under surveillance, they looked inside the window, they stood outside and we were told to stay together and consummate our marriage. They conducted surveillance the whole night."); **E1/321.1** Chum Samoeurn, T. 24 June 2015, 14.29.45-14.31.35, p. 66, lines 10-15 ("There were militias who came to eavesdrop on us, but they did nothing. I did not know whether these militias were armed because I did not see them, I only heard their footsteps [...] They wanted to know whether we consummate the marriage."); **E1/305.1** Meas Laihour, T. 26 May 2015, 09.46.36-09.48.56, p. 19, lines 10-21 ("They came to watch over whether we got along with each other and whether we consummated our marriage."); **E1/476.1** Heng Lai Heang, T. 19 Sept. 2016, 09.50.55-09.53.55, p. 16, lines 19-22 ("For those who agreed with each other, they were not monitored. But for those who did not get along with each other, they were monitored and investigated. They were followed and they would be called to reprimand or re-educated."); **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 15.45.52-15.47.54, p. 87, lines 1-8 ("When the Militia came to eavesdrop on

newlywed couples varied from case to case is also of no relevance.[2531] Some individuals forced themselves to be quiet,[2532] while others forced themselves to have sexual relations.[2533] Both scenarios clearly established that such monitoring caused fear and there was a climate of coercion.

739. Appellant also fails to establish that the testimonies of Chea Deap[2534] and Nop Ngim[2535] were misrepresented and unreliable in this regard. The fact that Chea Deap's testimony is the only testimony to indicate that monitoring occurred within her ministry is of no relevance as the TC did not enter any findings with regard to monitoring at ministries. Similarly, the TC did not rely on the testimony of Nop Ngim for its finding that the monitoring of marriages was carried out on orders from the authorities.[2536]

Reporting on the consummating of marriages to upper echelons and the role of militias

740. Appellant points to no evidence capable of substantiating his arguments relating to the TC's finding that the militia reported their monitoring activities to the authorities. His allegation that Ry Pov's account should have been treated with more caution given that the reporting structure he described would have required a "large number of personnel movements"[2537] is nothing more than supposition. The fact that the reporting structure was complex does not indicate it was not in place. Similarly, with regard to the evidence of Heng Lai Heang, Appellant is dealing in semantics.[2538] Her evidence corroborates other testimony that information was collected and reported up the chain of command.[2539]

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us, in order to check whether we didn't have sex with one another so we were just on silence and we pretended to be quiet and sleeping.").

2531 **F54** Appeal Brief, para. 1346.

2532 *See e.g.* **E1/489.1** Nget Chat, T. 25 Oct. 2016, 09.07.15-09.08.56, p. 3, line 23-p. 4, line 2 ("I dared not make noise. Because I noticed that militiamen were walking nearby and I was afraid that they would eavesdrop and hear me saying something or that I did not respect the resolution and would be sent to the upper level. So I was quietly lying there with that person.").

2533 *See e.g.* **E1/488.1** Kul Nem, T. 24 Oct. 2016, 15.08.17-15.10.02, p. 100, lines 17-22 ("We were being monitored if we consummated the marriage or not, and that's what happened. We were afraid, so we had to consummate the marriage and that happened three days after the marriage. I had to think during the initial three days and then after that I decided to consummate the marriage because we had been monitored."); **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 10.40.49-10.44.13, p. 29, lines 12-15 ("I, at that time, had to sleep with my husband because I would be in danger if I did not sleep with my husband. Because there was a militiaman eavesdropping, I submitted myself to be a wife. I could not avoid, so I tried to take this.").

2534 **F54** Appeal Brief, para. 1347.

2535 **F54** Appeal Brief, para. 1348.

2536 *See* **E465** Case 002/02 TJ, para. 3643 (discussing evidence that militiamen who monitored couples reported to authorities, and citing evidence that they were assigned to monitor couples; Nop Ngim is not cited). *Contra* **F54** Appeal Brief, para. 1348.

2537 **F54** Appeal Brief, paras 1349-1350 *impugning* **E465** Case 002/02 TJ, para. 3643.

2538 **F54** Appeal Brief, para. 1351.

2539 **E465** Case 002/02 TJ, para. 3643, *particularly* fn. 12183.

Whether such reports were sent to unit "supervisors" or "senior officials" is irrelevant, as the TC never asserted that senior CPK officials directly received such reports.[2540]

741. Appellant wrongly argues that the TC ignored evidence regarding the real role of militias in communities,[2541] pointing to the testimonies of Neang Ouch and Yean Lon to argue that the militia only watched over communities and provided security.[2542] However, their testimony does little to displace the finding supported by ample evidence that militias were monitoring couples. Appellant simply prefers an alternate explanation of the facts.

Alleged errors in the TC's assessment of Duch's testimony

742. Appellant wrongly argues that the TC did not take into account Duch's testimony that only "immoral cadre" monitored weddings as evidenced by the fact that a cadre named Pang was punished for such behaviour.[2543] The Judgment directly rejects this claim. The TC explicitly stated that "contrary to Duch's statement, the evidence before the Chamber indicates that newlywed couples were monitored to check whether they had consummated the marriage", while "Pang was not arrested [for asking his subordinate to spy on married couples] but [as part of] a large purge of people from Hospital P-78".[2544] This was supported by entries in various S-21 entry logs.[2545] Thus, the TC properly evaluated inconsistencies in the evidence, considered reliability and credibility *in toto*, and accepted and rejected fundamental features of the evidence based on a holistic assessment.[2546] Appellant fails to show the TC erred.

The effect of a coercive environment on forced consummation

743. In addition to challenging the existence of a monitoring policy, Appellant argues that the TC erred in concluding that the environment was such that individuals felt that they were compelled to have sexual relations with their spouses.[2547] First, he argues the TC incorrectly interpreted the statements of Prak Yut, Chang Srey Mom and Mam Soeurn.[2548] In each case, he merely presents an alternative interpretation of the facts

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2540 *Contra* **F54** Appeal Brief, para. 1351. *See also* **E465** Case 002/02 TJ, para. 3644 (the TC was satisfied that couples were commonly monitored to ensure that they had consummated their marriages).
2541 **F54** Appeal Brief, para. 1352.
2542 **F54** Appeal Brief, paras 1352, 1354.
2543 **F54** Appeal Brief, para. 1353.
2544 **E465** Case 002/02 TJ, para. 3641, fn. 12177.
2545 **E465** Case 002/02 TJ, para. 3641, fn. 12177.
2546 *Setako* AJ, para. 31.
2547 **F54** Appeal Brief, para. 1361.
2548 **F54** Appeal Brief, paras 1365-1366.

already considered by the TC. Illustrative of this is the fact that Appellant himself acknowledges that Chang Srey Mom and Mam Soeurn referenced a fear of being killed if marriages were not consummated,[2549] clearly indicating a coercive climate. The testimony of Prak Yut is equally misrepresented by Appellant, who argues that the TC ignored an important piece of her testimony: namely, that in her capacity as district chief, she did not send couples away to be punished for not consummating their marriage.[2550] He fails to acknowledge that directly before this cited passage, Prak Yut expressly stated, "I did not have any measure to enforce upon them. However, *they would be brought to the district to be educated* so that they could understand each other".[2551] A wealth of evidence before the TC demonstrates that reeducation was often used as a threat and often involved punishment for those who did not conform to CPK policies.[2552]

744. In relation to evidence from the marriage trial segment, Appellant argues the TC committed several errors in its evaluation of the testimony of Say Naroeun, Om Yoeurn, Chea Deap, Kul Nem, Pen Sochan, and expert Kasumi Nakagawa.[2553] He makes no further argument in relation to Say Naroeun, Chea Deap, or Kul Nem beyond this sentence. In relation to the remaining two CPs, he advances a series of arguments which misrepresent the evidence and ignore the presumption that the TC has evaluated all of the evidence before it.[2554] He argues that the rapes of Pen Sochan and Om Yoeurn should have been considered as exceptional and inconsistent with the CPK policy of consent.[2555] As argued elsewhere, he fails to establish this point and simply repeats the erroneous argument that the moral principles of the CPK promoted consensual relationships.[2556]

745. As to expert witness Kasumi Nakagawa, Appellant wrongly argues that she spoke about abuse of power by *local authorities* "which she analysed as being the failure of the senior leadership to enforce 'the policy to protect women'".[2557] However, her testimony, cited in full by Appellant, shows clear support for the TC's finding that no such policy existed in practice because of *higher authorities*: "There was a very strict policy and everybody knew about it. I think the higher authority failed to implement that policy."[2558]

2549 **F54** Appeal Brief, para. 1366.
2550 **F54** Appeal Brief, para. 1365.
2551 **E1/378.1** Prak Yut, T. 19 Jan. 2016, 13.47.30-13.49.36, p. 55, line 21-p. 56, line 2 (emphasis added).
2552 *See e.g.* response to Grounds 179, 184.
2553 **F54** Appeal Brief, paras 1367, 1370.
2554 *See* Standard of Review (Reasoned Decision).
2555 **F54** Appeal Brief, paras 1368-1369.
2556 *See* response to Ground 173.
2557 **F54** Appeal Brief, para. 1370 (emphasis added).
2558 **E1/473.1** Kasumi Nakagawa, T. 14 Sept. 2016, 14.13.21-14.15.30, p. 77, lines 16-19 ("There was a very

746. Appellant also points to evidence that was allegedly "ignored" by the TC. He argues the TC failed to note that CPs who were married against their will (Nop Ngim, Phan Him, and Seng Soeun) did not mention consummating their marriages under duress.[2559] His argument ignores the TC's finding that where consent to marriage is not real, consummation of the marriage is *ipso facto* forced.[2560] Appellant further points to the testimonies of Chang Srey Mom, Nop Ngim and Srey Soeum to argue that they "did not 'feel scared'" or "accepted sexual relations [...] because they were already husband and wife".[2561] As argued elsewhere, the assertion that marriage normalised their sexual relations is meritless.[2562]

747. The testimony of Preap Sokhoeurn and Prak Doeun is further misrepresented in this regard. Appellant presents Preap Sokhoeurn's rape as a voluntary action on her husband's part.[2563] However, her testimony clearly indicates that "he did that according to *Angkar's* order so that he would not die".[2564] While she also emphasises "that there was no one ordering them" it is still clear from her testimony *in toto* that the circumstances were such that neither could refuse.

748. Prak Doeun is also wrongly reported by Appellant as testifying that couples were not punished for failing to consummate their marriage.[2565] In fact, his testimony indicates the opposite: "I heard [the couples who were arrested] were not punished, but they were re-educated once. They were advised by *Angkar* to consummate their marriage and to live together, and not to blame *Angkar*. And later on, I did not know what happened to them."[2566] Threatened with reeducation, individuals subjected to forced marriage could no more consent to the marriage than they could to its forced consummation.

749. Appellant also argues that the TC ignored the findings of Peg Levine who claimed, "No-one in my [research] sample [was] threatened with death if they did not comply to the request."[2567] Despite Appellant's claims, this statement alone does not show "an

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strict policy [against rape] and everybody knew about it. I think that the higher authority failed to implement that policy. So the policy to protect women, were used to attack women."); **F54** Appeal Brief, para. 1370, fn. 2594.

2559 **F54** Appeal Brief, paras 1371-1372.

2560 **E465** Case 002/02 TJ, para. 3661. *See also* response to Ground 173 (discussing that the very act of rape establishes suffering or harm without it having to be explicitly stated).

2561 **F54** Appeal Brief, para. 1372.

2562 *See* response to Grounds 173.

2563 **F54** Appeal Brief, para. 1372.

2564 **E1/488.1** Preap Sokhoeurn, T. 24 Oct. 2016, 13.51.50-13.54.28, p. 75, lines 18-25; *contra* **F54** Appeal Brief, para. 1387.

2565 **F54** Appeal Brief, para. 1372.

2566 **E1/361.1** Prak Doeun, T. 2 Dec. 2015, 15.58.56-16.00.43, p. 100, lines 7-10.

2567 **F54** Appeal Brief, para. 1373, fn. 2601 *citing* **E1/480.1** Peg Levine, T. 10 Oct. 2016, before 15.51.24.

objective and unbiased selection would lead to a different finding".[2568] Indeed, she also testified that 76 out of 192 respondents in her study reported that sexual intercourse was prescribed, and 19 reported compliance with prescription.[2569] The TC therefore clearly acted within its discretion to determine which parts of the evidence to accept and which to reject based on a holistic assessment of the evidence before it, of which Peg Levine's evidence was one small part.

750. Appellant next challenges the TC's finding that the non-consummation of marriage had to be hidden in order to avoid harmful consequences,[2570] simply repeating erroneous arguments relating to the relevance of the traditional Khmer context, which have already been addressed elsewhere in this Response.[2571] Finally, he challenges the finding that when individuals failed to consummate their marriages they were summoned by authorities, claiming the TC ignored the testimony of cadres who emphasised that the purpose was to advise the couple, not reprimand.[2572] However, a number of testimonies Appellant cites in support confirm that individuals were re-educated.[2573] Appellant entirely overlooks the threat that the prospect of reeducation posed.

Alleged errors in relation to the actus reus of rape

751. Lastly, in addition to challenging the facts surrounding the monitoring of individuals, Appellant also challenges the TC's findings with regard to the *actus reus* of rape.[2574] While this section of Appellant's brief is lengthy, Appellant is simply rehashing a number

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2568 **F54** Appeal Brief, para. 1373.
2569 **E465** Case 002/02 TJ, para. 3654.
2570 **F54** Appeal Brief, para. 1374 *impugning* **E465** Case 002/02 TJ, para. 3647.
2571 *See* response to Ground 162.
2572 **F54** Appeal Brief, paras 1375-1376 *impugning* **E465** Case 002/02 TJ, para. 3656.
2573 *See e.g.* **E1/412.1** Sun Vuth, T. 31 Mar. 2016, 09.14.49-09.16.01, p. 5, line 24-p. 6, line 2 ("The upper level would take [newlyweds who would not consummate] for re-education. If the woman didn't love the husband, then the woman would be re-educated that she should love the husband based on the instruction of *Angkar* and that they had to listen and obey the orders of *Angkar*."); **E1/376.1** You Vann, T. 14 Jan. 2016, 15.40.03-15.41.44, p. 71, lines 17-18 ("After they were advised [to sleep together] they agreed to do so. And this couple remains husband and wife at present time."); **E1/378.1** Prak Yut, T. 19 Jan. 2016, 13.47.30-13.49.36, p. 55, line 21-p. 56, line 2 ("For couples who did not consummate their marriage, I did not have any measure to enforce upon them. However, they would be brought to the district to be educated so that they could understand each other and because they were already married. In my capacity as the district chief, I did not take those couples who did not consummate their marriage away for any mistreatment or punishment at all."); **E1/361.1** Prak Doeun, T. 2 Dec. 2015, 15.58.56-16.00.43, p. 100, lines 7-10 ("I heard [the couples who were arrested] were not punished, but they were re-educated once. They were advised by *Angkar* to consummate their marriage and to live together, and not to blame *Angkar*. And later on, I did not know what happened to them.").
2574 **F54** Appeal Brief, paras 1378-1398.

of unfounded and erroneous arguments employed elsewhere in his appeal.[2575]

Ground 173: Errors concerning the examination of the suffering endured in the context of sexual relations within marriage[2576]

752. **Ground 173 should be dismissed as Appellant fails to establish that the TC erred by finding women in particular experienced severe and lasting trauma resulting from forced consummation of marriage as part of the forced marriage policy under DK.**

Alleged errors in the TC's reliance on Chang Srey Mom's testimony

753. Appellant erroneously challenges the finding that at least one instance of rape was established at Tram Kak, arguing that the TC could not reasonably rely on the testimony of Chang Srey Mom to consider that the *actus reus* was established, even less for finding the existence of suffering to the level of severity required to characterise the CAH of OIA.[2577] Closer inspection of Appellant's argument reveals that, rather than providing any evidence capable of triggering appellate review, Appellant is simply disagreeing with the TC's conclusions. There is nothing in the law or the facts to support the assertion that "the fact of being officially married normalised and legitimised their sexual relations".[2578] Appellant simply refashions Chang Srey Mom's testimony in a manner that entirely disregards the fact that the coercive environment made genuine consent impossible.[2579]

754. Neither the marriage nor its subsequent consummation could have been genuinely consented to. While, as noted by Appellant, Chang Srey Mom did indeed testify that "on the issue of consummation, [her husband] didn't force [her]",[2580] Appellant ignores her testimony that "I had no choice [other than to sleep with my husband], because we were husband and wife and if we did not accept each other, […] I would lose my life."[2581] She also highlighted the influence that being monitored by a militiaman had on her decision to consummate her marriage.[2582] The fact that she later developed feelings for her

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2575 *See* response to Grounds 173, 161, 163.

2576 Ground 173: **F54** Appeal Brief, *Errors concerning the examination of the suffering endured in the context of sexual relations within marriage,* paras 1301-1340; **F54.1.1** Appeal Brief Annex A, p. 59 (EN), pp. 54-55 (FR), pp. 85-86 (KH).

2577 **F54** Appeal Brief, para. 1303 *impugning* **E465** Case 002/02 TJ, para. 3674.

2578 **F54** Appeal Brief, para. 1305.

2579 *See* response to Grounds 165, 167.

2580 **F54** Appeal Brief, para. 1304.

2581 **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 10.44.13-10.45.55, p. 29, line 19-p. 30, line 2.

2582 **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 10.45.55-10.48.20, p. 30, lines 11-17 ("At first I did not love my husband, but I was afraid because there was a militiaman below my house. My husband tried to console me, and he said that we were husband and wife, so we had nothing to hide each other. I listened to my

husband does not diminish the existence of suffering. Appellant has therefore failed to establish any error in relation to the TC's use of the testimony of Chang Srey Mom.

Consent in the context of forced marriages

755. Appellant erroneously argues that the TC erred in fact and law by finding in general that, insofar as consent to marriage was not "real", the consummation of the marriage was *ipso facto* forced, either because the victims acted out of fear for their lives or physical security and therefore did not genuinely consent, or because they were physically forced to engage in sexual intercourse with their husbands.[2583] To support this, Appellant misrepresents the testimonies of Preap Sokhoeurn, Om Yoeurn, Mom Vun, Pen Sochan, Sou Sotheavy, Nop Ngim, and Chea Deap, painting their testimonies as "extraordinary" and "atypical" by repeating the erroneous argument that consent was a part of CPK policy,[2584] ignoring the coercive environment rendering consent impossible,[2585] and incorrectly challenging their credibility despite the TC already having dealt with this issue in detail.[2586]

756. Appellant's most egregious misrepresentation of the evidence concerns the testimony of Om Yoeurn. According to Appellant, Om Yoeurn's husband "comforted her" and eventually they "lived together and felt normal".[2587] However, her testimony read in full reveals a very different picture. She testified to never developing feelings for him,[2588] to resisting his advances on the first night and feeling that "he simply wanted to rape her violently"[2589] and finally to being raped by another cadre as punishment for refusing to initially consummate her marriage.[2590] Her decision to reunite and live with her husband

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husband, and at the same time I was afraid. The militiaman was listening in what we were doing, whether we live along with each other or we had argument.").

2583 **F54** Appeal Brief, para. 1306 *impugning* **E465** Case 002/02 TJ, paras 3659, 3661.

2584 *See* response to Ground 165.

2585 **E1/469.1** Nop Ngim, T. 5 Sept. 2016, 11.11.18-11.13.12, p. 52, lines 5-6 ("A few nights after our marriage, they monitored our activities. And since we got along well, nothing happened."), 11.13.12-11.15.00, p. 52, lines 19-23 ("I did not want to get married and I wanted to run away. But there was no choice so I had to bear with the arrangement. As I repeat myself on a number of occasions, there – I had no options but to go along with *Angkar's* plan."). *See also* response to Ground 162.

2586 **E465** Case 002/02 TJ, paras 3657-3659.

2587 **F54** Appeal Brief, para. 1307.

2588 **E1/462.1** Om Yoeurn, T. 23 Aug. 2016, 13.39.08-13.41.15, p. 52, lines 14-18 ("Q: During the time when you stayed with your husband, did your husband show any expression of love towards you? A: Later on he consoled me, but to me I remained unchanged. Even he has already passed away I still feel that I remain unchanged. My husband was not a talkative person.").

2589 **E1/462.1** Om Yoeurn, T. 23 Aug. 2016, 09.08.47-09.11.33, p. 5, lines 3-10 ("[On the first night] we didn't talk much. He just slept with me. I was frightened. I resisted his advance. He was upset, so he went out of the room and informed his chief who was his direct military commander. [… I resisted…] I disliked him, and he – he didn't try to console me or to comfort me at all. He simply wanted to rape me violently.").

2590 **E1/462.1** Om Yoeurn, T. 23 Aug. 2016, 09.12.36-09.14.42, p. 6, lines 4-15 ("I was called to a quiet room, and when I was in the room, I was questioned why I didn't consent to have sex with my husband. [Comrade

after the regime was the result of pressure from her family and village elders.[2591] The assertion that their "marriage normalised and legitimised their sexual relations"[2592] in light of such testimony is meritless. She could no more consent to the marriage than she could to its forced consummation. The fact that she "did not complain of suffering" in her testimony is also irrelevant,[2593] as it is well settled that the very act of rape establishes suffering or harm without it having to be explicitly stated.[2594]

757. Appellant wrongly argues that the TC "should have appreciated the severity of the suffering of women resulting from sexual intercourse with their husband in the Khmer cultural context at the time of the events in which they […] were required to submit to their husband in everyday activities and in sexual intercourse."[2595] This argument is a reiteration of Appellant's unsupported assertion that marriage under DK was akin to arranged marriages pre-DK.[2596] There is no evidence on file to suggest that the first acts of sexual intercourse the women had with men they hardly knew or knew not at all were no different whether they took place within a marriage arranged by parents or within a marriage arranged by DK authorities, nor does Appellant cite any basis for this assertion.[2597] In fact, the TC *did* consider the relevance of the Cambodian social and cultural context when assessing the impact that forced consummation had on individuals and found that the women who lost their virginity as a result of marriages not arranged by their parents endured additional suffering because of the importance Khmer culture placed on the purity of women.[2598]

758. Despite Appellant's repeated assertions, the fact that individuals did not explicitly mention the suffering that resulted from consummating their marriage or later developed feelings for their spouses is of no relevance. The very act of rape establishes suffering or harm without it having to be explicitly stated.[2599] For the same reason, the fact that men did not mention the suffering of their wives does not mean that suffering cannot be established. Lastly, the fact that some women did not consider themselves to have been

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Phan] did not ask me further, then [Comrade Phan] simply forced upon me and raped me in that very room. […] [Comrade Phan] said that if he – he raped me and I shouted, then I would be shot dead. And after that warning, after the rape, I had to shut my mouth and that I had to agree to live with my newlywed husband.").

2591 **E1/462.1** Om Yoeurn, T. 23 Aug. 2015, 09.31.58-09.34.14, p. 12, lines 17-25.

2592 **F54** Appeal Brief, para. 1305.

2593 **F54** Appeal Brief, para. 1304.

2594 *Čelebići* TJ, paras 486, 495-496; *Kunarac* AJ, para. 151.

2595 **F54** Appeal Brief, para. 1320.

2596 *See* response to Ground 162.

2597 **F54** Appeal Brief, paras 1320-1322.

2598 **E465** Case 002/02 TJ, paras 3684-3685.

2599 *Kunarac* AJ, para. 151.

raped does not negate the fact that the context in which forced marriages and the subsequent consummation occurred was such that genuine consent was impossible.[2600] Appellant has therefore failed to substantiate any shortcuts in reasoning or biases on the part of the TC, and simply repackages a series of erroneous claims.

Ground 244: Marriages[2601]

759. **Ground 244 should be dismissed as Appellant fails to demonstrate that the TC erred in fact or law in finding that Appellant intended to commit, pursuant to CPK policy, the CAH of OIA through forced marriage and rape in the context of forced marriage.[2602]**

760. In the 300 paragraphs spent disputing these conclusions in his brief,[2603] Appellant fails to demonstrate that the TC's findings were incorrect or unreasonable. The five paragraphs of this ground simply repeat his erroneous claims and do not advance any new or substantive argumentation.[2604]

E. CRIME SITES

i. Cooperatives and Worksites

761. The TC correctly found that the CAH of enslavement, persecution on political grounds, OIA (attacks on human dignity and enforced disappearances), and murder were committed at the cooperatives and worksites[2605] pursuant to a CPK policy to establish and operate such sites, aimed at building the country, defending it against enemies, and radically transforming the population into a homogenous society of worker-peasants.[2606] This criminal policy was intrinsically linked to the common purpose.[2607] In addition, the TC correctly found that CAH were committed due to the imposition of inhumane working and living conditions at the cooperatives and worksites.[2608]

762. Appellant's 13 grounds[2609] regarding the cooperatives and worksites fail, as they adopt

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2600 *See* response to Ground 170.
2601 Ground 244: **F54** Appeal Brief, *Errors on the regulation of marriage and its implementation*, paras 2114-2118; **F54.1.1** Appeal Brief Annex A, pp. 80-81 (EN), p. 75 (FR), p. 116 (KH).
2602 **E465** Case 002/02 TJ, paras 4248-4249, 4303-4305.
2603 *See* **F54** Appeal Brief, paras 1098-1398.
2604 **F54** Appeal Brief, paras 2114-2118 *citing* his paras 1098-1398.
2605 **E465** Case 002/02 TJ, paras 3920 (murder), 3922-3927 (enslavement, persecution on political grounds, OIA through attacks against human dignity and enforced disappearances).
2606 **E465** Case 002/02 TJ, paras 3918-3919, 3928.
2607 **E465** Case 002/02 TJ, paras 3927-3928.
2608 **E465** Case 002/02 TJ, paras 1145, 1388, 1672, 1804.
2609 Grounds 99-102, 107, 113-119, 123.

an erroneous piecemeal approach to the evidence and the Judgment, misrepresent relevant factual findings, and amount to simple disagreements with the TC's findings. In particular, Appellant repeatedly disputes the TC's findings on the *actus reus* and *mens rea* of murder committed with *dolus eventualis*, failing to appreciate in particular that the TC was *not* required to point to any criminal provision mandating the perpetrators to take measures to change or improve life-threatening conditions that they themselves imposed at the cooperatives and worksites. Their failure to alleviate those conditions was simply a continuation of their positive criminal acts, which they were duty-bound to abandon.[2610] Appellant further attacks the TC's findings on the political persecution of NP and "enemies" and its assessment of the evidence generally, ignoring the large body of highly probative evidence on the Case File supporting its findings.[2611]

1. TRAM KAK COOPERATIVES

Ground 99: Errors in Law: Culpable omission[2612]

763. **Ground 99 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *actus reus* of murder was satisfied in respect of deaths from living conditions in the TK Cooperatives.[2613]**

764. The ground fails, as Appellant overlooks the interrelationship between positive acts – which underlie the TC's finding on the *actus reus* of murder[2614] and which Appellant does not challenge[2615] – and omissions. His arguments are contrary to common sense.

765. The TC was *not* required to state which criminal provision mandated the direct perpetrators to address the "foreseeably [...] fatal" conditions[2616] that they themselves imposed at the crime site.[2617] Their failure to take "appropriate measures to change or alleviate"[2618] the conditions was therefore not a separate omission that independently

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2610 Grounds 99-102, 113, 115-117, 123.

2611 Grounds 107, 114, 118-119.

2612 Ground 99: **F54** Appeal Brief, *Errors in law: culpable omission*, paras 673-675; **F54.1.1** Appeal Brief Annex A, p. 38 (EN), p. 35 (FR), p. 54 (KH).

2613 Appellant repeats this erroneous claim in relation to each of the crime sites of TK, 1JD, TTD and KCA. *See* response to Grounds 99, 113, 115 and 123.

2614 **E465** Case 002/02 TJ, para. 1144. Regarding the failure to act, *see* response to Ground 100.

2615 **E465** Case 002/02 TJ, paras 1144-1145. If Appellant intended to challenge authorities' positive acts through his other appeal grounds, he failed to indicate his intention in **F54** Appeal Brief, paras 672-675 with a cross-reference to other paras in his brief. In any event, *see* response to Grounds 101 and 107. *See also* response to Ground 100 (and all citations therein).

2616 The conditions were food shortages, malnutrition, overwork, sickness, and inadequate medical treatment. *See* **E465** Case 002/02 TJ, para. 1142 and *reiterated* at fn. 13101. *See also* paras 1145, 1144.

2617 **E465** Case 002/02 TJ, para. 1144. *Contra* **F54** Appeal Brief, para. 674.

2618 **E465** Case 002/02 TJ, para. 1144.

gave rise to criminal responsibility, but rather a continuation of their positive acts.[2619]

766. In any event, it is trite law that there is a legal duty to abandon the commission of a crime. The perpetrators' duty to act *arose from* their positive criminal acts, from which they were obliged to desist.[2620] Given that the direct perpetrators in the TK District were the very people who imposed the conditions, it is clear that they were in a position to change or alleviate the conditions, and thus had a duty to do so.

767. Consequently, there was no need for the TC to explicitly characterise the nature and scope of the duty to act.[2621] It is also common sense as to what is required to improve a situation that one creates and/or maintains. For example, regarding the imposed condition of food shortages,[2622] the TC found that the communes and cooperatives set rations,[2623] but not at the prescribed amount.[2624] It was incumbent on the relevant authorities to set rations at the prescribed amount and not, for instance, to give less food to the NP,[2625] who in particular suffered and died from malnourishment.[2626] Additionally, at the district level, former committee member Pech Chim provided evidence of the committee's failure to punish discriminatory rations[2627] despite the existence of measures to punish those who stole food.[2628]

768. Appellant therefore fails to demonstrate that the TC did not provide appropriate legal

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2619 Regarding Appellant's contributions to the perpetrators' commission of murder with *dolus eventualis*, *see* section entitled Section VIII.D Aid and Abet in this response brief, which relates to Grounds 246-247 (*actus reus*), 245, 209, 248-249 (*mens rea*).

2620 **E465** Case 002/02 TJ, para. 1144. The ICTY Appeals Chamber has recognised commission by omission where a perpetrator has the capacity to, and fails to, reverse conditions imposed upon victims, *i.e.* positive acts, that constitute international crimes. *See Čelebići* AJ, paras 342-343, holding that criminal responsibility for the *commission* of unlawful confinement of civilians arises for an individual "who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist". The Chamber rejected the case *in casu* because a simple prison guard did not possess sufficient authority so as to impose on him a duty to act, however, the authority of the perpetrators in TK District to impose the conditions themselves necessarily meant that they were in a position to alter the conditions, and thus had a duty to do so.

2621 *Contra* **F54** Appeal Brief, para. 674.

2622 **E465** Case 002/02 TJ, para. 1142 and *reiterated* at fn. 13101. *See also* paras 1145, 1444.

2623 **E465** Case 002/02 TJ, para. 1010.

2624 **E465** Case 002/02 TJ, para. 1013.

2625 *See e.g.* **E465** Case 002/02 TJ, paras 1014 (Ry Pov, Meas Sokha), 1016 (including Pech Chim). *See also* response to Ground 107 (persecution of the NP).

2626 **E465** Case 002/02 TJ, paras 1016, 1045. *See also* paras 1020 (Sim Chheang), 1037 (Chou Koemlan).

2627 **E1/291.1** Pech Chim, T. 23 Apr. 2015, 13.59.32-14.03.25, p. 60, lines 18-25. *See also* 09.56.59-10.01.35, p. 21, lines 24-25-p. 22, lines 4-5, 11, 19-20, 22. Regarding the District Secretary being dismissive about people suffering from swelling, diarrhoea and lack of nutrition, *see* **E465** Case 002/02 TJ, para. 1046 *citing*, *inter alia*, **E1/278.1** Riel Son, T. 17 Mar. 2015, 10.52.04-10.54.12, p. 33, lines 13-14. *See also* **E1/278.1** Riel Son, T. 17 Mar. 2015, 10.47.14-10.50.17, p. 31, line 25-p. 32, line 13; **E465** Case 002/02 TJ, paras 1014, 1029 (Yem Khonny), 1045.

2628 **E465** Case 002/02 TJ, paras 1057, 1029 (Eam Yen). *See also* **E1/291.1** Pech Chim, T. 23 Apr. 2015, 13.59.32-14.03.25, p. 60, lines 20-25; **E465** Case 002/02 TJ, para. 1055 (Bun Saroeun).

analysis of the evidence and reasons for establishing the *actus reus* of murder.[2629]

Ground 100: Errors in law regarding dolus eventualis[2630]

769. **Ground 100 should be dismissed as Appellant fails to establish that the TC erred in law by using an "X 'or' Y" alternative to find the *mens rea* for murder with *dolus eventualis* was satisfied in relation to the living conditions in the TK Cooperatives.**

770. This ground fails because Appellant's unsubstantiated claim shows no legal error in the TC finding that a *dolus eventualis mens rea* for murder was satisfied where principal perpetrators, namely authorities in TK District, acted "with the knowledge that [conditions] would likely lead to deaths *or* in the acceptance of the possibility of this fatal consequence".[2631] Knowledge that deaths would likely occur,[2632] and acceptance of the possibility that death will result from one's actions,[2633] both satisfy the *mens rea* element. Extensive ECCC and international jurisprudence confirms that, where any one of several valid factual findings is sufficient to establish a material element, it is permissible to determine them in the alternative without definitively demonstrating one independently.[2634]

771. A holistic reading of the TC's findings demonstrates that the authorities in the district acted with *dolus eventualis* because deaths from a combination of living *and* working conditions (e.g. food shortages, overwork, and inadequate medical treatment) were "well-known" in the district, and the authorities maintained those conditions "for an extended period of time, including *after the effects became apparent*".[2635]

772. For example, the authorities in the district knew that food rations were being inadequately

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2629 **F54** Appeal Brief, paras 674-675.

2630 Ground 100: **F54** Appeal Brief, *Errors in law regarding dolus eventualis*, paras 676-677; **F54.1.1** Appeal Brief Annex A, p. 39 (EN), p. 35 (FR), p. 54 (KH).

2631 **F54** Appeal Brief, fn. 1181 *citing* **E465** Case 002/02 TJ, para. 1145 (emphasis added).

2632 **F36** Case 002/01 AJ, paras 387 (upheld in 410), 395.

2633 **F36** Case 002/01 AJ, para. 390 *citing Stakić* TJ, para. 587. *See also* para. 409 ("the causing of death with less than direct intent but more than mere negligence (such as *dolus eventualis* or recklessness) incurs criminal responsibility and is considered as intentional killing").

2634 *See e.g.* Case 001-**E188** *Duch* TJ, paras 526, 531; *Đorđević* TJ, para. 2139 and confirmed in *Đorđević* AJ, para. 192 ("The Appeals Chamber finds no ambiguity [with alternate findings] and that it was within the Trial Chamber's discretion to reasonably make such findings."); *Galić* TJ, paras 317, 596 and confirmed in *Galić* AJ, para. 140; *Blagojević & Jokić* TJ, para. 551 ("the attack was widespread or systematic") and confirmed in *Blagojević & Jokić* AJ, paras 99-103.

2635 **E465** Case 002/02 TJ, paras 1020, 1142 (emphasis added and *reiterated* at fn. 13101). *Contra* **F54** Appeal Brief, para. 677.

apportioned,[2636] and they were present at worksites[2637] to observe the arduous work conditions being imposed on the underfed labourers.[2638] Despite the clear visibility of malnourished bodies, deaths resulting from malnourishment,[2639] and authorities punishing those who stole food or did not meet their work quotas,[2640] the authorities accepted the possibility of further deaths when they chose not to implement appropriate measures to remedy the situation.[2641] Medical care remained inaccessible[2642] and inadequate.[2643] When the district secretary received a report on the causes of hospitalised patients' ill health, he chose only to discourage future reports on dire conditions.[2644] Unsurprisingly, deaths "increased dramatically towards the latter part of the regime".[2645]

Ground 102: Lack of evidence of manslaughter in deaths due to starvation and living conditions[2646]

773. **Ground 102 should be dismissed as Appellant fails to establish that the TC erred in fact by finding that the *mens rea* for murder with *dolus eventualis* from living**

2636 The district, which gave the communes an overall food allocation, received reports on food shortage. Communes and cooperatives did not set the rations at the prescribed amount. It was generally known and observable, even to Pech Chim on the district committee, that the BP were receiving more food than others. *See* **E465** Case 002/02 TJ, paras 1010, 1012-1014, 1016. *See also* paras 955 (authorities' presence in the district), 1009 (CPK policy to set discriminatory rations), 1011 (Nut Nov).

2637 *E.g.* **E465** Case 002/02 TJ, para. 955.

2638 Enslavement: **E465** Case 002/02 TJ, paras 1022-1023, 1034 (Meas Sokha). *See also* paras 1060 (if workers protested, they could be punished with death), 1150-1153. Inhumane tasks: **E465** Case 002/02 TJ, paras 1018, 1020, 1034. *See also* para. 1044, fn. 3490. Long hours: **E465** Case 002/02 TJ, paras 1019-1020. Demanding work quotas: **E465** Case 002/02 TJ, para. 1018.

2639 *See* **E465** Case 002/02 TJ, paras 1016 (Riel Son and reiterated at para. 1045), 1020 (Ek Hoeun, Sim Chheang), 1037 (Chou Koemlan), fn. 3283.

2640 Punishment for stealing food: **E465** Case 002/02 TJ, paras 1057, 1029 (Eam Yen). *See also* **E1/291.1** Pech Chim, T. 23 Apr. 2015, 13.59.32-14.03.25, p. 60, lines 20-25; **E465** Case 002/02 TJ, para. 1055 (Bun Saroeun). Withholding food as punishment: **E465** Case 002/02 TJ, paras 1018, 1023.

2641 *See e.g.* **E465** Case 002/02 TJ, para. 1046 (*citing*, *inter alia*, **E1/278.1** Riel Son, T. 17 Mar. 2015, 10.52.04-10.54.12, p. 33, lines 13-14); **E1/278.1** Riel Son T., 17 Mar. 2015, 10.47.14-10.50.17, p. 31, line 25-p. 32, line 13. *See also* **E465** Case 002/02 TJ, paras 1014, 1029 (Yem Khonny), 1045. For the continuing failure to take appropriate measures to change or alleviate the situation, *see e.g.* **E465** Case 002/02 TJ, paras 1046, 1016, 1029 (Yem Khonny), 1046; **E1/291.1** Pech Chim, T. 23 Apr. 2015, 09.56.59-10.01.35, p. 21, lines 24-25-p. 22, lines 4-5, 11, 19-20, 22, 13.59.32-14.03.25, p. 60, lines 22-25.

2642 Authorities denied requests for medical treatment, choosing instead to accuse sick people of having mental problems or being an enemy. *See* **E465** Case 002/02 TJ, para. 1050.

2643 Medical inexperience: **E465** Case 002/02 TJ, paras 1040-1043. Inadequate medicine: **E465** Case 002/02 TJ, paras 1042, 1046, 1050. Reduced food for hospitalised patients: **E465** Case 002/02 TJ, para. 1047.

2644 **E465** Case 002/02 TJ, para. 1046.

2645 **E465** Case 002/02 TJ, paras 1013, 1047 (*citing*, *inter alia*, **E1/279.1** Riel Son, T. 18 Mar. 2015, 13.51.00-13.53.10, p. 52, lines 10-25). *See also* paras 1047 (*citing* **E1/278.1** Riel Son, T. 17 Mar. 2015, 15.39.11-15.42.41, p. 90, lines 2-7), 1050 (*citing* **E1/262.1** Ry Pov, T. 12 Feb. 2015, 10.48.01-10.49.35, p. 34, line 25-p. 35, line 2).

2646 Ground 102: **F54** Appeal Brief, *Lack of evidence of manslaughter in deaths due to starvation and living conditions*, paras 683-685; **F54.1.1** Appeal Brief Annex A, p. 39 (EN), p. 36 (FR), p. 55 (KH). The original version of the Appeal Brief says "dol éventuel", which is better translated as "*dolus eventualis*", not "manslaughter".

conditions was satisfied in the TK Cooperatives.

774. This ground fails, as Appellant does not substantiate his allegation that the TC unreasonably assessed the evidence underlying its finding.[2647] He advances arguments that are based on a misreading of the Judgment and unsupported by the evidence.

775. First, the TC's recognition of external factors possibly contributing to insufficient food and medical facilities in TK District at times[2648] does *not* prevent a reasonable trier of fact from establishing the authorities' *mens rea* for deaths from conditions.[2649] Appellant ignores that (i) the conditions extended *beyond* insufficient food and medical facilities to include inhabitants being "deliberately forced to work in a climate of ['extreme levels' of] control, threats, fear, […] and discrimination, with the most extreme consequences for those who protested";[2650] and (ii) "the evaluation of *all* the evidence [which Appellant does not challenge][2651] *clearly* establishes" that the authorities "willingly imposed" conditions "for an extended period of time", giving the population "no option other than to accept their fate, including when the result was foreseeably going to be fatal".[2652] Appellant fails to demonstrate why no reasonable trier of fact would have found that the extent and severity of the authorities' actions, independent of external factors, satisfied the *mens rea* for murder.

776. Second, the TC's finding that the authorities maintained the "conditions for an extended period of time, *including* after the effects became apparent" did *not* require it to determine when the authorities' *mens rea* and *actus reus* coincided.[2653] The TC found the *mens rea* for the crime covered the entire period before and after the effects of the crime became apparent. This is supported by the TC's findings that, for example, (i) food shortages existed prior to the 1976-1977 harvest[2654] and continued afterwards,[2655] and (ii) the NP (evacuated from cities on 17 April 1975) were subordinate to the BP upon their arrival at the TK Cooperatives,[2656] and this subordination continued past mid-1978.[2657]

2647 *Contra* **F54.1.1** Appeal Brief Annex A, p. 39.
2648 **E465** Case 002/02 TJ, para. 1145.
2649 *Contra* **F54** Appeal Brief, para. 684.
2650 **E465** Case 002/02 TJ, paras 1145, 1144. *See also* para. 1142.
2651 *See* response to Grounds 100 (and all citations therein) and 101.
2652 **E465** Case 002/02 TJ, paras 1145 (emphasis added), 1144.
2653 **E465** Case 002/02 TJ, para. 1145 (emphasis added). *Contra* **F54** Appeal Brief, para. 685.
2654 **E465** Case 002/02 TJ, para. 1142 *cross-referring* to para. 1013.
2655 **E465** Case 002/02 TJ, para. 1013.
2656 **E465** Case 002/02 TJ, paras 980-985 (policy), 996-1001, 1004 (implementation).
2657 **E465** Case 002/02 TJ, para. 1007.

Ground 101: Lack of sufficient evidence of alleged deaths[2658]

777. **Ground 101 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that the *actus reus* of murder from living conditions was satisfied in the TK Cooperatives.**

778. This ground fails as Appellant does not demonstrate that the TC unreasonably assessed the large body of highly probative evidence that underpins the impugned finding.[2659] Appellant's erroneous arguments are limited to single pieces of evidence and ignore (i) additional evidence relating to the myriad of harsh living *and* working conditions that the TC found were imposed on the inhabitants,[2660] who were all put to work in TK District;[2661] and (ii) the cumulative impact that these conditions had on people's health and, ultimately, their death.[2662] That additional evidence concerns (i) food shortages and resulting deaths;[2663] (ii) working conditions;[2664] (iii) control of the population, including through penalties such as the deprivation of food and increased workloads;[2665] and (iv) inadequate medical care.[2666]

779. Additionally, Appellant's challenge to certain items of evidence concerning the existence

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2658 Ground 101: **F54** Appeal Brief, *Lack of sufficient evidence of alleged deaths*, paras 678-682; **F54.1.1** Appeal Brief Annex A, p. 39 (EN), p. 35 (FR), p. 55 (KH). Regarding Appellant's reiterated appeal grounds at **F54** Appeal Brief, para. 672, *see* response to Grounds 39-40, 62, 65-66 (saisine), and 86 (murder with *dolus eventualis* law).

2659 *See* Standard of Review (Errors of fact).

2660 *See also* **E465** Case 002/02 TJ, paras 1144-1145.

2661 **E465** Case 002/02 TJ, para. 979.

2662 **E465** Case 002/02 TJ, para. 1142 and citations therein.

2663 Acute food shortages before and after the 1976-1977 harvest that resulted in deaths: **E465** Case 002/02 TJ, paras 1011-1012 (based on Pech Chim, Nut Nov, Sao Van, Ek Hoeun, Chou Koemlan, Em Phoeung, Long Vonn), 1013 (TK District records at fns 3225 and 3228), 1014 (Oem Saroeurn, Phneou Yav, Thann Thim, TK District report, Riel Son, Ry Pov, Sao Han, Meas Sokha). Food was generally far below the quantity necessary to sustain the population: **E465** Case 002/02 TJ, para. 1016, fn. 3261 *cross-referring* to para. 1008 (based on CPK SC and Council of Ministers minutes, CPK magazines, CPK economic plan 1977-1980). The NP received less food than the BP: **E465** Case 002/02 TJ, para. 1016 (based on Pech Chim, Keo Chandara, Tak Sann, Chou Koemlan, Riel Son). If Appellant intended to challenge this finding regarding the NP through his other appeal grounds, he failed to indicate his intention in **F54** Appeal Brief, paras 678-682 with a cross-reference to other paras in his brief. In any event, *see* response to Ground 107. Deaths: **E465** Case 002/02 TJ, paras 1045-1047 (based on Riel Son). *See also* para. 1012.

2664 **E465** Case 002/02 TJ, para. 1144. *See* paras 1018 (based on Sao Han, Bun Saroeun, Tak Sann, Eam Yen), 1019 (based on TK District records, Em Phoeung, Sao Han, Chang Srey Mom, Meas Sokha, Phneou Yav), 1020 (based on Ry Pov, Nut Nov at fn. 3279, Riel Son), 1029 (based on Yem Khonny), 1045 (based on Riel Son), 1047 (based on Riel Son).

2665 Deprivation of food: **E465** Case 002/02 TJ, para. 1023 (based on Bun Saroeun, Im Vannak, Tak Sann) including cross-reference in fn. 3295 to para. 1009 (based on CPK magazines and Ieng Sary's Diary). *See also* paras 1018 (Eam Yen), 1057 (including fns 3494, 3496, 3498). Increased workloads: **E465** Case 002/02 TJ, paras 1029 (based on Yem Khonny). Other penalties: **E465** Case 002/02 TJ, paras 1022 (based on Khieu Samphan), 1029 (based on Chang Srey Mom, Sao Han, Khiev Neou, Eam Yen), 1030 (based on TK District records and KTC notebooks) including cross-references in fns 3329, 3331 to paras 866, 891. *See also* para. 1039.

2666 **E465** Case 002/02 TJ, paras 1040-1043, 1046 (based on Riel Son), 1050 (based on Riel Son, Oem Saroeurn, Chou Koemlan, Ry Pov).

of food shortages (which Appellant does not dispute as part of his OIA conviction for attacks against human dignity),[2667] deaths from starvation, and inadequate medical treatment is unfounded because he misreads that evidence and relevant TC findings.

780. Regarding the existence of food shortages resulting from authorities' acts and omissions in TK District,[2668] Appellant unpersuasively contests the TC's assessment of two pieces of evidence. He fails to demonstrate why no reasonable fact finder could have concluded from a DK report that the Southwest Zone was referring to food when it said that "some Districts and Sub-districts [in Takeo Province] have encountered the shortage".[2669] The reported shortage was written under the sub-heading of "[t]he people's living standard",[2670] and in relation to the "[e]conomics situation" and "agriculture plan for the early 1977".[2671] The statement is also corroborated by, *inter alia*, numerous TK District records.[2672]

781. Additionally, Appellant neglects to show how the TC distorted Neang Ouch *alias* Ta San's testimony by finding that the witness "attributed such a lack of food to failings by the heads of particular cooperatives".[2673] Neang Ouch stated that (i) heads of communes/cooperatives arranged the food for their inhabitants/workers, (ii) some of these heads did not "coordinate" or "manage" the food well, and (iii) "for this reason" their failure resulted in people receiving insufficient food in some cooperatives.[2674]

782. Regarding deaths from starvation,[2675] Appellant again unsuccessfully challenges the TC's assessment of two pieces of evidence. The TC reasonably found that Riel Son testified that deaths from starvation "increased dramatically toward the latter part of the regime".[2676] During his testimony, Riel Son elaborated on this dramatic increase that he had mentioned in his statement to DC-Cam. He explained to the TC that the increased

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2667 *See* **E465** Case 002/02 TJ, paras 1195, 1197, 1199.
2668 **E465** Case 002/02 TJ, paras 1142, 1144-1145.
2669 **E3/853** Report from Southwest Zone to *Angkar*, 3 June 1977, EN 00185246, which is consistent with the Khmer document and the ERN in the Khmer Trial Judgment. *Contra* **F54** Appeal Brief, para. 678.
2670 **E3/853** Report from Southwest Zone to *Angkar*, 3 June 1977, EN 00185246. The Co-Prosecutors note the English and French translations for the sub-heading in the original Khmer document. A perusal of DK reports indicates that food shortages were discussed in relation to people's "situation", "living standard", and "livelihood". *See* **E465** Case 002/02 TJ, fn. 13049 *citing*, *inter alia*, **E3/179** Report from Office 560, 29 May 1977, EN 00183013 and **E3/1179** Report from Office 560, 8 June 1977, EN 00583919.
2671 **E3/853** Report from Southwest Zone to *Angkar*, 3 June 1977, EN 00185243.
2672 *See* **E465** Case 002/02 TJ, fns 3225, 3228.
2673 **E465** Case 002/02 TJ, para. 1013. *See also* para. 1016 including fn. 3253.
2674 **E1/274.1** Neang Ouch, T. 10 Mar. 2015, 09.32.45-09.37.06, p. 12, line 12-p. 13, line 8. The Co-Prosecutors note that the Khmer transcript helps to clarify some of the inconsistencies that exist between the English and French translations. *Contra* **F54** Appeal Brief, para. 679.
2675 **E465** Case 002/02 TJ, paras 1142, 1144-1145.
2676 **E465** Case 002/02 TJ, para. 1013. *Contra* **F54** Appeal Brief, para. 679.

deaths were because "people did not have anything to eat".[2677]

783. Additionally, the TC reasonably found that "Chang Srey Mom testified that [...] people died from malnutrition because the daily ration was insufficient."[2678] The TC recognised the causal link between insufficient food and deaths because it had regard to (i) the numerous times Chang Srey Mom said there was insufficient food[2679] and (ii) Chang Srey Mom stating that "*because* we [...] never had enough food to eat, [...] some ate too much" when they could and "some died because of such eating".[2680]

784. Regarding the TC's finding that workers had "problems obtaining food and some died as a result",[2681] Appellant's unfounded claims ignore the TC's holistic assessment of evidence.[2682] Similar to the TC's earlier findings regarding insufficient food in TK District and it causing deaths,[2683] the testimony of Ek Hoeun, who worked for the district, confirmed that workers were no exception. Workers "had problems feeding themselves" and deaths occurred on the worksites.[2684] Sim Chheang, who lived and worked in a cooperative, stated in his WRI that he received insufficient food, and that even while emaciated and exhausted, he was "made [to] work as usual" and "saw at least one person die from starvation".[2685] Given the consistent evidence of inhabitants/workers receiving insufficient food and it leading to deaths,[2686] the TC reasonably relied on "[n]umerous" corroborating CPAs that gave "detailed and specific accounts" of people, including workers, "dying from a combination of" conditions including a "lack of food".[2687]

785. Regarding deaths from inadequate medical treatment,[2688] it is unclear whether Appellant is alleging an error of law or fact or both.[2689] In any case, he ignores the plain language

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2677 **E465** Case 002/02 TJ, para. 1013. *See also* **E1/278.1** Riel Son, T. 17 Mar. 2015, 11.08.58-11.11.05, p. 38, line 20-p. 39, line 10.

2678 **E465** Case 002/02 TJ, para. 1015; *Contra* **F54** Appeal Brief, para. 679.

2679 **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 9.34.25-9.35.48, p. 12, lines 4-5, 8-9, 11.09.57-11.11.45, p. 39, line 16.

2680 **E1/254.1** Chang Srey Mom, T. 29 Jan. 2015, 9.34.25-9.35.48, p. 12, lines 4-10 (emphasis added).

2681 **E465** Case 002/02 TJ, para. 1142.

2682 *Contra* **F54** Appeal Brief, para. 680.

2683 *See* **E465** Case 002/02 TJ, para. 1142, including fns 3880-3882, and *cross-referring* to para. 1020 ("The overall evidence [...] establishes" "numerous deaths [...] was the general [...] situation in Tram Kak".).

2684 **E1/298.1** Ek Hoeun, T. 7 May 2015, 15.56.26-15.58.59, p. 104, lines 20-23. *See also* 15.54.04-15.55.18, p. 103, lines 11-12, 15.55.18-15.56.26, p. 104, lines 11-12; **E465** Case 002/02 TJ, paras 820, 1020.

2685 **E465** Case 002/02 TJ, para. 1020; **E3/7980** Sim Chheang WRI, EN 00231693.

2686 *See also* the evidence underlying the factual findings at **E465** Case 002/02 TJ, paras 979 ("the population of Tram Kak district was put to work"), 1047 ("coherent, consistent and credible Riel Son's first-hand description [...] that people died from malnutrition" at the district hospital).

2687 **E465** Case 002/02 TJ, para. 1020 including fn. 3283.

2688 **E465** Case 002/02 TJ, paras 1142, 1144-1145.

2689 Appellant's complaint commences as an alleged "error in law", but then does not state clearly what that error is and concludes his complaint with "no reasonable trier of fact". *See* **F54** Appeal Brief, para. 682; **F54.1.1** Appeal Brief Annex A, p. 39 ("Error(s): misconstruction of the evidence").

of the TC's finding that "people died in the District Hospital *among other locations* because of inadequate medical treatment".[2690] That language does not limit deaths to those at the district hospital and, therefore, contrary to Appellant's contention, does not rest "exclusively" on evidence from the hospital's former Deputy Chief Riel Son.[2691]

786. Supposing that the finding that people dying from inadequate medical treatment had rested exclusively on Riel Son, Appellant fails to explain why it is unreasonable to infer the likelihood of patients dying from this condition. Riel Son provided a "coherent, consistent and credible [...] first-hand description of the hospital facilities, including the food supply, as having been inadequate",[2692] which Appellant does not dispute. Additionally, the likelihood of such deaths is confirmed by other corroborating evidence[2693] and common sense.

Ground 107: NP were not persecuted on political grounds[2694]

787. **Ground 107 should be dismissed as Appellant fails to establish that the TC erred in fact by finding proven the *actus reus* for political persecution against the NP in TK.**

788. This ground fails as Appellant does not demonstrate that the TC made an unreasonable assessment of the highly probative evidence that underpins the impugned finding. Appellant fails to prove that no reasonable trier of fact could have reached that finding upon a holistic, as opposed to piecemeal, assessment of the evidence.[2695] His erroneous complaints, which are addressed below, ignore (i) relevant evidence and findings, including the CPK's discriminatory categorisation and segregation of the NP that was "deeply ingrained, widely known and implemented throughout Tram Kak district";[2696]

2690 **E465** Case 002/02 TJ, para. 1142 (emphasis added). *Contra* **F54** Appeal Brief, para. 682.

2691 *See* **E465** Case 002/02 TJ, paras 1050 (regarding inadequate medical treatment, including Ry Pov stating that "nobody was sent to a clinic: if people fell ill or died from starvation, it was viewed as the 'will of history'"), 1020 (regarding people dying from bad health based on Ek Hoeun, Sim Chheang, and numerous CPAs). *See also* **E1/277.1** Nut Nov, T. 16 Mar. 2015, 10.14.40-10.15.45, p. 27, line 20-p. 28, line 9. *Contra* **F54** Appeal Brief, para. 682.

2692 **E465** Case 002/02 TJ, para. 1142 *cross-referring* in fn. 3884 to para. 1047 (*note*: overall conclusion of Riel Son's evidence is based on paras 1040-1047). *See also* fn. 3426 regarding insufficient medicine to treat diarrhoea and swelling. *Contra* **F54** Appeal Brief, para. 682.

2693 *See* **E465** Case 002/02 TJ, paras 1050 (regarding inadequate medical treatment, including Ry Pov stating that "nobody was sent to a clinic: if people fell ill or died from starvation, it was viewed as the 'will of history'"), 1020 (regarding people dying from bad health based on Ek Hoeun, Sim Chheang, and numerous CPAs). *See also* **E1/277.1** Nut Nov, T. 16 Mar. 2015, 10.14.40-10.15.45, p. 27, line 20-p. 28, line 9.

2694 Ground 107: **F54** Appeal Brief, *NP were not persecuted on political grounds*, paras 727-742; **F54.1.1** Appeal Brief Annex A, pp. 40-41 (EN), p. 37 (FR), p. 57 (KH). Regarding Appellant's reiterated appeal grounds at **F54** Appeal Brief, para. 727, *see* response Grounds 39, 63, and 67, 71, 73, 74 (saisine for facts of discrimination).

2695 *See* Standard of Review (Errors of Fact).

2696 **E465** Case 002/02 TJ, para. 1177, fn. 4008 *cross-referring* to paras 1004, 1007. *See also* paras 980-1003, 1005.

and (ii) that *de facto* discrimination occurred because of the categorisation as NP, a targeted group of "real or perceived enemies" as defined by the CPK on political grounds,[2697] regardless of whether others were affected by those same acts.[2698]

789. Appellant fails to appreciate that the TC *did* consider exculpatory evidence[2699] that suggested there were "broadly equal rations to different categories of person"[2700] before it concluded that the NP received less food than others in the district.[2701] The TC gave more weight to inculpatory testimonies because those accounts were (i) "convincing"[2702] and (ii) consistent with highly probative contemporaneous documents from the DK period that "the CPK set different rations for different categories of person based on their class background", which Appellant does not dispute.[2703]

790. Additionally, Appellant challenges only two of these inculpatory accounts – Tak Sann and Pech Chim – making unpersuasive claims that ignore the deference that is given to the TC's assessment of the credibility and reliability of the evidence before it.[2704] Appellant's unsubstantiated complaint regarding Tak Sann's credibility ignores that her evidence was based on what she witnessed and experienced when she and the other NP ate with the BP.[2705] Regarding Pech Chim, Appellant fails to appreciate that the witness "observed" the NP receiving less food *in* the district[2706] *when* he was on the district

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2697 **E465** Case 002/02 TJ, paras 714, 718, 1174, 1178. *Contra* **F54** Appeal Brief, paras 733-734, 737, 739, 741.

2698 *See* response to Ground 108.

2699 **E465** Case 002/02 TJ, paras 1014 (Sao Han), 1016 (Pech Chim, Chang Srey Mom). Neang Ouch's evidence that "some kitchen halls did not have enough food for people to eat" is *not* exculpatory because the TC found that it is *within* this general environment of insufficient food in TK District that the NP received even less food than others. *See* **E465** Case 002/02 TJ, fn. 3253 (*citing*, *inter alia*, **E1/274.1** Neang Ouch, T. 10 Mar. 2015, 09.32.45-09.34.03, p. 12, lines 15-16), paras 1016 ("the quantity of food generally available in Tram Kak district was far below [...] the level which the CPK's leaders expressly recognised as necessary to sustain the population"), 1142. *See also* Standard of Review (Reasoned Decision). *Contra* **F54** Appeal Brief, para. 730.

2700 **E465** Case 002/02 TJ, para. 1016.

2701 **E465** Case 002/02 TJ, para. 1177 (legal finding). *See also* para. 1016 (factual finding).

2702 **E465** Case 002/02 TJ, para. 1016 (factual finding).

2703 **E465** Case 002/02 TJ, para. 1009. *See also* paras 1008, 1177 (fn. 4004 *cross-referring* to para. 1009).

2704 *See* Standard of Review (Errors of Fact). *Contra* **F54** Appeal Brief, para. 729.

2705 **E1/286.1** Tak Sann, T. 1 Apr. 2015, 14.11.51-14.14.03, p. 45, lines 22, 25-p. 46, lines 3-5, 11-12.

2706 **E465** Case 002/02 TJ, fn. 3252 *citing* **E1/291.1** Pech Chim, T. 23 Apr. 2015, 13.59.32-14.03.25, p. 60, lines 18-22.

committee,[2707] and knew "*usually* it was [the] New People who were hungry".[2708] This discrimination was not secretive but observable, and known by Pech Chim and other people who lived in the district and testified to this fact – two of whose accounts Appellant does not challenge.[2709] It is irrelevant who determined the unequal distribution that Pech Chim witnessed because it was a CPK policy to set different rations for different categories of persons[2710] and Pech Chim provided evidence of the district committee's failure to take reasonable measures to prevent and punish the discrimination in fact.[2711]

791. Given the several testimonial accounts on differences in access to food, which accord with the abovementioned CPK policy on food rations and evidence of the life-threatening consequences for the NP if they tried to obtain additional food,[2712] Appellant fails to appreciate that the TC relied on Riel Son's DC-Cam interview to "*further* corroborate" the strong testimonial and documentary evidence.[2713] Appellant's alternative and narrow interpretation of evidence in the DC-Cam interview further shows no error in the TC's usage of evidence for the broader finding on "[d]ifferences in *access* to food".[2714]

792. Appellant misreads the TC's legal finding that the NP "in particular suffered and died from malnutrition, whereas [the] Base People were less likely to be malnourished" as being based "solely" on a DC-Cam statement.[2715] The NP's suffering is also based on the abovementioned testimonies of NP receiving less food than BP in an environment where food was already "far below [...] the level which the CPK's leaders expressly recognised as necessary to sustain the population".[2716] The NP dying from malnutrition is further

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2707 **E465** Case 002/02 TJ, para. 818. Pech Chim's responsibilities included being in charge of economics and production, and "monitor[ing] all communes every day" through visits and reports. *See* **E1/289.1** Pech Chim, T. 21 Apr. 2015, 15.24.30-15.26.39, p. 75, lines 14-16; **E1/291.1** Pech Chim, T. 23 Apr. 2015, 09.40.33-09.41.41, p. 15, lines 22-23, 14.25.48-14.27.10, p. 68, lines 18, 20-23 (food supply to district hospital), 09.54.04-09.56.59, p. 20, lines 17-20 (visit to Kus Commune), 09.46.29-09.52.06, p. 18, lines 9-14, 23-25-p. 19, lines 14, 16-19 (visiting units with shortcomings), after 10.10.24-10.12.02, p. 26, lines 12-15, 10.13.08-10.14.42, p. 27, lines 18-20, 09.43.44-09.46.29, p. 16, lines 24-25 (accurate district reporting to the upper level from the economic section, with the assistance of unit chiefs).

2708 **E1/291.1** Pech Chim, T. 23 Apr. 2015, 13.44.44-13.48.16, p. 56, line 8 (emphasis added).

2709 *See* **E465** Case 002/02 TJ, para. 1016 (Keo Chandara, Tak Sann, Chou Koemlan). Appellant does not challenge Keo Chandara's and Chou Koemlan's evidence. *Contra* **F54** Appeal Brief, para. 729.

2710 *See* **E465** Case 002/02 TJ, fn. 3260 *cross-referring* to para. 1009.

2711 **E1/291.1** Pech Chim, T. 23 Apr. 2015, 09.56.59-10.01.35, p. 21, lines 24-25-p. 22, lines 4-5, 11, 19-20, 22, 13.59.32-14.03.25, p. 60, lines 22-25.

2712 *See* **E465** Case 002/02 TJ, fns 3493-3497 (Im Vannak, Phneou Yav, TK District records, Oem Saroeurn). *See also* fn. 3498.

2713 **E465** Case 002/02 TJ, para. 1016 (emphasis added). *Contra* **F54** Appeal Brief, para. 731.

2714 **E465** Case 002/02 TJ, para. 1016. *Contra* **F54** Appeal Brief, para. 731 (emphasis added).

2715 **E465** Case 002/02 TJ, para. 1177. *See also* response to Ground 31. *Contra* **F54** Appeal Brief, para. 731.

2716 **E465** Case 002/02 TJ, para. 1016, fn. 3261 *cross-referring* to para. 1008. *See also* fn. 4005 *cross-referring* to para. 1016.

based on former TK District hospital deputy chief Riel Son's testimony.[2717]

793. Appellant narrowly reads the Judgment to erroneously challenge the TC's legal finding that "working conditions varied depending on a person's categorisation, with Full-Rights Persons generally enjoying better conditions".[2718] This finding cross-references to the TC's factual findings on general working conditions in the district, which Appellant fails to appreciate are not exclusively in relation to the NP[2719] and which must be read in the broader context of the TC's factual findings regarding the CPK's categorisation of people and the implementation of that categorisation in the district.[2720]

794. As part of that broader context, the TC found that (i) the SC required NP "to give in, or bow to, the cooperatives";[2721] (ii) NP were classified as "Depositees" or "parasitic people" in the district;[2722] (iii) NP were placed in cooperatives separate to the BP;[2723] and (iv) "any position of power or oversight [such as chief of a unit or of a group within a unit] was reserved for Full-Rights members, i.e. the BP considered to have clean biographies".[2724] The TC identified several testimonies that demonstrated, *inter alia*, that Full-Rights members supervised NP's work, and made them work harder.[2725] In particular, Ry Pov, a Khmer Krom from Vietnam who worked with NP, said their supervisors "would control every activity [...] including moving, working, eating, and also sleeping".[2726] The fact that Full-Rights members generally enjoyed better work conditions than NP is further demonstrated by relevant testimonies that the TC noted as part of its factual findings on general work conditions in the district, including mobile

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2717 **E465** Case 002/02 TJ, fn. 3259 *cross-referring* to para. 1047. If Appellant intended to challenge Riel Son's evidence in **E465** Case 002/02 TJ, para. 1047 through his other appeal grounds, he failed to indicate his intention in **F54** Appeal Brief, para. 731 with a cross-reference to other paras in his brief. In any event, *see* response to Ground 101 (deaths from conditions).

2718 **E465** Case 002/02 TJ, para. 1177. Appellant's complaints include an alleged error of law that he does not substantiate. He simply states that the TC "erred in law [...] by not indicating how the conditions were allegedly worse for NP" without explaining how his claim amounts to a legal error. *Contra* **F54** Appeal Brief, paras 732-734.

2719 *See e.g.* **F54** Appeal Brief, paras 733 (Meas Sokha), 734 (Ek Hoeun).

2720 **E465** Case 002/02 TJ, Sections 10.1.7.4: Working conditions, 10.1.7.2: Categorisation of people: Full-Rights, Candidates and Depositees. *Contra* **F54** Appeal Brief, paras 732 (Sao Han, Bun Saroeun, Tak Sann, Eam Yen), 734 (Ry Pov, Nut Nov).

2721 **E465** Case 002/02 TJ, para. 981 (regarding **E3/216** Record of the Standing Committee's Visit to the Northwest Zone, 20-24 Aug. 1975, EN 00850975). *See also* para. 1176.

2722 **E465** Case 002/02 TJ, paras 998, 1176. *See also* para. 1004.

2723 **E465** Case 002/02 TJ, para. 999. *See also* paras 1000-1005, 1176.

2724 **E465** Case 002/02 TJ, paras 1004, 1002. *See also* paras 996, 1005.

2725 **E465** Case 002/02 TJ, fn. 3168. *See also* para. 1005.

2726 **E465** Case 002/02 TJ, fn. 3168 *citing*, *inter alia*, **E1/262.1** Ry Pov, T. 12 Feb. 2015, 09.45.19-09.47.00, p. 16, lines 12-16. *See also* 09.45.19-09.43.04, p. 15, lines 6-10, 20-22, 13.56.57-13.59.11, p. 64, lines 6-15, 13.59.11-14.00.17, p. 65, lines 5-10.

youth units,[2727] and is corroborated by other testimonies and TK reports.[2728]

795. Similarly, Appellant's unfounded challenge to the TC's legal finding on NP's miserable treatment ignores the discriminatory effect that the NP's segregation and subordination to BP had on their treatment.[2729] The TC found in its factual findings that "[t]he express purpose of this division of people [...] was to exert control over" them.[2730] NP "were the enemy and not as valuable as Base People, who were instructed to watch over them".[2731] The segregation of NP therefore did "not allow any further confusion" when "assess[ing] a person's conduct and attitude".[2732]

796. Consequently, the TC reasonably relied on Im Vannak's and Tak Sann's testimonies on mistreatment because they demonstrated that they and the other NP in their segregated units were targeted by supervisors who used their "full-rights" to withhold food as a threat or punishment for unmet work quotas.[2733] This discriminatory act had a greater impact on the NP because, as explained above, their food rations were already less than those for the BP and they were made to work harder than Full-Rights members.

797. Additionally, contrary to Appellant's erroneous assertions,[2734] a holistic reading of Ry Pov's evidence indicates that the NP in his unit were treated like "worthless slaves" because they undertook forced labour[2735] in an environment where the BP, who were chiefs of 50-member units or of a group within the units,[2736] controlled their every movement, including how much food they could eat.[2737] This is corroborated by Im Vannak, who said she was beaten by base children for seeking additional food and

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2727 **E465** Case 002/02 TJ, paras 1018 (*e.g.* Sao Han, Tak Sann, Eam Yen), 1019 (*e.g.* Em Phoeung), 1020 (*e.g.* Ry Pov, Nut Nov).

2728 Nature of tasks: *E.g.* **E1/288.1** Im Vannak, T. 3 Apr. 2015, 15.27.37-15.29.47, p. 91, lines 15-16 (*see also* **E465** Case 002/02 TJ, fn. 3176); **E1/252.1** Chou Koemlan, T. 22 Jan. 2015, 11.21.58-11.23.40, p. 49, lines 20-23. Intensity of the work: *E.g.* **E1/252.1** Chou Koemlan, T. 22 Jan. 2015, 11.21.58-11.23.40, p. 49, lines 23-24; **E3/2441** Reports Between the Communes and District and Kraing Ta Chan, EN 00369488, 00369485; **E1/283.1** Oem Saroeurn, T. 26 Mar. 2015, 09.14.01-09.17.06, p. 6, lines 13-16.

2729 *Contra* **F54** Appeal Brief, paras 735-738.

2730 **E465** Case 002/02 TJ, para. 1005. *See also* paras 983 (members of cooperatives were in charge of administering evacuees' education and re-fashioning them), 1023.

2731 **E465** Case 002/02 TJ, para. 1007 (summarising evidence from Khoem Boeun).

2732 **E465** Case 002/02 TJ, paras 989, 996.

2733 **E465** Case 002/02 TJ, para. 1023 including fns 3290-3291. Regarding Im Vannak and Tak Sann being part of the NP, *see* **E465** Case 002/02 TJ, paras 824-825; **E1/286.1** Tak Sann, T. 1 Apr. 2015, 14.11.51-14.14.03, p. 45, line 22. *Contra* **F54** Appeal Brief, para. 735.

2734 *Contra* **F54** Appeal Brief, para. 737.

2735 **E465** Case 002/02 TJ, para. 1177, fn. 4007 *cross-referring* to para. 1023; **E1/262.1** Ry Pov, T. 12 Feb. 2015, 09.43.04-09.45.19, p. 15, lines 6-9, 10.00.13-10.03.21, p. 22, lines 20-22-p. 23, lines 4-8.

2736 **E465** Case 002/02 TJ, para. 1023; **E1/262.1** Ry Pov, T. 12 Feb. 2015, 09.45.19-09.47.00, p. 16, lines 10-15, 13.59.11-14.00.17, p. 65, lines 6-7.

2737 **E1/262.1** Ry Pov, T. 12 Feb. 2015, 09.43.04-09.45.19, p. 15, lines 10-25, 09.45.19-09.47.00, p. 16, lines 14-16.

visiting her parents, and that the other NP in her unit also suffered beatings.[2738] Given this evidence, Appellant's other complaints about Ry Pov's testimony are unfounded.[2739]

798. Lastly, Appellant fails to appreciate that the TC's legal finding that "New People [...] and other perceived threats to the CPK were targeted for arrest for innocuous thoughts, speech or conduct considered to be contrary to the revolution" does not detract from the reality that NP were subject to *de facto* discrimination.[2740] As described above, the NP's subordinate status to BP and the district's instruction to the communes for BP to watch over NP because they were the enemy[2741] resulted in NP being specifically monitored and "particularly susceptible to arrest".[2742]

799. The TC therefore reasonably relied on Thann Thim's and Vong Sarun's testimonies because they provided evidence that the NP were "constantly" monitored by default due to their inferior categorisation.[2743] Thann Thim also stated that the BP "never" trusted them and were persistent in their enquiries.[2744] No reasonable trier of fact would have found Vong Sarun's hearsay evidence to be of low probative value,[2745] particularly since the TC acknowledged other evidence, which includes the TK District records, that corroborates her and the evidence of Thann Thim.[2746] Regarding NP's susceptibility to arrest, Appellant also overlooks the TC's acknowledgment of several highly probative TK District records[2747] and other relevant evidence.[2748]

2738 **E465** Case 002/02 TJ, para. 1023; **E1/288.1** Im Vannak, T. 3 Apr. 2015, 13.47.54-13.54.23, p. 58, lines 1-25-p. 60, lines 1-6, 14.17.58-14.23.45, p. 70, lines 7-25-p. 71, lines 1-5, 14.34.35-14.37.10, p. 76, lines 17-23.

2739 Regarding Appellant's claim that the BP's behaviour that Ry Pov described was contrary to CPK policy, *see* response to Ground 181. *Contra* **F54** Appeal Brief, para. 737.

2740 **E465** Case 002/02 TJ, para. 1177. *Contra* **F54** Appeal Brief, paras 739-741.

2741 **E465** Case 002/02 TJ, para. 1007 (summarising evidence from Khoem Boeun).

2742 **E465** Case 002/02 TJ, para. 1080.

2743 **E465** Case 002/02 TJ, para. 1055; **E1/289.1** Thann Thim, T. 21 Apr. 2015, 10.35.16-10.47.53, p. 27, lines 2-13; **E1/300.1**. Vong Sarun, T. 18 May 2015, 13.54.30-13.57.01, p. 63, lines 5-8. *Contra* **F54** Appeal Brief, para. 740.

2744 **E1/289.1** Thann Thim, T. 21 Apr. 2015, 10.35.16-10.37.53, p. 27, lines 2-13. *Contra* **F54** Appeal Brief, para. 740.

2745 *See* response to Ground 32 (Hearsay). The TC was also aware that the CPK operated in a culture of secrecy. *See e.g.* **E465** Case 002/02 TJ, paras 342, 362, 398, 459, 623. *Contra* **F54** Appeal Brief, para. 740.

2746 *E.g.* **E465** Case 002/02 TJ, para. 1055 (Chang Srey Mom), fns 3471 (**E3/2441** TK District Record, 22 Sept. 1977, EN 00369488 concerns a New Person who was monitored when he slept), 3480, 3591 (instruction from commune to distinguish between the BP and NP when monitoring). *Contra* **F54** Appeal Brief, paras 739-741.

2747 *See* **E465** Case 002/02 TJ, fn. 3471 (**E3/2441** TK District Record, 22 Sept. 1977, EN 00369488), paras 1064, 1081. *Contra* **F54** Appeal Brief, para. 741.

2748 *E.g.* **E465** Case 002/02 TJ, para. 1055 (Thann Thim, Chang Srey Mom).

2. 1ST JANUARY DAM

Ground 115: There was no murder with dolus eventualis[2749]

800. **Ground 115 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *actus reus* for murder was established with regard to deaths due to living conditions at 1JD.**

801. The ground fails as Appellant merely repeats his erroneous assertions regarding the *saisine*, the lawfulness of recharacterising the facts as murder with *dolus eventualis*, and the applicability of murder with *dolus eventualis* at the time of the facts.[2750] The TC was properly seised,[2751] it acted within its authority in recharacterising these facts,[2752] and the definition of the *mens rea* of murder as a CAH extended to *dolus eventualis* in 1975.[2753]

802. Appellant's claim that the *actus reus* of murder at 1JD has not been established is contrary to common sense and based on a misinterpretation of the Judgment. He alleges that the TC erred by finding a culpable omission while failing to characterise the nature and scope of the duty to act.[2754] In fact, and as acknowledged by Appellant,[2755] the TC found that the *actus reus* of murder at 1JD was established by positive criminal acts ("the imposition on the workers of conditions that caused their death"), and the failure to desist from these acts by taking "appropriate measures to change or alleviate such conditions".[2756] Appellant further alleges that the TC erred in law by failing to legally characterise why measures undertaken by the direct perpetrators to improve conditions at 1JD were inadequate, without citing evidence of any such measures.[2757] The TC made extensive findings on conditions imposed at 1JD and reasonably found that the conditions caused the deaths of six to ten workers, the deaths caused by accidents, and the deaths of a large number of workers.[2758] The absence of appropriate measures to change the conditions is simply demonstrative of the worksite authorities' uninterrupted act of their

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2749 Ground 115: **F54** Appeal Brief, *There was no murder with dolus eventualis*, paras 768-771; **F54.1.1** Appeal Brief Annex A, p. 43 (EN), p. 39 (FR), pp. 60-61 (KH).
2750 **F54** Appeal Brief, para. 768.
2751 *See* response to Grounds 69 and 70.
2752 *See* response to Ground 6.
2753 *See* response to Grounds 86 and 87-93.
2754 **F54** Appeal Brief, para. 770. Appellant repeats this erroneous claim in relation to each of the crime sites of TK, 1JD, TTD and KCA. *See* response to Grounds 99, 113, 115 and 123.
2755 **F54** Appeal Brief, para. 770 *citing* **E465** Case 002/02 TJ, para. 1672.
2756 **E465** Case 002/02 TJ, para. 1672. *See also* response to Ground 99.
2757 **F54** Appeal Brief, para. 771. If Appellant intended to refer to the replacement of Central Zone cadres with Southwest Zone cadres, he failed to do so. Regardless, the TC found that the appointment of Southwest Zone cadres did not improve conditions at 1JD but were considered by many to be harsher, *see* **E465** Case 002/02 TJ, para. 1519.
2758 *See* response to Ground 116. *See also* **E465** Case 002/02 TJ, paras 1535, 1606-1610, 1626, 1629.

imposition, thereby causing deaths throughout the entirety of the Dam's construction.

Ground 116: Unreasonableness of the findings on which the actus reus of murder with dolus eventualis was based[2759]

803. **Ground 116 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that the *actus reus* of the crime of murder with *dolus eventualis* was established at 1JD.**

Appellant's claims regarding the deaths of six to ten workers[2760]

804. Appellant's claims that the TC erred in finding that six to ten workers died at 1JD due to the working and living conditions[2761] are based on a selective reading of the Judgment and ignores relevant factual findings. Based on the totality of the evidence, the TC found that at least six to ten workers "died due to the imposition of hard labour, starvation rations, and inhospitable conditions, including an unhygienic environment and insufficient and ineffective medicine. Workers were forced to exceed their human limits while being deprived of food and adequate treatment when they became ill."[2762] Contrary to Appellant's contention that the evidence "merely state[s] that individuals who were sick were evacuated",[2763] the evidence establishes the deaths: one witness saw a worker "with [her] own eyes" after the worker "became sick at the worksite and his condition deteriorated",[2764] and another witness testified that two workers in his unit died from illness.[2765] Additional witnesses stated that some sick people from 1JD "were referred to the hospital [...] and died at the hospital",[2766] and clarified that workers who could not

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2759 Ground 116: **F54** Appeal Brief, *Unreasonableness of the findings on which the actus reus of murder with dolus eventualis was based*, paras 772-782; **F54.1.1** Appeal Brief Annex A, p. 43 (EN), p. 39 (FR), p. 61 (KH).

2760 **F54** Appeal Brief, paras 773-778.

2761 **F54** Appeal Brief, para. 773.

2762 **E465** Case 002/02 TJ, paras 1670 *citing* paras 1626, 1629. The evidence establishes that at least six workers died, *see* fns 5529-5531 *citing* **E1/306.1** Hun Sethany, T. 27 May 2015, 14.11.27-14.14.02, p. 61, lines 4-21 (stating that she saw *one* young man die due to an illness contracted at 1JD "with [her] own eyes"). *See also* fn. 5543 *citing* **E1/305.1** Meas Laihour, T. 26 May 2015, 13.46.03-13.48.18, p. 58, lines 18-22 (stating that her unit chief told her that *one* particular individual died because he could not be cured); **E1/307.1** Un Rann, T. 28 May 2015, 09.32.30- 09.34.36, p. 13, lines 9-22 (stating that *two* workers in her group fell ill, were sent to a hospital, and disappeared); and *see* fn. 5533, **E1/309.1** Uth Seng, T. 3 June 2015, 11.16.57-11.20.16, p. 44, line 8 (stating that *two* of the people he was close with in his work unit died from illness).

2763 **F54** Appeal Brief, para. 773.

2764 **E465** Case 002/02 TJ, para. 1626, fns 5529-5531 *citing* **E1/306.1** Hun Sethany, T. 27 May 2015, 14.11.27-14.14.02, p. 61, lines 4-21.

2765 **E1/309.1** Uth Seng, T. 3 June 2015, 11.16.57-11.20.16, p. 44, line 8. The TC noted, at para. 1626, that Uth Seng did not specify where the workers died.

2766 **E465** Case 002/02 TJ, para. 1629, fn. 5543 *citing* **E1/326.1** Om Chy, T. 30 July 2015, 13.32.28-13.34.00, p. 65, lines 6-8.

be cured were sent to hospital, as authorities did not want dead bodies at the worksite.[2767]

805. Appellant's claims must fail, as they fall far short of the standard of review on appeal, simply disagreeing with the weight assigned to the evidence.[2768] The Chamber cited six different witnesses and two WRIs in finding that "few people died of illness or injury at the [1JD], but usually individuals who were seriously sick were sent back to their villages or to local clinics where they died when treatments failed".[2769] The TC's holistic examination of the evidence led to the reasonable conclusion that at least six to ten workers at 1JD died due to the conditions, and others suffered the same fate at clinics and hospitals after enduring the harsh conditions of the worksite.[2770] Appellant's disagreements with the TC's conclusion are not sufficient to overturn factual findings, and should be dismissed.

Appellant's claims regarding the deaths caused by accidents[2771]

806. Appellant again misrepresents the totality of the evidence, claiming the TC erred by finding that several accidents caused deaths at the worksite.[2772] Contrary to Appellant's contention that Meas Laihour's evidence was "general",[2773] she was directly asked whether she witnessed accidents at 1JD and responded affirmatively, providing clear and specific testimony: "Yes. When I was carrying earth at the worksite, soil collapsed on the worker who was digging soil at the bottom of the canal [...] There was soil collapse on people who were digging soil, and they were killed."[2774] Appellant further ignores relevant factual findings: in addition to the four witnesses who corroborated the deaths caused by accidents,[2775] Or Ho testified that "some members of my unit died from a

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2767 **E465** Case 002/02 TJ, para 1629, fn. 5543 *citing* **E1/305.1** Meas Laihour, T. 26 May 2015, 09.59.58-10.01.55, p. 24, lines 7-17 ("They did not leave anyone dead at the worksite. For serious illnesses, the patients were sent to other hospitals afar because they did not want the mobile unit members to see and feel dispirited"). In the same footnote, this evidence is corroborated by **E3/7775** Kong Uth WRI, EN 00233534 ("When someone was seriously ill they would be sent to the far-away hospital. No one was wanted to be left dead at the site.").

2768 **F54** Appeal Brief, paras 774-777. For example, Appellant claims Sou Soeurn lacked credibility, despite the fact that the TC addressed her credibility in the Judgment, noting that it would accord "minimal weight" to her testimony on the conditions and hardships faced by workers at 1JD, *see* **E465** Case 002/02 TJ para. 1584. Appellant further claims, without merit, that the TC "distorted" Un Rann's testimony, but does not demonstrate any distortion.

2769 **E465** Case 002/02 TJ, para. 1629, fn. 5543.

2770 **E465** Case 002/02 TJ, para. 1670.

2771 **F54** Appeal Brief, paras 779-781.

2772 **F54** Appeal Brief, para. 779.

2773 **F54** Appeal Brief, para. 780.

2774 **E465** Case 002/02 TJ, paras 1535, 1627-1628, fns 5236, 5534, 5535, 5538 *citing* **E1/305.1** Meas Laihour, T. 26 May 2015, 09.40.37-09.42.49, p. 16, line 24-p. 17, line 8.

2775 **E465** Case 002/02 TJ, paras 1535, 1627, 1628, fns 5236, 5534, 5535, 5538 *citing* **E1/305.1** Hun Sethany, T. 26 May 2015, p. 95; **E1/307.1** Un Rann, T. 28 May 2015, 09.34.36-09.37.13, p. 14, lines 18-23,

landslide at the dam worksite",[2776] and provided a detailed description as to why the soil had collapsed.[2777] Finally, in claiming Nuon Narom's evidence could not be used to establish deaths due to accidents,[2778] Appellant misrepresents the TC's reliance on this evidence, which served to establish that soil collapses occurred in fact.[2779]

807. The TC's holistic examination of the evidence led to the reasonable conclusion that "several accidents precipitated by competition between workers occurred at the worksite wherein embankments of dirt fell upon and buried workers, killing a number of them".[2780] Appellant's claims ignore the totality of evidence, amount to mere disagreements with the finding, and thus should be dismissed.[2781]

Appellant's claims regarding the number of deaths[2782]

808. In claiming the TC erred in law and fact by finding that a large number of the workers at 1JD died due to living and working conditions,[2783] Appellant ignores relevant and reasoned factual findings on the conditions at 1JD.[2784] The TC was satisfied that, over the span of its construction, the number of workers at 1JD "was in the tens of thousands",[2785] and noted the "sheer number of workers at the site [...] who were not afforded proper hygiene, food, and medical treatment".[2786] Based on the "extensive and generally consistent" evidence presented on living conditions at 1JD,[2787] the TC made

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15.21.40-15.25.45, p. 80, lines 1-12; **E1/309.1** Uth Seng, T. 3 June 2015, 13.42.39-13.45.54, p. 54, line 22-p. 55, line 5; **E1/322.1** Kong Uth, T. 25 June 2015, 09.46.30-09.49.07, p. 17, lines 12-16.

2776 **E1/301.1** Or Ho, T. 19 May 2015, 11.29.21-11.32.18, p. 43, lines 20-21, *cited* in **E465** Case 002/02 TJ, para. 1627, fn. 5535.

2777 **E465** Case 002/02 TJ, para 1627, fn. 5535 *citing* **E1/302.1** Or Ho, T. 20 May 2015, 10.09.09-10.11.12, p. 26, lines 1-22 ("The reason for the soil collapse was that we worked at night and each team was competing with one another [...] and they actually drilled a hole on the lower surface of the embankment [...] After that the soil collapsed [...] the total amount of soil that collapsed was about one or two truck full.").

2778 **F54** Appeal Brief, para. 781.

2779 **E465** Case 002/02 TJ, para. 1628 ("Nuon Narom gave evidence that she saw soil collapse around a hole in the ground that some youth were digging"), fn. 5236 (where the TC notes that Nuon Narom testified "that she saw soil collapse around a hole in the ground that some youth were digging").

2780 **E465** Case 002/02 TJ, para. 1670.

2781 *See also* response to Ground 21.

2782 **F54** Appeal Brief, para. 782.

2783 **F54** Appeal Brief, para. 782.

2784 Though the TC did not include a citation after it inferred a large number of deaths had occurred, the TC is not required to articulate every step of reasoning in detail, *see* Standard of Review (Reasoned Decision). The TC referred to the "harsh conditions" at 1JD in para. 1670, including, *inter alia*, "the imposition of hard labour, starvation rations, and inhospitable conditions, including an unhygienic environment and insufficient and ineffective medicine", with citations to relevant evidence. The TC made factual findings on each of these conditions throughout the section of the Judgment dedicated to 1JD.

2785 **E465** Case 002/02 TJ, para. 1499.

2786 **E465** Case 002/02 TJ, para. 1670.

2787 **E465** Case 002/02 TJ, para. 1585.

findings regarding (i) the "dangerously unhygienic environment",[2788] which "led to disease, and exacerbated the suffering";[2789] (ii) the "insufficient"[2790] food, which allowed workers to grow "malnourished and emaciated";[2791] and (iii) the "limited"[2792] and "ineffective"[2793] medical treatment. Overall, the TC found the living conditions "were extremely poor and inadequate to sustain the workers in the assignments they had to undertake",[2794] and thus reasonably inferred a large number of workers died as a result.[2795]

Ground 117: Lack of evidence of dolus eventualis for the deaths due to hunger and living conditions [2796]

809. **Ground 117 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that the *mens rea* of the crime of murder with *dolus eventualis* was established at 1JD.**

810. Appellant ignores relevant factual findings to incorrectly contend that the evidence relied on to establish *mens rea* was of low probative value.[2797] Based on testimony from "numerous witnesses", the TC found that 1JD was a "hot battlefield".[2798] This testimony is linked to the documentary evidence relied on to establish the Party Centre's knowledge of the harsh living and working conditions at the dam: CPK documents described workers labouring "day and night in a most vigorous, seething, and active manner" on projects

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2788 **E465** Case 002/02 TJ, para. 1596. The TC found that: workers contracted dysentery from the water, which caused some to die (*see* para. 1597); workers were forced to defecate in the bushes (*see* para. 1598); workers were not provided with proper clothing or the means to clean their clothing, which meant lice was "abundant" (*see* paras 1600-1601); and there were no sanitary pads available to women (*see* para. 1602).

2789 **E465** Case 002/02 TJ, para. 1603.

2790 **E465** Case 002/02 TJ, para. 1595. The TC found that "people starved" (*see* para. 1586), and were provided with "meagre rations" (*see* para. 1592). *See also* paras 1587-1594.

2791 **E465** Case 002/02 TJ, para. 1586.

2792 **E465** Case 002/02 TJ, para. 1607.

2793 **E465** Case 002/02 TJ, para. 1608. The TC further found that medical workers "received very little training" (*see* para. 1610), and that workers who fell sick were forced to continue working (*see* paras 1539, 1557, 1558, 1606, 1610).

2794 **E465** Case 002/02 TJ, para. 1610.

2795 **E465** Case 002/02 TJ, para. 1670.

2796 Ground 117: **F54** Appeal Brief, *Lack of evidence of dolus eventualis for the deaths due to hunger and living conditions*, paras 783-786; **F54.1.1** Appeal Brief Annex A, p. 43 (EN), pp. 39-40 (FR), pp. 61-62 (KH).

2797 **F54** Appeal Brief, para. 784. Contrary to Appellant's claim, the TC additionally cited para. 1504 in its findings on *mens rea*, *see* **E465** Case 002/02 TJ, fn. 5676.

2798 **E465** Case 002/02, para. 1504. "Hot battlefields" were sites with strict timelines to complete the work. The TC included reference to testimony stating that the worksite was referred to as a "hot battlefield" over the loudspeakers at the site, *see* **E1/306.1** Hun Sethany, T. 27 May 2015 14.35.56-14.38.08, p. 69, lines 1-13.

including 1JD,[2799] with "shortcomings" in their living standards.[2800] Appellant further ignores the TC's extensive factual findings on Ke Pauk and the upper echelon's knowledge of the conditions at 1JD.[2801] Based on the totality of the evidence, the TC rightly concluded that leaders at the worksite and in the Party Centre knew of the abject living conditions, yet continued to impose harsh working conditions, which showed that "leadership was prepared to accept the risk that workers would die" while building 1JD.[2802] The TC thus reasonably held that the "acceptance of the risk of the workers' death as a result of the poor and unsafe working and living conditions"[2803] satisfied the *mens rea* for murder with *dolus eventualis*.[2804]

811. Appellant also argues, without merit, that the TC failed to assess the evidence in its "temporality",[2805] claiming the TC's finding of *mens rea* was based on facts known only after the *actus reus* was committed, and as such, the deaths did not occur with criminal intent.[2806] The claim fails, as the TC clearly held the deaths at 1JD occurred simultaneously with Appellant's knowledge of the inhumane conditions. Appellant acknowledged wide-scale food shortages at worksites,[2807] that "people were forced to work [...] while they could barely walk",[2808] and that conditions deteriorated as a result of the CPK's objectives.[2809] The TC found that construction on 1JD began between late 1976 or early 1977, and was completed by early 1978.[2810] A plain reading of the TC's language indicates that the *mens rea* extended to the entire period of the Dam's construction, due to the consistent imposition of abject working and living conditions:[2811] "the workers were provided with the minimum necessary to survive and accomplish the

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2799 **E465** Case 002/02 TJ, fn. 5575 *citing* **E3/287** FBIS, *Commentary on Completing Dry Season Irrigation Work,* 9 May 1977, EN 00168139-40, which is quoted in **E465** Case 002/02 TJ, para. 1506.

2800 **E465** Case 002/02 TJ, para. 1639, fn. 5574 *citing* **E3/170** *Revolutionary Flag*, Oct.-Nov. 1977, EN 00182564.

2801 **E465** Case 002/02 TJ, paras 1630-1640 finding that Ke Pauk was apprised of the conditions from "personal supervision" (*see* para. 1631), that he informed the Party Centre about the "specific difficulties" faced at 1JD (*see* para. 1633), and that the Party Centre "maintained the deadline for the Dam which risked the lives of the workers" (*see* para. 1640).

2802 **E465** Case 002/02 TJ, para. 1671.

2803 **E465** Case 002/02 TJ, para. 1672.

2804 **F54** Appeal Brief, para. 1672.

2805 **F54** Appeal Brief, para. 785.

2806 **F54** Appeal Brief, paras 785-786.

2807 **E465** Case 002/02 TJ, paras 4211-4212.

2808 **E465** Case 002/02 TJ, para. 4214 *citing* **E3/4043** Transcript of Recorded Interview with Khieu Samphan, undated, EN 00786109-10.

2809 **E465** Case 002/02 TJ, paras 4211-4212.

2810 **E465** Case 002/02 TJ, paras 1430, 1447.

2811 **E465** Case 002/02 TJ, paras 1504-1526 (consideration of the working hours), 1527-1541 (consideration of the work conditions and quotas), 1586-1615 (consideration of the living conditions).

goal of building the Dam [...] leadership was prepared to accept the risk that workers would die in the process".[2812] The TC made factual findings referring to the Party Centre's awareness of the conditions throughout its construction, noting Pol Pot's visits to 1JD between late 1976 and 1978,[2813] the inauguration on 1 January 1977,[2814] and visits from foreign delegations between April 1977 and March 1978,[2815] which "apprised the CPK Standing Committee of the prevailing conditions at worksites, including the 1st January Dam".[2816]

Ground 118: Treatment of NP [2817]

812. **Ground 118 should be dismissed as Appellant fails to establish that the TC erred in assessing the evidence underlying the finding that the *actus reus* of the crime of persecution on political grounds against NP was established at 1JD.**

813. The ground fails with regard to the alleged legal error that the evidence cited in Judgment paras 1642-1648 cannot serve to establish a pattern of discriminatory treatment.[2818] The TC correctly relied on evidence outside the temporal and geographic scope of the Closing Order to find this pattern,[2819] and thus find a context of "segregation and mistreatment of New People"[2820] which underpins specific evidence of *de facto* discrimination suffered at 1JD.

814. The ground fails with regard to the alleged factual error as Appellant has not demonstrated that the finding was one that no reasonable trier of fact could have reached upon a holistic, as opposed to a piecemeal, assessment of the evidence. Despite Appellant's assertion of equal treatment between BP and NP,[2821] the TC's assessment of the evidence demonstrated numerous meaningful differences establishing *de facto*

2812 **E465** Case 002/02 TJ, para. 1671.
2813 **E465** Case 002/02 TJ, para. 1489.
2814 **E465** Case 002/02 TJ, para. 1484.
2815 **E465** Case 002/02 TJ, paras 1491-1496.
2816 **E465** Case 002/02 TJ, para. 1497.
2817 Ground 118: **F54** Appeal Brief, *Treatment of NP*, paras 787-796; **F54.1.1** Appeal Brief Annex A, p. 43 (EN), p. 40 (FR), p. 62 (KH).
2818 **F54** Appeal Brief, para. 789.
2819 *See* response to Ground 3.
2820 **E465** Case 002/02 TJ, para. 1649.
2821 **F54** Appeal Brief, para. 790.

discrimination.[2822] NP were "bad elements",[2823] they were spied on[2824] and watched by local militia,[2825] and their biographies were drafted to sort them as NP.[2826] Based on their biographies, they were arrested,[2827] and were disappeared or killed.[2828] Specifically at 1JD, BP received special privileges[2829] and could hold supervisory roles.[2830] NP faced stricter punishments,[2831] and lived in an atmosphere of "constant fear".[2832]

815. Appellant's erroneous claim that the Chamber's recognition that NP and BP shared some similar treatment renders any finding of discrimination unreasonable[2833] must also fail. The TC's acknowledgement that both NP and BP endured difficult conditions at 1JD does not detract from the reality that NP were subjected to *de facto* discrimination by the Khmer Rouge in furtherance of the CPK's political agenda. Based on the evidentiary record, the TC reasonably concluded that, though harsh conditions at 1JD affected everyone, NP suffered more severely than BP as a result of this classification by the CPK.[2834] Appellant's mere assertion that the TC failed to interpret the evidence of six

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2822 **E465** Case 002/02 TJ, paras 1641-1653.

2823 **E465** Case 002/02 TJ, para. 1648. *See also* para. 1641, fn. 5576 *citing* paras 980-995, fn. 5577 *citing* paras 3839, 3845-3846, 3848.

2824 **E465** Case 002/02 TJ, para. 1642, fns 5582 (*citing* **E1/301.1** Or Ho, T. 19 May 2015, 10.00.01-10.03.04, p. 18, line 16-p. 19, line 12, 10.43.18-10.45.14, p. 27, lines 4-13), 5596-5597 (*citing* **E1/309.1** Uth Seng, T. 3 June 2015, 09.29.18-09.30.58, p. 11, lines 17-25).

2825 **E465** Case 002/02 TJ, fn. 5601 *citing* **E1/309.1** Uth Seng, T. 3 June 2015, 09.30.58-09.35.15, p. 12, line 18-p. 13, line 14, 09.44.15-09.46.42, p. 17, lines 16-22.

2826 **E465** Case 002/02 TJ, para. 1646; fn. 5604 *citing* **E1/317.1** Yean Lon, T. 16 June 2015, 13.52.32-13.54.37, p. 53, lines 15-22.

2827 **E465** Case 002/02 TJ, para. 1643, fn. 5590 (*citing* **E1/306.1** Hun Sethany, T. 27 May 2015, pp. 17-18, 33), para. 1646, fns 5603 (*citing* **E1/317.1** Yean Lon, T. 16 June 2015, 13.52.32-13.54.37, p. 53, lines 15-22); 5605-5606 (*citing* **E3/7322** Yean Lon WRI, EN 00330719), para. 1647, fn. 5608 (*citing* **E1/317.1** Yean Lon, T. 16 June 2015, 13.54.37-13.56.27, p. 54, lines 3-13).

2828 **E465** Case 002/02 TJ, para. 1643, fns 5590-5595 (*citing* **E1/306.1** Hun Sethany, T. 27 May 2015, 09.48.10-09.52.41, p. 17, line 3-p. 18, line 14, 10.53.02-10.59.14, p. 32, line 2-p. 33, line 23, 11.06.10-11.15.04, p. 36, line 12-p. 39, line 7), para. 1644, fn. 5600 (*citing* **E1/309.1** Uth Seng, T. 3 June 2015, 09.21.24-09.25.23, p. 8, line 17-p. 9, line 18), para. 1646, fn. 5607 (*citing* **E3/7322** Yean Lon WRI, EN 00330719).

2829 Specifically, BP could request specific work locations, were entitled to new clothing and footwear, and were allowed to attend formal ceremonies. *See* **E465** Case 002/02 TJ, para. 1652, fns 5619 (*citing* **E1/305.1** Hun Sethany, T. 26 May 2015, 15.56.12-16.00.49, p. 98, lines 5-22), 5620 (*citing* **E1/309.1** Uth Seng, T. 3 June 2015, 10.04.09-10.05.42, p. 26, lines 1-12, 11.16.57-11.20.16, p. 44, lines 5-21), 5624 (*citing* **E1/306.1** Hun Sethany, T. 27 May 2015, 14.30.25-14.34.36, p. 67, lines 9-20), 5625 (*citing* **E1/305.1** Hun Sethany, T. 26 May 2015, 15.49.15-15.52.48, p. 97, lines 1-7), 5627 (*citing* **E1/307.1** Un Rann, T. 28 May 2015, 09.45.50-09.50.50, p. 18, line 19-p. 19, line 11), 5629 (*citing* **E1/308.1** Seang Sovida, T. 2 June 2015, 10.45.31-10.48.38, p. 37, lines 6-11, 11.21.13-11.22.57, p. 53, lines 14-22).

2830 **E465** Case 002/02 TJ, para. 1652, fns 5617 (*citing* **E1/339.1** Nuon Narom, T. 1 Sept. 2015, 10.33.33-10.34.38, p. 25, lines 14-18), 5629 (*citing* **E1/308.1** Seang Sovida, T. 2 June 2015, 10.45.31-10.48.38, p. 37, lines 6-11, 11.21.13-11.22.57, p. 53, lines 14-22).

2831 **E465** Case 002/02 TJ, para 1652, fns 5621 (*citing* **E1/301.1** Or Ho T. 19 May 2015, 09.39.55-09.47.12, p. 13, line 1-p. 14, line 20), 5622 (*citing* **E1/306.1** Hun Sethany, T. 27 May 2015, 09.28.17-09.31.05, p. 11, lines 3-15).

2832 **E465** Case 002/02 TJ, paras 1653, 1688.

2833 **F54** Appeal Brief, para. 791.

2834 **E465** Case 002/02 TJ, para. 1653.

witnesses to his liking fails to meet the standard of review on appeal.[2835]

816. Appellant contends that the TC "selectively disregard[ed]" parts of Om Chy and Or Ho's testimonies,[2836] but fails to demonstrate that the TC erred in relying on portions of the testimony while rejecting others. It is within the Chamber's discretion to accept part of a witness' testimony as credible and reliable and to reject other parts.[2837] The TC addressed these testimonies, noting the supervisory roles held by these witnesses at the Dam.[2838]

817. Again without merit, Appellant takes particular issue[2839] with the TC's reliance on Or Ho's testimony that NP were reprimanded for minor offences and their safety could not be guaranteed if they committed serious mistakes.[2840] The TC has the deference to assess the reliability and credibility of relevant evidence.[2841] Additional testimony corroborated this fact,[2842] and so the TC found that NP were "more readily reprimanded".[2843]

818. The TC's holistic examination of the evidence led to the reasonable conclusion that NP's "precarious situation" was "exacerbated" by a "number" of discriminatory acts.[2844] Appellant's disagreements[2845] with the probative value assigned to the remaining testimony used in finding *de facto* discrimination does not detract from its reasonableness, and his mere assertions that the finding is in error should be dismissed.

Ground 119: Alleged treatment of New People[2846]

819. **Ground 119 should be dismissed as Appellant fails to establish that the TC erred in fact or law in finding that the *actus reus* of the crime of persecution on political grounds against NP was established at 1JD.**

820. The ground fails with regard to the alleged legal and factual errors as Appellant: (i) fails

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2835 *See Boškoski & Tarčulovski* AJ, para. 18; *Krajišnik* AJ, para. 27, *Martić* AJ, para. 19.
2836 **F54** Appeal Brief, para. 791.
2837 *See* **F36** Case 002/01 AJ, para. 357; *Karemera & Ngirumpatse* AJ, para. 468 *citing Kajelijeli* AJ, para. 167.
2838 *See* Case **E465** Case 002/02 TJ, para. 1651 *citing* paras 1526, 1540 ("Om Chy and Or Ho were both supervisors who had an incentive to minimise their culpability for the mistreatment of workers or discrimination against particular groups").
2839 **F54** Appeal Brief, para. 794.
2840 **E465** Case 002/02 TJ, para. 1652, fn. 5621 *citing* **E1/301.1** Or Ho T. 19 May 2015, 09.39.55-09.47.12, p. 13, line 1-p. 14, line 20, *confirming* **E3/5255**, EN 00250047 ("Depositee people were more easily found to be at fault and were punished more than the other people").
2841 **F36** Case 002/01 AJ, paras 88, 89, 227; Case 001-**F28** Duch AJ, para. 17.
2842 **E465** Case 002/02 TJ, para. 1652, fn. 5622 *citing* **E1/306.1** Hun Sethany, T. 27 May 2015, 09.28.17-09.31.05, p. 11, lines 9-11 ("If the Old People made a minor mistake, the Old People could provide justification to the Khmer Rouge but this did not apply to the New People").
2843 **E465** Case 002/02 TJ, para. 1688.
2844 **E465** Case 002/02 TJ, para. 1688.
2845 **F54** Appeal Brief, paras 793, 795, 796.
2846 Ground 119: **F54** Appeal Brief, *Alleged treatment of New People*, para. 797; **F54.1.1** Appeal Brief Annex A, p. 44 (EN), p. 40 (FR), pp. 62-63 (KH).

to explain how the TC's reference to a fundamental right to equal treatment invalidates the decision; (ii) fails to demonstrate that the TC erred in law or fact in finding that the treatment suffered by NP was a violation of a fundamental right; and (iii) merely asserts but does not demonstrate that the TC erred in its application of the gravity threshold for the crime of persecution.

821. Appellant claims the TC erred in law by affirming the existence of a fundamental right to equal treatment without supporting legal sources,[2847] but fails to appreciate that the TC was simply articulating, in other terms, that the evidence established that NP were subject to differential treatment, as is required in analysing whether a group has suffered *de facto* discrimination.[2848] Appellant's selective reading of the Judgment also ignores that the TC's finding of persecution against NP at 1JD was *not* grounded on a right to equal treatment, but rather on the violation of multiple rights, including "fundamental rights pertaining to life, personal dignity, liberty and security and freedom from arbitrary or unlawful arrest as enshrined in customary international law".[2849]

822. Appellant then erroneously contends that the TC erred in law and fact in finding that the treatment described in paragraph 1653 of the Judgment amounts to a violation of a fundamental right, and further contends, without merit, that the TC erred in law by failing to characterise the level of gravity required to allow for the discriminatory violation of a fundamental right to constitute the crime of persecution.[2850] With respect to the alleged factual error, again, Appellant wrongly presents the TC's findings through a selective reading of the Judgment, ignoring that the finding was based on the violation of multiple rights.[2851] The TC's analysis of the discriminatory acts suffered by NP demonstrates blatant violations of their rights to life, personal dignity, liberty and security, and freedom from arbitrary or unlawful arrest, as reasonably held by the TC.[2852]

2847 **F54** Appeal Brief, para. 797 *citing* **E465** Case 002/02 TJ, para. 1689.

2848 *See* **F28** *Duch* AJ, paras 256-258. *See further* response to Ground 109. Appellant also fails to appreciate that the right to not be discriminated against underpins all the core international human rights instruments (*see e.g.* UDHR, preamble, arts 1 (equal dignity and rights), 2 (right to non-discrimination), 7 (right equality before the law); ICCPR, preamble, arts 2(1) (right to non-discrimination), 26 (right to equality before the law)) and is the essence of the crime of persecution itself.

2849 **E465** Case 002/02 TJ, para. 1691 *citing* GC IV, art. 3(1)(a), UDHR, preamble, arts 1, 3, 9, 22, 23(3), ICCPR, arts 6, 9(1), 10, ECHR, arts 2, 5, ACHPR, arts 4-6, ACHR, arts 4-7, *Kordić and Čerkez* AJ, para. 106.

2850 **F54** Appeal Brief, para. 797.

2851 **E465** Case 002/02 TJ, para. 1691.

2852 **E465** Case 002/02 TJ, para. 1691. For example, the findings that NP were spied upon (*see* fns 5582, 5596-5597, 5601) and arrested (*see* fns 5590, 5603, 5605-5606, 5608) infringe on their rights to personal dignity, liberty, security, and freedom from arbitrary and unlawful arrest. Likewise, the findings that NP were disappeared or killed (*see* fns 5590-5595, 5600, 5607), reasonably infringe on their right to life. For additional detail, *see also* paras 1641-1653.

823. The alleged legal errors fail, as Appellant has not demonstrated with any specificity that the TC erred in its application of the law; he simply disagrees with the findings. Appellant misinterprets the proper consideration of fundamental rights, and merely claims that the relevant discriminatory acts found by the TC did not reach the requisite level of gravity to satisfy the *actus reus* of persecution, without identifying an error in this standard or specifying an alternate standard.

824. Among other discriminatory acts, the TC found that NP at 1JD were more readily reprimanded for offences or mistakes; were forced to hide their identities; and lived in constant fear of being arrested or refashioned due to surveillance as well as the disappearances of other NP.[2853] The TC did not qualify these acts as "fundamental rights", as erroneously claimed by Appellant,[2854] but, rather, correctly considered that these were the underlying persecutory acts resulting in breaches of fundamental rights.[2855]

825. The TC correctly articulated the gravity threshold.[2856] Applying the proper analysis by considering these acts "together" and "within the already harsh context" in which they were committed, the TC was satisfied that the violations of rights stemming from the discriminatory treatment of the NP "cumulatively r[o]se to a similar level of gravity as enumerated crimes against humanity".[2857]

3. TRAPEANG THMA DAM

Ground 113: There was no murder with dolus eventualis [2858]

826. **Ground 113 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *actus reus* and *mens rea* for murder with *dolus eventualis* were established with regard to deaths due to living conditions at TTD.**

827. The ground fails as Appellant merely repeats his erroneous assertions regarding the lawfulness of recharacterising facts as murder with *dolus eventualis*,[2859] and the applicability of murder with *dolus eventualis*.[2860] The TC acted in its authority to

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2853 **E465** Case 002/02 TJ, para. 1653. *See also* response to Ground 118.
2854 **F54** Appeal Brief, para. 797.
2855 **E465** Case 002/02 TJ, para. 1691. The proper analysis is not whether a specific persecutory act itself breaches a human right that is fundamental in nature, but whether the persecutory acts, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights."
2856 **E465** Case 002/02 TJ, paras 716, 1691. *See* response to Ground 109.
2857 **E465** Case 002/02 TJ, para. 1691.
2858 Ground 113: **F54** Appeal Brief, *There was no murder with* dolus eventualis, paras 758-762; **F54.1.1** Appeal Brief Annex A, p. 42 (EN), pp. 38-39 (FR), p. 60 (KH).
2859 **F54** Appeal Brief, para. 758.
2860 **F54** Appeal Brief, para. 761.

recharacterise the facts,[2861] and the *mens rea* of the CAH of murder extended to *dolus eventualis* in 1975.[2862]

828. Appellant's claim that the *actus reus* of murder at TTD has not been established is contrary to common sense, and based on a misreading of the Judgment, as he alleges the TC erred by finding a culpable omission while failing to characterise the nature and scope of the duty to act.[2863] In fact, and as Appellant acknowledges,[2864] the TC found that the *actus reus* of murder at TTD was established by positive criminal acts ("the imposition on the workers of conditions [...] that caused their death"), rather than an "omission". The worksite authorities' "unwillingness to adapt working hours and working or living conditions to the workers' needs, and to provide basic appropriate medical care"[2865] was simply a failure to desist, and thus a continuation, of these positive acts.

829. Notably, Appellant does not challenge the TC's evaluation of the evidence or the factual findings that form the basis of the impugned legal finding.[2866] These factual findings include, *inter alia*: (i) workers were not provided with sufficient food, lacked access to drinking water, and became ill due to the poor water quality;[2867] (ii) workers were not provided adequate accommodation, frequently fell ill, and some died of illness;[2868] (iii) workers who fell ill were accused of imaginary sickness, provided with ineffective medicine, and only had access to incompetent medics;[2869] (iv) the working conditions were demanding, and included, *inter alia*, the exclusive reliance on manual labour,[2870] the requirement to work regardless of weather conditions,[2871] the requirement to work long hours (in some instances, to work day and night continuously),[2872] and the imposition of onerous work quotas;[2873] and (v) workers died almost every day after

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2861 *See* response to Ground 6.
2862 *See* response to Grounds 86 and 87-93.
2863 **F54** Appeal Brief, para. 759. Appellant repeats this erroneous claim in relation to each of the crime sites of TK, 1JD, TTD and KCA. *See* response to Grounds 99, 113, 115 and 123.
2864 **F54** Appeal Brief, para. 759 *citing* **E465** Case 002/02 TJ, para. 1388.
2865 **E465** Case 002/02 TJ, para. 1388. *See also* response to Ground 99.
2866 If Appellant intended to challenge the factual findings through other appeal grounds, he failed to indicate his intention in **F54** Appeal Brief, paras 758-762 with a cross-reference to other sections of his Brief. In any event, his other appeal grounds do not challenge *all* the factual findings that underpin the impugned finding in Ground 113.
2867 *See e.g.* **E465** Case 002/02 TJ, paras 1298, 1301.
2868 *See e.g.* **E465** Case 002/02 TJ, paras 1308, 1320, 1375.
2869 *See e.g.* **E465** Case 002/02 TJ, paras 1321-1322.
2870 *See e.g.* **E465** Case 002/02 TJ, para. 1296.
2871 *See e.g.* **E465** Case 002/02 TJ, para. 1270.
2872 *See e.g.* **E465** Case 002/02 TJ, paras 1278-1280.
2873 *See e.g.* **E465** Case 002/02 TJ, para. 1288.

collapsing to the ground.[2874] The unwillingness to adapt these conditions is simply demonstrative of the worksite authorities' uninterrupted act of imposing them, thereby causing death throughout the entirety of the Dam's construction.

830. Further, Appellant has not demonstrated that the TC erred in its assessment of the *mens rea*[2875] in finding that the authorities at TTD willingly imposed conditions that they knew would likely lead to deaths or accepted the possibility of this fatal consequence.[2876] Rather, Appellant makes mere assertions unsupported by the evidence and based on an incorrect reading of the TC's legal findings on murder and extermination.

831. Appellant erroneously claims that factors beyond the control of authorities, as well as the existence of "pre-existing conditions", render the causal link between the imposed conditions and their impact on the workers so unascertainable as to prevent a reasonable trier of fact from establishing the authorities' *mens rea* for deaths from conditions.[2877] Appellant fails, however, to identify any external factors or pre-existing conditions, and further ignores critical portions of the TC's legal findings.

832. The TC found that the authorities "willingly imposed" conditions "for an extended period of time" with the intent of "exploit[ing] the workers [...] while being indifferent to their well-being and accepting the risk of their death in order to achieve their objective".[2878] The TC further noted the authorities' "unwillingness" to adapt conditions so that the workers' needs were considered.[2879] Given the above-noted findings, Appellant fails to demonstrate why no reasonable trier of fact would have found that the extent and severity of the authorities' actions proved beyond a reasonable doubt the intent to commit murder.

833. Appellant also erroneously argues that the TC erred by failing to specify the "temporal scope" of the evidence it relied on in establishing the *mens rea*.[2880] The TC found that construction at TTD began between early 1976 and 1977,[2881] that there was a peak of activity during the year 1977,[2882] and that TTD was largely completed by the end of 1977

2874 *See e.g.* **E465** Case 002/02 TJ, paras 1375, 1385. Taking into account all these findings, the TC was "satisfied that the death of those who collapsed at the worksite was due to the overwork, exhaustion and lack of food. Workers died of illnesses developed as a result of the hard work and the unhealthy living conditions, which was further aggravated by the lack of appropriate basic medical care. The Chamber is satisfied that the imposition of these conditions caused the death of the workers at the construction site" (*see* **E465** Case 002/02 TJ, para. 1384 and the citations therein).

2875 **F54** Appeal Brief, para. 761.

2876 **E465** Case 002/02 TJ, para. 1389.

2877 **F54** Appeal Brief, para. 761.

2878 **E465** Case 002/02 TJ, paras 1389, 1387.

2879 **E465** Case 002/02 TJ, para. 1388.

2880 **F54** Appeal Brief, para. 761.

2881 **E465** Case 002/02 TJ, para. 1220.

2882 **E465** Case 002/02 TJ, paras 1220, 1262.

or mid-1978.[2883] The TC went on to hold that authorities imposed the relevant conditions "for an extended period of time, including after their effects on the workers became apparent".[2884] A plain reading of the TC's language indicates that the *mens rea* extended to the entire period of the Dam's construction. This is further supported by the TC's factual findings, which refer to reports on the poor living conditions at TTD from mid-1976;[2885] *RY* and media articles noting water shortages at TTD in mid- to late 1977;[2886] controlled-information visits to the Dam throughout 1977 and early 1978 in which CPK officials provided diplomatic delegations and journalists with a false perception of the working and living conditions;[2887] and CPK reports and telegrams discussing the poor living conditions at TTD from mid-1977 to mid-1978, including several reports sent by the Northwest Zone Office 560 to Office 870, Party Centre.[2888]

Ground 114: Persecution on political grounds[2889]

834. **Ground 114 should be dismissed as Appellant fails to establish that the TC erred in its assessment of the evidence underlying the finding that the *actus reus* of the crime of persecution on political grounds was established at TTD.**

835. The ground fails as Appellant's argument is based on a misrepresentation of the evidence and omissions of relevant factual findings, and thus should be dismissed.[2890] Specifically, Appellant's claim is based entirely on his erroneous interpretation of the CO, and does not reflect the totality of the evidence relied on in establishing persecution on political grounds.[2891] The TC, being properly seised,[2892] found the persecuted group at TTD was "real or perceived enemies of the CPK".[2893] Appellant's dismissal of the TC's extensive factual and legal findings on the persecution of enemies of the CPK does not detract from the reasonable findings that (i) enemies of the CPK were subjected to *de facto*

2883 **E465** Case 002/02 TJ, para. 1221.
2884 **E465** Case 002/02 TJ, para. 1389.
2885 **E465** Case 002/02 TJ, para. 1307
2886 **E465** Case 002/02 TJ, para. 1285.
2887 **E465** Case 002/02 TJ, paras 1216, 1217, 1222, 1253.
2888 **E465** Case 002/02 TJ, paras 1239-1248, 1318.
2889 Ground 114: **F54** Appeal Brief, *Persecution on political grounds*, paras 763-767; **F54.1.1** Appeal Brief Annex A, pp. 42-43 (EN), p. 40 (FR), p. 60 (KH).
2890 *See Boškoski & Tarčulovski* AJ, para. 18; *Krajišnik* AJ, para. 18; *Martić* AJ, para. 17.
2891 **F54** Appeal Brief, paras 763-767 (Appellant's argument is based entirely on the false premise that the TC was seised only of acts of political persecution against NP).
2892 *See* response to Grounds 68, 72, 75, 76, 77, 124, 134 (*Saisine* for Persecution on Political Grounds).
2893 **E465** Case 002/02 TJ, paras 1407, 1413.

discrimination,[2894] (ii) this discriminatory treatment violated fundamental rights,[2895] and (iii) the violation of these rights reached the requisite level of gravity to satisfy the *actus reus* of persecution.[2896]

4. KAMPONG CHHNANG AIRFIELD

Ground 123: Kampong Chhnang Airfield[2897]

836. **Ground 123 should be dismissed as Appellant fails to demonstrate that the TC erred by recharacterising the crime of extermination to *dolus eventualis* murder at KCA.**

837. The ground fails as Appellant merely repeats his erroneous assertions regarding the *saisine*,[2898] the lawfulness of recharacterising the facts as murder with *dolus eventualis*,[2899] and the applicability of murder with *dolus eventualis* at the time of the facts.[2900] These arguments fail as the TC was properly seised, acted within its authority in recharacterising these facts,[2901] and the definition of the *mens rea* of murder as a CAH extended to *dolus eventualis* in 1975.[2902]

838. Appellant's argument regarding *saisine* fails for the reasons stated above.[2903] It also fails as the IS specifically requested an investigation into, *inter alia*, enslavement, persecution, imprisonment, and OIA at KCA.[2904] The IS states that workers at KCA "slowly starved", were forced to work "extremely hard", and were taken away for execution and disappeared.[2905] Moreover, Schedule 52 of the IS notes the evidence of numerous witnesses describing insufficient food, exhausting work and other deplorable conditions at KCA.[2906] The CIJs were thus properly seised to further investigate the conditions at KCA and charge Appellant with the resulting deaths.[2907]

2894 **E465** Case 002/02 TJ, paras 1409, 1410. *See also* paras 1268 (*citing* four witnesses who testified that those who were not considered hard working were put in special units with harder working conditions), 1345 (*citing* six witnesses who testified that BP were given leadership positions), 1362-1367 (three witnesses detail the arrests and killings of people considered to be enemies of the CPK).

2895 **E465** Case 002/02 TJ, para. 1411.

2896 **E465** Case 002/02 TJ, para. 1412.

2897 Ground 123: **F54** Appeal Brief, *Kampong Chhnang Airfield,* paras 814-824; **F54.1.1** Appeal Brief Annex A, p. 45 (EN), p. 41 (FR), p. 64 (KH).

2898 **F54** Appeal Brief, para. 818.

2899 **F54** Appeal Brief, para. 814.

2900 **F54** Appeal Brief, para. 822.

2901 *See* response to Ground 6. *See also* **E465** Case 002/02 TJ, paras 1803-1804.

2902 *See* response to Ground 86.

2903 *See* response to Ground 38.

2904 **D3** IS, para. 122.

2905 **D3** IS, para. 47.

2906 **D3** IS, para. 47 *citing* Schedule 52 *Conditions at the Kampong Chhnang Airport Construction Site,* pp. 97-99.

2907 **D427** Closing Order, paras 1381-1390.

839. Appellant further erroneously claims that the TC failed to characterise the legal duty to act and therefore erred in establishing the *actus reus* of murder.[2908] In fact, and as acknowledged by Appellant,[2909] the TC found that the *actus reus* of murder at KCA was established by positive criminal acts: "conditions were imposed which resulted in the death of many people, including by placing people in unsafe working conditions, and forcing them to work extended hours without sufficient food".[2910] The "absence of appropriate measures to change or alleviate such conditions" was thus not a separate omission, but rather a failure to desist from these acts.[2911]

840. The TC established that conditions at KCA included rock fragments hitting workers from work-related explosions,[2912] a lack of protective gear and the occurrence of fatal accidents,[2913] and overwork and starvation.[2914] Worksite authorities were aware of the conditions at KCA throughout the entirety of its construction, but were unwilling to adapt the conditions and "indifferen[t] as to the fate of [the] workers",[2915] thus satisfying the requisite *mens rea*.[2916] The TC found that deaths at KCA could have been avoided if authorities "adapt[ed] the work schedule or improv[ed] safety and living conditions" but they deliberately did not do so.[2917] Appellant further fails to identify any external factors that render the causal link between the conditions and the deaths at KCA invalid.[2918]

841. Appellant also erroneously alleges that the TC did not assess the "evidence accurately in terms of its temporality".[2919] The TC found that the decision to begin construction at KCA was made by the SC in April 1976, and construction commenced mid-1976 and continued until January 1979.[2920] In assessing conditions at KCA, the TC relied on testimony from witnesses who worked at KCA throughout the entirety of its

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2908 **F54** Appeal Brief, para. 821. Appellant repeats this erroneous claim in relation to each of the crime sites of TK, 1JD, TTD and KCA. *See* response to Grounds 99, 113, 115 and 123.

2909 **F54** Appeal Brief, para. 822 *citing* **E465** Case 002/02 TJ, para. 1805.

2910 **E465** Case 002/02 TJ, para. 1800.

2911 **E465** Case 002/02 TJ, para. 1804. Further, with respect to KCA, due to the military nature of the base, the TC relied on jurisprudence delineating the existence of a duty of care to soldiers to guarantee "that that their work and discipline do not exceed the level of suffering inherent to their function", *see* **E465** Case 002/02 TJ, para. 1834 *citing Quispialaya Vilcapoma v. Peru*, Inter-Am. Ct.H.R., Judgment, 23 Nov. 2015 (Series C No. 308), para. 124 (unofficial translation). *See also* response to Ground 99.

2912 **E465** Case 002/02 TJ, paras 1755, 1801.

2913 **E465** Case 002/02 TJ, paras 1755-1756, 1760, 1801.

2914 **E465** Case 002/02 TJ, paras 1758, 1800, 1802.

2915 **E465** Case 002/02 TJ, para. 1800.

2916 **E465** Case 002/02 TJ, para. 1805.

2917 **E465** Case 002/02 TJ, paras 1832, 1835.

2918 *Contra* **F54** Appeal Brief, para. 823.

2919 **F54** Appeal Brief, para. 823.

2920 **E465** Case 002/02 TJ, paras 1723-1724.

construction,[2921] and held that the dangerous and inhumane conditions were maintained "for an extended period of time" including after the negative effects on workers became apparent.[2922]A plain reading of the TC's language thus indicates that the *mens rea* of murder extended to the entire period of the construction of KCA.

ii. Security Centres

842. The TC correctly found that during the DK period, the CAH of imprisonment, enslavement, persecution, OIA (attacks on human dignity and enforced disappearances), torture, murder, and extermination were committed at security centres, pursuant to a CPK policy to identify, arrest, isolate and "smash" the most serious category of enemy at security centres and execution sites, and to re-educate "bad elements".[2923] This criminal policy was intrinsically linked to the common purpose.[2924] In addition, the TC correctly found that CAH were committed due to the imposition of inhumane conditions at the security centres.[2925]

843. Appellant's eight grounds[2926] regarding the security centres fail, as they incorrectly limit the evidence that the TC considered,[2927] rely on conjecture,[2928] do not meet the required standard for appellate review,[2929] and fail to advance claims that warrant SCC intervention.[2930] In particular, Appellant misunderstands and misapplies key aspects of the law on persecution.[2931]

1. S-21

Ground 125: Persecution on Political Grounds[2932]

844. **Ground 125 should be dismissed as Appellant fails to establish that the TC erred in law or fact by finding that "real or perceived enemies of the CPK" was a sufficiently**

2921 **E465** Case 002/02 TJ, para. 1731 *citing e.g.* **E1/321.1** Him Han, T. 24 June 2015, 11.10.27-11.16.13, pp. 41-42; **E3/5810** Kaing Guek Eav alias Duch", T. 25 Nov. 2009, 11.21.58-11.25.00, p. 58; **E3/369** Koy Mon WRI, EN 00272716-17.

2922 **E465** Case 002/02 TJ, para. 1805.

2923 **E465** Case 002/02 TJ, paras 3976 (murder), 3978-3983 (extermination, enslavement, imprisonment, torture, persecution on political grounds), 3985-3986 (OIA through attacks against human dignity and enforced disappearances). *See also* para. 3987.

2924 **E465** Case 002/02 TJ, paras 3973, 3987.

2925 **E465** Case 002/02 TJ, paras 2568, 2815, 3116,

2926 Grounds 125, 127, 129, 131-133, 135, 251.

2927 Ground 133.

2928 Ground 131.

2929 Ground 135.

2930 Grounds 127, 132, 251.

2931 Grounds 125, 129.

2932 Ground 125: **F54** Appeal Brief, *Persecution on political grounds*, paras 825-827; **F54.1.1** Appeal Brief Annex A, p. 46 (EN), p. 42 (FR), p. 65 (KH).

discernible group and that they suffered from *de facto* discrimination at S-21.

845. This ground fails with regard to the alleged errors, the type of which Appellant does not articulate, as he ignores relevant ECCC jurisprudence and misrepresents this Chamber's findings in Case 001.

846. Contrary to Appellant's erroneous claims,[2933] "real or perceived enemies of the CPK" may constitute a sufficiently discernible group.[2934] The TC thus did not err in finding that the categories of real or perceived enemies "expand[ed] over time" during DK[2935] and that a range of S-21 prisoners fell into those categories.[2936] These findings were based on the highly probative evidence set out in the Judgment,[2937] from which the TC identified a clear chronology of the CPK's notion of enemies and unambiguous categories of persons falling within the CPK's targeted group of real or perceived enemies.[2938]

847. Appellant also unpersuasively argues that the TC's finding that prisoners at S-21 "were arrested *en masse* […], particularly during the purges and in connection to the escalation of the conflict with Vietnam" demonstrates that they were indiscriminately targeted rather than discriminated in fact.[2939] As established above, confirmed by the SCC, and correctly applied by the TC, "an act or omission is discriminatory in fact where 'a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds'".[2940] It is not the number of people targeted that determines whether those people were subjected to *de facto* discrimination. If anything, the number of victims demonstrates the systematic and organised manner in which real or perceived enemies of the CPK were targeted.[2941]

848. Additionally, Appellant misrepresents this Chamber's findings in Case 001 regarding persecution on political grounds at S-21 to support his erroneous claim that prisoners in Case 002/02 were indiscriminately targeted.[2942] Taking into account the TC's finding in

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2933 **F54** Appeal Brief, para. 825.

2934 Case 001-**F28** *Duch* AJ, para. 273; **F36** Case 002/01 AJ, para. 669. *See also* Case 001-**F28** *Duch* AJ, para. 282. *See* response to Grounds 68, 72, 75, 76, 77, 124, and 134 (*Saisine* for persecution on political grounds: three groups).

2935 **E465** Case 002/02 TJ, para. 2600, fn. 8789 *cross-referring* to paras 3744-3863 (Section 16.3: Real or Perceived Enemies). *See particularly* para. 3839.

2936 *See* **E465** Case 002/02 TJ, paras 2600, 2602. *See also* para. 2577.

2937 **E465** Case 002/02 TJ, paras 3744-3748.

2938 *See* **E465** Case 002/02 TJ, paras 3744-3863 (Section 16.3: Real or Perceived Enemies). *See also* paras 2600, 2602.

2939 **E465** Case 002/02 TJ, para. 2601 (original emphasis). *Contra* **F54** Appeal Brief, para. 826.

2940 *See* response to Ground 108. *See also* Case 001-**F28** *Duch* AJ, para. 272 (original emphasis removed); **F36** Case 002/01 AJ, paras 667, 690; **E465** Case 002/02 TJ, para. 714.

2941 *See e.g.* **E465** Case 002/02 TJ, paras 2548, 3982. *See also* paras 2563 (killings at S-21), 2568 (mistreatment at S-21), 2602 (CPK policy to target perceived political adversaries), 3958 (CPK's systematic killings).

2942 *Contra* **F54** Appeal Brief, paras 826 (fns 1483-1484 *citing* Case 001-**F28** *Duch* AJ, paras 277, 283), 827.

Case 001 that "[b]y the end of the regime, '[t]he process of elimination of Party enemies turned into paranoia'", this Chamber nevertheless held that "as long as political enemies were defined pursuant to a policy employing some kind of general criteria, while other members of the population enjoyed a degree of freedom, there are grounds to find persecution on political grounds".[2943] The legal principle established in Case 001 is, logically, that indiscriminate targeting does not satisfy the requisite elements of persecution. Factual findings as to whether the targeting was indeed indiscriminate, however, are unique to each case, and, as Appellant acknowledges, "these are two different cases".[2944]

849. Based on a plethora of highly probative evidence,[2945] the Case 002/02 TC reasonably found that "the focus of the S-21 operation was directed against real or perceived political enemies of the CPK", a sufficiently discernible group.[2946] Victims included detractors of the socialist revolution, the Party's critics or opponents, ex-KR, and the NP,[2947] who were identified and arrested *because* they had been "labelled as enemies, traitors or spies and viewed as political enemies of the CPK and the revolution".[2948] Throughout their detention at S-21, they "were in fact viewed as internal or external enemies with perceived links to the CIA, KGB or the Vietnamese".[2949]

850. Additionally, the TC reasonably found from the evidence that these victims "were arrested, detained, subjected to harsher treatment and living conditions and ultimately tortured and executed at S-21 as a direct result of their perceived status as enemies of the CPK".[2950] For example, "all S-21 staff were taught to recognise and be 'absolute' in their approach to the 'enemy'".[2951] "[I]nterrogators were told to feel no pity for the 'enemy'

2943 Case 001-**F28** *Duch* AJ, para. 282.

2944 **F54** Appeal Brief, para. 827. It is worth noting, that on appeal, Duch remained guilty for persecuting on political grounds the S-21 prisoners that *he knew* were in fact enemies of the Party, and that his conviction for persecution was overturned *only* for the prisoners who he did not believe were in fact enemies and, therefore, whom he indiscriminately targeted. *See* Case 001-**F28** *Duch* AJ, paras 283 ("With respect to acts against *these persons*, […] the Trial Chamber committed an error of law by qualifying them as persecution on political grounds.") (emphasis added), 284, 277. Regardless, Appellant fails to demonstrate how a factual finding from Case 001 prevents a finding of persecution on political grounds at S-21 in Case 002/02. *See also* response to Grounds 68, 72, 75, 76, 77, 124, and 134 (*Saisine* for persecution on political grounds: three groups).

2945 *See* **E465** Case 002/02 TJ, paras 2086-2134 (Section 12.2.3: General Considerations on Evidence).

2946 **E465** Case 002/02 TJ, para. 2601.

2947 **E465** Case 002/02 TJ, paras 2600, 2485-2492, 2230.

2948 **E465** Case 002/02 TJ, para. 2601.

2949 **E465** Case 002/02 TJ, para. 2602.

2950 **E465** Case 002/02 TJ, para. 2602. *See also* para. 2601. For additional categories of real or perceived enemies of the CPK at S-21, *see e.g.* paras 2600, 2486. *See also* para. 2531.

2951 **E465** Case 002/02 TJ, para. 2163. *See also* paras 2169, 2402.

even if they were their parents".[2952] Victims belonging to the targeted group were required to acknowledge their mistakes and guilt.[2953] Those who were interrogated were "subjected to physical and psychological pressure or mistreatment to secure confessions about their supposed traitorous networks".[2954] Afterwards, members of the targeted group had to be smashed.[2955] Similarly, prominent prisoners from within the CPK, who were kept in the Special Prison at S-21, were placed in "conditions only sufficient to keep them alive long enough to provide exhaustive confessions before their unavoidable execution".[2956]

2. KRAING TA CHAN

Ground 127: Kraing Ta Chan[2957]

851. **Ground 127 should be dismissed as Appellant fails to demonstrate that the TC erred in finding that the act of enforced disappearance may be committed more than once against the same person.**

852. The ground fails as Appellant has not demonstrated that the TC erred in its interpretation or application of the law; he simply disagrees with the TC's findings. Appellant fails to provide any legal authority to support his contention that the act of enforced disappearance is a "continuous criminal behaviour"[2958] and therefore cannot be considered as two separate crimes; the first, when detainees were initially disappeared from cooperatives to be detained in KTC and the second, when they were disappeared from detention at KTC to be executed.[2959] Appellant further fails to establish that the TC's relevant finding actually occasions a miscarriage of justice in circumstances where the finding is not critical to the verdict reached that Appellant committed the initial enforced disappearance against those taken to KTC.[2960]

853. The SCC has articulated that enforced disappearances as a crime did not have "specific

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2952 **E465** Case 002/02 TJ, para. 2163. *See also* paras 2169, 2394.

2953 **E465** Case 002/02 TJ, para. 2163. *See also* paras 2169, 2236, 2372, 2389.

2954 **E465** Case 002/02 TJ, para. 2601 *cross-referring* in fn. 8792 to, *inter alia*, para. 2328. *See also* paras 2327, 2387, 2389, 2396-2397.

2955 *See e.g.* **E465** Case 002/02 TJ, paras 2149, 2236, 2245, 2350, 2504. It was rare not to execute. *See* paras 2350, 2566, 2601 (fn. 8795 *cross-referring to*, *inter alia*, para. 2451). *See also* para. 2362.

2956 **E465** Case 002/02 TJ, paras 2256, 2258.

2957 Ground 127: **F54** Appeal Brief, *Kraing Ta Chan,* para. 837-840; **F54.1.1** Appeal Brief Annex A, p. 46 (EN), p. 42 (FR), p. 66 (KH).

2958 **F54** Appeal Brief, paras 837-838.

2959 **F54** Appeal Brief, para. 839.

2960 **E465** Case 002/02 TJ, para. 4306 (TC found Appellant committed, through a JCE, the CAH of OIA of through enforced disappearance at TK Cooperatives).

legal definitions and elements"[2961] in 1975. The appropriate legal analysis to establish the crime is thus to prove the legal elements of the crime of OIA, namely: (i) there was an act or omission of similar seriousness to the other acts enumerated as CAH; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed intentionally.[2962] The TC correctly found that "the underlying conduct of enforced disappearance can be committed more than once in relation to the same person, provided the necessary elements of OIA are established on each occasion".[2963]

854. The TC correctly found that enforced disappearances occurred in the first instance when detainees were arrested in their communes and worksites and disappeared to KTC.[2964] Family members were not provided any information regarding the whereabouts of their loved ones.[2965] Once imprisoned at KTC, the Chamber found a further act of enforced disappearance, as individuals were disappeared from their fellow detainees, often taken to their execution under the ruse that "they were being sent home".[2966] The actions of guards who enforced the second disappearance from KTC constituted a further crime of enforced disappearance, as "[t]hese were deliberate and material steps by additional actors following the initial disappearance of persons from the cooperatives."[2967]

855. The TC's findings are supported by the discrete nature of the two crimes against the same person. A different direct perpetrator committed the subsequent disappearance from a second environment. Importantly, as aptly articulated in the CO, "beyond the direct victims, enforced disappearances [...] caused suffering amongst those who witnessed them as a result of the climate of fear and uncertainty that they engendered".[2968] The separate acts caused suffering to two distinct groups of people, first, those left in the communes and worksites following the initial disappearance, and second, those detained at KTC who were left without recourse when their peers were disappeared from KTC.[2969]

856. Appellant's contention that there is a restriction on how many times the act can be

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2961 **F36** Case 002/1 AJ, para. 589.
2962 **F36** Case 002/1 AJ, para. 580.
2963 **E465** Case 002/02 TJ, para. 2854.
2964 **E465** Case 002/02 TJ, para. 2853, fn. 9741 *citing* Section 10.1.13.10: Tram Kak Cooperatives: Legal Findings: Other Inhumane Acts through Conduct Characterised as Enforced Disappearances.
2965 **E465** Case 002/02 TJ, para. 2856.
2966 **E465** Case 002/02 TJ, paras 2809, 2855.
2967 **E465** Case 002/02 TJ, para. 2854.
2968 **D427** Closing Order, para. 1360.
2969 **E465** Case 002/02 TJ, para. 2855 ("the fact and method of executions ensured the complete denial of individual recourse for fellow inmates, family or friends to any of the applicable legal remedies and procedural guarantees enshrined under international law"), 2856-2858.

committed against the same person is made without any legal basis; instead, Appellant relies on selective, misleading portions of quotes from the Working Group on Enforced or Involuntary Disappearances to underpin his position.[2970]

857. Appellant erroneously relies on the Working Group's finding that, notwithstanding the "principle of non-retroactivity", if a person is convicted of enforced disappearances, the Court should not separate the crime to consider only the facts after the legal instrument to convict the person was enacted.[2971] These findings are irrelevant here, as they only apply to a person disappeared on one occasion, by one perpetrator, over a period of time during which the conduct was criminalised. The current scenario is distinct, as it refers to one person disappeared on two separate occasions, from two distinct environments by two different direct perpetrators. Contrary to Appellant's misleading assertion, the Working Group made no findings in relation to separate acts committed against the same person by different direct perpetrators.

3. PHNOM KRAOL

Ground 133: Enslavement[2972]

858. **Ground 133 should be dismissed as Appellant fails to establish that the TC erred by finding that enslavement was established at PK security centre.**

859. First, Appellant's argument that the CIJs, and subsequently the TC, were not seised of facts relating to K-17 and PK prison is without merit.[2973] Second, as to the issue of sufficient evidence, the ground fails, as Appellant incorrectly limits the evidence of enslavement to K-11, thereby excluding relevant evidence from K-17 and PK prison. Contrary to Appellant's argument, the TC properly considered evidence of enslavement at all three locations to support its conviction.

860. The TC found that detainees at K-17 were compelled to stomp jute seeds for hours at a time under a relaxed shackling regime.[2974] Other prisoners were forced to thresh and transplant rice pursuant to a regulated work schedule. There was no evidence that detainees were remunerated for their toil, and they feared being killed if they did not follow instructions while working at PK. Detainees were subjected to psychological

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2970 **F54** Appeal Brief, para. 837.
2971 Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 26 Jan. 2011, para. 39-5.
2972 Ground 133: **F54** Appeal Brief, *Enslavement,* paras 880-883; **F54.1.1** Appeal Brief Annex A, p. 48 (EN), p. 44 (FR), p. 68 (KH).
2973 *See* response to Ground 48.
2974 **E465** Case 002/02 TJ, para. 3121.

suffering as a result of their treatment.[2975] Appellant's assertion that the conviction was based solely on insufficient and untested evidence from K-11, namely the CP testimony of Kul Nem and the written statement of deceased witness Aum Mol,[2976] is therefore baseless. Appellant has failed to demonstrate any legal error in the TC's finding that enslavement occurred at K-17, K-11 and PK prison BRD.

Ground 131: Errors in finding that Heus was intentionally murdered[2977]

861. **Ground 131 should be dismissed as Appellant fails to demonstrate that the TC erred in law and fact by finding that the elements of murder as a CAH were established.**

862. The ground fails, as Appellant has not demonstrated that the alleged legal error was based on inappropriate legal sources or inapplicable rules of interpretation. It also fails as Appellant has not shown that the factual finding was based on evidence that could not have been accepted by any reasonable finder of fact, that the evaluation of the evidence was wholly erroneous, or that exculpatory evidence was deliberately omitted.

863. As to the alleged legal error, Appellant argues without merit that the TC erroneously based its findings on the written accounts of two witnesses, Uong Dos and Sok El, who did not appear at trial, in violation of the principle of equality of arms and the rules of evidence.[2978] As established in response to Grounds 21 and 30, it was reasonable for the TC to rely on the statements and CPA of Uong Dos and Sok El which mutually corroborated "the victim's identity, the nature of the attack against him, the manner of his death and subsequent treatment of his corpse".[2979]

864. As to the alleged factual error, Appellant challenges the value of the evidence provided by Uong Dos and Sok El, claiming there was "objective circumstantial evidence concerning the possibility of collusion between the accounts".[2980] This argument fails primarily because the TC is presumed to have properly evaluated all of the evidence.[2981] Appellant's concerns that the interviews were conducted on the same day, in the same village, at a similar hour[2982] do not rebut this presumption, as the argument is merely conjecture, demonstrating no collusion or other impropriety.

2975 **E465** Case 002/02 TJ, para. 3121.
2976 **F54** Appeal Brief, paras 881-883.
2977 Ground 131: **F54** *Errors in finding that Heus was intentionally murdered,* paras 863-869, **F54.1.1** Appeal Brief Annex A, p. 47, p. 43 (FR), p. 67 (KH).
2978 **F54** Appeal Brief, para. 864.
2979 **E465** Case 002/02 TJ, para. 3100.
2980 **F54** Appeal Brief, para. 866.
2981 **F36** Case 002/01 AJ, para. 352.
2982 **F54** Appeal Brief, para. 866.

865. Appellant also alleges that the TC deliberately omitted exculpatory evidence relating to both the murders of prisoners Touch and Heus.[2983] Appellant has not substantiated any argument, however, that the TC deliberately operated with ill-will, or engaged in malicious conduct, as required to meet the particularly high threshold for appellate review.[2984] That discretion is exercised erroneously or in a way with which an appellant disagrees, as appears to be the case here, is not sufficient to reasonably infer bad faith. Moreover, a TC's failure to explicitly refer to exculpatory evidence does not automatically invalidate the finding.[2985] Critically, Appellant has not identified evidence that would cast reasonable doubt on the TC's findings in relation to the two murders. The fact that Chan Toi *alias* Chan Tauch and Neth Savat did not witness any killings first-hand, which was even noted by the TC and considered in the Judgment as far as Chan Toi is concerned,[2986] is not in itself exculpatory.[2987] Appellant has not demonstrated that this finding was one no reasonable finder of fact could have found.[2988]

Ground 132: Errors in finding that Touch was murdered with dolus eventualis[2989]

866. **Ground 132 should be dismissed as Appellant fails to demonstrate that the TC erred in law and fact by finding that murder with *dolus eventualis* was established.**

867. The ground fails as Appellant merely repeats his erroneous assertion regarding the applicability of murder with *dolus eventualis*.[2990] Appellant is further unable to demonstrate that the TC committed a legal error by (i) relying *exclusively* on the statement of a deceased person to convict Appellant of murder; (ii) using a statement of a deceased person as a basis of conviction; (iii) failing to provide detailed reasons when relying on untested evidence; and (iv) deliberately omitting exculpatory evidence of the

2983 **F54** Appeal Brief, paras 876-879. *See also* response to Ground 132.

2984 *Bemba Gombo* Second Corrected Musamba Appeal Brief, para. 52, para. 54 *citing* Arrêt de la Cour de cassation de Belgique du 28 mai 2013, para. 16: "[T]he contested investigative acts amounted to a fishing expedition, namely maliciously collecting and without any proof, evidence of offenses that were not the subject of a referral in the context of the judicial investigation; [T]he irregularity committed is not the result of objectionable conduct that is excusable and forgivable, nor the result of negligence or excusal recklessness; but it is the deliberate action of the person in charge of the investigation." (unofficial translation).

2985 **F36** Case 002/01 AJ, para. 352.

2986 **E465** Case 002/02 TJ, para. 3109 (regarding Chan Toi).

2987 *Kvočka* AJ, para. 23 (If the TC did not refer to the evidence given by a witness, even if it is in contradiction to the TC's finding, it is to be presumed that the TC assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings).

2988 *See* Standard of Review (Errors of Fact).

2989 Ground 132: **F54** Appeal Brief, *Errors in finding that Touch was murdered with dolus eventualis,* paras 870-875; **F54.1.1** Appeal Brief Annex A, p. 47 (EN), p. 43 (FR), pp. 67-68 (KH).

2990 **F54** Appeal Brief, paras 874-875. *See* response to Ground 86.

murder.[2991] Nor has he demonstrated that, any of the alleged errors, if established, would invalidate the Judgment.

868. First, Appellant misrepresents the TC's findings by stating it relied "exclusively" on the statement of a deceased witness to prove the murder of a prisoner. There is no legal principle that direct corroboration of a death is required in order to prove murder, and a victim's death can be inferred circumstantially from all of the evidence before the TC.[2992] Indeed, the facts of the death of Touch were corroborated by circumstantial evidence of extremely poor conditions in the prison.[2993] While the TC did not hear additional evidence in court about conditions at K-11 or PK prison, it correctly stated that it was seised of the facts as they relate to PK security centre *as a whole*.[2994] Together, this evidence thus provides corroboration of Sok El's account.

869. Second, Appellant incorrectly states that Sok El's written statement cannot serve as a basis of the conviction for the death of Touch given that he was not subject to defence examination. There is no absolute rule of evidence that a trier of fact cannot convict on the basis of evidence from one or more witnesses who have not been subject to defence examination.[2995] Nonetheless, in this case, the TC relied on the evidence of the written statement of Sok El only in so far as it corroborated or contradicted evidence of detention conditions described at trial.[2996]

870. Third, Appellant also incorrectly argues that the TC failed to provide detailed reasoning as required when relying on untested evidence.[2997] Appellant's question as to how the TC came to the conclusion that Touch had died as a result of prison conditions when the evidence did not allow for the prisoner's real identification and was uncorroborated,[2998] gives rise to neither a legal nor factual error. As to identity, Appellant does not explain how Sok El's written statement "does not make it possible to clearly identify the prisoner

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2991 *See* response to Ground 131.
2992 *Kvočka* AJ, para. 260.
2993 The TC made general findings of the shackling of prisoners; the exposure of detainees to substandard conditions of hygiene and detention; subjection to a mandatory work regime; the provision of insufficient food; the interrogation of detainees and occasional physical mistreatment outside of interrogations. *See* **E465** Case 002/02 TJ, paras 3101 (death of Touch), 3102 (prisoner conditions at K-11 and K-17).
2994 *See* response to Ground 48.
2995 *See* response to Ground 21.
2996 **E465** Case 002/02 TJ, para. 3094. *See also* response to Ground 30.
2997 **F54** Appeal Brief, para. 872.
2998 **F54** Appeal Brief, para. 872.

in question".[2999] Sok El names the prisoner and identifies his ethnic origin.[3000]

871. Finally, Appellant wrongly alleges that exculpatory evidence examined in court relating to murders at PK security centre was deliberately omitted by the TC.[3001] Appellant has not substantiated any argument that the TC deliberately operated with ill-will, or engaged in malicious conduct when allegedly omitting evidence as required in order to meet the particularly high threshold for appellate review.[3002] Critically, however, Appellant has not identified any evidence that would cast reasonable doubt on the TC's findings.[3003] The fact that Chan Toi *alias* Chan Tauch and Neth Savat did not witness any killings first-hand, which was even noted by the TC and considered in the Judgment as far as Chan Toi is concerned,[3004] is not in itself exculpatory.[3005] It is within the Chamber's discretion to evaluate inconsistencies in the evidence and to consider whether the evidence *in toto* is reliable and credible and to accept or reject fundamental features of the evidence.[3006]

872. In any event, Appellant has not demonstrated that if the TC erred, such an error would have invalidated the Judgment. Revising the verdict by one murder at PK does not affect the validity of the finding of guilt for extermination at S-21, KTC, and AuKg, or murder at the TK Cooperatives, TTD, 1JD and KCA.[3007] With regard to the impact of any such legal error on penalty, revising the finding would not invalidate the TC's determination on the sentence, which is cumulative and reflects the total criminal conduct. Consequently, Appellant does not demonstrate how such an error would in any way invalidate the conviction for murder or the sentence.

Ground 251: General Conclusion[3008]

873. **Ground 251 should be dismissed as Appellant fails to demonstrate that the TC's**

2999 **F54** Appeal Brief, para. 872.

3000 **E3/7702** Sok El WRI, EN 00239510 ("I saw another prisoner named Touch, an ethnic Phnorng lying dead with his head hanging down and his tongue sticking out and I told the guards to take him away since he had died").

3001 **F54** Appeal Brief, paras 876-879, *see* response to Ground 131.

3002 *Muvunyi* AC Interlocutory Decision, fn. 86.

3003 *See* response to Ground 131.

3004 **E465** Case 002/02 TJ, para. 3109 (regarding Chan Toi).

3005 *Kvočka* AJ, para. 23 (If the TC did not refer to the evidence given by a witness, even if it is in contradiction to the TC's finding, it is to be presumed that the TC assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings).

3006 *Setako* AJ, para. 31.

3007 **E465** Case 002/02 TJ, para. 4341.

3008 Ground 251: **F54** Appeal Brief, *General Conclusion,* para. 2141; **F54.1.1** Appeal Brief Annex A, p. 83 (EN), p. 77 (FR), pp. 118-119 (KH).

finding of Appellant's guilt for the crime of extermination at PK constitutes a legal error invalidating the Judgment.

874. The ground fails, as, though Appellant establishes that the TC erred in law when entering a conviction for extermination at PK despite elsewhere finding that "[t]he crime against humanity of extermination is [...] not established",[3009] he has not demonstrated that this error invalidated the Judgment.[3010] Appellant has not shown that in the absence of this error, a different verdict in whole or in part would have been entered.[3011] As the TC has convicted Appellant of extermination at S-21, KTC and AuKg, the revision of the verdict in respect of extermination at PK does not affect the validity of the basis of guilt for the crime of extermination at these other sites.[3012]

875. With regard to the impact of this legal error on penalty, when determining the appropriate sentence for the *totality* of crimes committed, the TC held that the gravity of the crimes served as the "litmus test", and relied on SCC jurisprudence to identify factors relevant to that assessment.[3013] Revision of the verdict in relation to extermination at PK does little to invalidate the TC's determinations in this regard. The TC clearly established the massive scale and brutality of the crimes, and their impact at other security centres.[3014]

Ground 135: Other inhumane acts through enforced disappearances[3015]

876. **Ground 135 should be dismissed as Appellant fails to establish that the TC erred in its assessment of the evidence underlying the finding that the CAH of OIA (through enforced disappearances) was established at PK security centre.**

877. The ground fails, as Appellant does not demonstrate any error in the TC's treatment of the evidence. First, Appellant's erroneous argument regarding the TC's *saisine* of the facts that witnesses Chan Toi and Uong Dos spoke to[3016] is moot for reasons addressed elsewhere in this Response.[3017]

878. Second, Appellant's allegation that the TC did not present direct evidence and relied on

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3009 **E465** Case 002/02 TJ, para. 3118.
3010 *See* Standard of Review (Errors of Law).
3011 **F36** Case 002/01 AJ, para. 99.
3012 **E465** Case 002/02 TJ, para. 4341.
3013 **E465** Case 002/02 TJ, para. 4349.
3014 **E465** Case 002/02 TJ, paras 4361-4376.
3015 Ground 135: **F54** Appeal Brief, *Other inhumane acts through enforced disappearances*, paras 887-891; **F54.1.1** Appeal Brief Annex A, p. 48 (EN), p. 44 (FR), pp. 68-69 (KH).
3016 **F54** Appeal Brief, para. 888.
3017 The TC was seised of the facts at K-11, K-17, and Phnom Kraol prison and indeed had evidence before it proving enforced disappearances at these locations, *see* response to Ground 50.

"nothing more than hearsay"[3018] is baseless. It is well recognised that the TC can rely on uncorroborated hearsay evidence to establish a crime, provided it treats the evidence with caution.[3019] The TC's reasonable and cautious approach is demonstrated by its finding that the hearsay evidence provided consistent and corroborated accounts only of the removal of prisoners from K-17 without explanation, not of their ultimate fate.[3020]

879. In any event, it is for Appellant to demonstrate that no reasonable trier of fact could have relied upon hearsay evidence in reaching a specific finding.[3021] Appellant merely asserts that the TC "failed to cite any direct evidence and the conviction was based solely on extrapolation".[3022] No further explanation of *how* the TC's findings were unreasonable beyond the fact that the evidence was hearsay is presented, thereby failing to meet the required standard for appellate review.[3023]

880. Third, Appellant alleges without merit that the TC violated the rules of evidence by relying on Sao Sarun's testimony to find that alleged disappearances at the security centre were the result of acts committed by the DK authorities or with the authorisation, support or acquiescence of the CPK.[3024] In contradiction to Appellant's claim, the TC acted within the bounds of its discretion when deciding which parts of the testimony were credible and which were not.[3025] Furthermore, despite not being obliged to,[3026] the TC consistently and continuously elaborated its reasoning each time it rejected or accepted parts of Sao Sarun's testimony, clearly demonstrating a well-reasoned exercise of its discretion.[3027] Were Sao Sarun's testimony rejected, *arguendo,* the impugned finding is independently corroborated by at least two other witnesses.[3028]

4. AU KANSENG

Ground 129: Persecution on political grounds[3029]

881. **Ground 129 should be dismissed as Appellant fails to establish any error of law in**

3018 **F54** Appeal Brief, para. 889.
3019 *See* response to Ground 32 (Hearsay).
3020 **E465** Case 002/02 TJ, para. 3091.
3021 *See* response to Ground 32 *citing* **F36** Case 002/01 AJ, para. 302 *referring to Karera* AJ, paras 39, 196.
3022 **F54** Appeal Brief, para. 889.
3023 *See* response to Ground 32 (Hearsay).
3024 **F54** Appeal Brief, paras 890-891.
3025 **F36** Case 002/01 AJ, para. 357.
3026 *See Ngirabatware* AJ, para. 97; *Karera* AJ, para. 21.
3027 *See e.g.* **E465** Case 002/02 TJ, paras 3039-3041, 3053, 3065, 3077-3078, 3080-3081, 3090-3092, 3162, 3388.
3028 **E465** Case 002/02 TJ, para. 3162.
3029 Ground 129: **F54** Appeal Brief, *Persecution on political grounds,* paras 848-858; **F54.1.1** Appeal Brief Annex A, p. 47 (EN), p. 43 (FR), pp. 66-67 (KH).

the TC's finding that persecution on political grounds was established at AuKg.

882. The ground fails as Appellant does not demonstrate (i) that the TC committed an error in finding that individuals detained at AuKg belonged to a sufficiently discernible group of "real or perceived enemies of the CPK"; and (ii) that 100 Jarai, Phon Thol, Moeurng Chandy and military prisoners were not discriminated against in fact at AuKg.

883. Appellant contends that groups found as falling under the category of enemies of the CPK did not "strictly reflect what a sufficiently discernible group should be",[3030] ignoring that real or perceived enemies of the CPK may constitute a sufficiently discernible group.[3031] In finding that the group was sufficiently discernible at AuKg, the TC properly examined evidence of the CPK's ideological objectives and policies towards enemies, the state of armed conflict between the DK and Vietnam, the evolving policy toward the Vietnamese and other enemies, and the internal purges.[3032] The evidence allowed the TC to conclude that the CPK targeted "counter-revolutionaries, detractors and traitors of the revolution, feudalists and those engaging in feudalistic practices, the Vietnamese, foreign agents and collaborators of the foregoing groups".[3033] The TC further found "numerous instances in which people were subjected to harsher treatment and living conditions than the remainder of the population",[3034] a finding that, logically, could only be made based on a comparison between discernible groups.

884. Appellant further unconvincingly argues that detention conditions varied according to whether prisoners were serious offenders, light offenders, and women and children, *not* according to whether prisoners were perceived as enemies, and thus, it could not be found that the Jarai, Phon Thol, Moeurng Chandy and military prisoners suffered harsher conditions.[3035] Appellant's argument however, overlooks the TC's finding that these groups were targeted and susceptible to arrest *because* of their membership in an enemy group defined by the CPK.[3036] While at AuKg, these individuals were "subjected to

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3030 **F54** Appeal Brief, para. 849.

3031 Case 001-**F28** *Duch* AJ, paras 273, 282; **F36** Case 002/01 AJ, para. 669. Regarding Appellant's misinterpretation of the Chamber's statement in Case 001 that "[a]s the revolution wore on, [...] individuals were indiscriminately apprehended, mistreated and eliminated", *see* response to Ground 125.

3032 **E465** Case 002/02 TJ, para. 2983.

3033 **E465** Case 002/02 TJ, para. 2983.

3034 **E465** Case 002/02 TJ, para. 2984.

3035 **F54** Appeal Brief, paras 854-858.

3036 **E465** Case 002/02 TJ, paras 2950 ("the Jarai were arrested on grounds of their perceived non-Cambodian affiliations rather than their membership of any ethnic or racial group, whether Jarai or Vietnamese. Accordingly, the Chamber is satisfied that the Jarai were arrested as a result of Division 801 and the Northeast Zone Secretary's perception that they were "external enemies."), 2897 ("Plantation worker Phon Thol was arrested, detained, interrogated about his use of "feudal" tree treatment techniques, subjected to re-education and attacks against his human dignity at Au Kanseng."), 2988 ("On the basis of her home's

harsher treatment and living conditions than the rest of the population by virtue of their detention at the Security Centre".[3037] The fact that other prisoners at AuKg were also interrogated and sent for execution does not undermine this finding.[3038]

VIII. INDIVIDUAL CRIMINAL RESPONSIBILITY

A. INTRODUCTION

885. The TC correctly found that Appellant participated, with full intent, in a criminal plan to commit the crimes charged in Case 002/02 and knowingly assisted and facilitated their commission. In his Appeal, Appellant criticises the TC for seeing through the veneer of altruism he gave the CPK's unambiguously criminal policies. He then continues his pretence of having been a mere titular head of state, without influence or intent in the creation and maintenance of those policies, and without knowing participation in their implementation. In this section, the Response will demonstrate how, through distortion of the well-established jurisprudence and wilful blindness to the responsibility borne by those who orchestrate international crimes with the privilege and detachment of power, Appellant misstates and misapplies decisive aspects of the law on JCE and A&A liability. It will show that Appellant's piecemeal approach to the evidence and allegations of bias fail to raise any reasonable doubt in the TC's findings regarding his individual criminal responsibility.

B. ROLES AND FUNCTIONS

886. The TC correctly found that Appellant held specific roles and functions within the CPK,[3039] which gave him knowledge (i) of the policies developed and implemented by the CPK; and (ii) that the crimes within the *saisine* of Case 002/02 would likely be, were being or had been committed.[3040] Moreover, they provided him with the ideal platform and authority to make a significant contribution to the common purpose,[3041] and to aid

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proximity to the Vietnamese border and her marriage to perceived enemy Phon Thol, the Chamber is satisfied that Witness Moeurng Chandy was arrested, detained and subjected to harsher treatment and living conditions as a result of her perceived enemy status."), 2989 ("The Chamber takes into consideration soldiers' perceived exposure to enemy combatants across the DK-Vietnam frontier and "internal enemies" or counter-revolutionary soldiers within military ranks as a result of the ongoing military conflict with Vietnam. It finds that military prisoners were arrested, detained and subjected to harsher treatment and living conditions as a result of their perceived enemy status").

3037 **E465** Case 002/02 TJ, para. 2984.

3038 *See* response to Ground 108.

3039 **E465** Case 002/02 TJ, paras 562-624.

3040 **E465** Case 002/02 TJ, paras 364, 3964 (fns 13191-13913), 4048, 4208, 4225, 4230, 4250, 4324.

3041 **E465** Case 002/02 TJ, paras 599, 3387, 3550-3551, 3570 (increase of population), 3742 (fn. 12489), 3773 (Lon Nol soldier), 3823 (Vietnamese enemy) 3897, 3909, 3916 (criminal policy regarding the cooperatives) 3960 (suppression of enemy) 4262, 4265, 4314.

and abet crimes.[3042] Appellant's 10 grounds,[3043] challenging the TC's findings regarding his roles and functions fail, as they variously adopt an erroneous piecemeal approach to either the evidence or the Judgment, misrepresent findings, and amount to mere reinterpretations of evidence properly considered by the TC. In particular, Appellant repeatedly and wrongly claims that he had no power or influence within the CPK and DK government, ignoring the weight of evidence demonstrating his unique position of standing within the Party leadership.[3044]

887. Appellant "supported, tacitly encouraged, legitimised [...] and [...] facilitated" the common purpose, including its criminal policies, through his continued occupation of prominent positions within the CPK and DK throughout the indictment period.[3045] By his regular attendance at SC meetings where crucial matters, such as the fate of enemies,[3046] and implementation of the policy concerning cooperatives and worksites were discussed,[3047] Appellant "personally enabled and controlled"[3048] the continued implementation of criminal policies against the DK population,[3049] and further "morally supported" the decision-making apparatus of the CPK, which continued to advance the planning and implementation of criminal initiatives.[3050] As a member of the CC, Appellant attended and participated in Party Congresses which adopted policies concerning the overall political line,[3051] as well as the decision to delegate the "right to smash" down ranks of the CPK.[3052]

888. As a member of Office 870 and overseer of DK trade and commerce, Appellant "personally enabled the smooth functioning of the DK administration to the detriment of its population".[3053] Appellant, as a respected Cambodian politician, the face of GRUNK and DK, and the "moral guarantor" of DK "support[ed] and therefore legitimise[d]" the implementation of the common purpose, both within Cambodia and internationally.[3054] By attending and "leading indoctrination sessions" at mass rallies and reeducation

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3042 **E465** Case 002/02 TJ, paras 4312-4319.
3043 Grounds 190-191, 194, 200-203, 205-207.
3044 **E465** Case 002/02 TJ, paras 624, 4224.
3045 **E465** Case 002/02 TJ, para. 4257.
3046 **E465** Case 002/02 TJ, para. 4316.
3047 **E465** Case 002/02 TJ, para. 4313.
3048 **E465** Case 002/02 TJ, para. 4278.
3049 **E465** Case 002/02 TJ, paras 4277-4278.
3050 **E465** Case 002/02 TJ, para. 4313.
3051 **E465** Case 002/02 TJ, para. 4260.
3052 **E465** Case 002/02 TJ, para. 4260.
3053 **E465** Case 002/02 TJ, para. 4276.
3054 **E465** Case 002/02 TJ, paras 4265, 4314, 4383.

seminars aimed at engendering support for CPK policies, Appellant "publicly promoted, confirmed [...] endorsed", and "personally perpetuated" the Party line.[3055] Through his public speeches and statements during the DK period, Appellant also "openly and actively" "encouraged and incited" the execution of the CPK's policies on the operation of cooperatives and worksites, the regulation of marriage, as well as the arrest and execution of enemies.[3056]

Ground 203: "Member" of the CC and SC[3057]

889. **Ground 203 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that Appellant was part of a small group of well-informed CPK members.**

890. The ground fails as Appellant does not demonstrate that the TC erred in finding that (i) he was member of the CC;[3058] (ii) he participated in several SC meetings where important issues were discussed and crucial decisions were made;[3059] and (iii) he took part in CC and SC meetings in accordance with the principle of democratic centralism, which gave him the opportunity to participate in the decision-making process.[3060] Appellant incorrectly claims that the TC's assessment of evidence was unreasonable and biased.[3061]

The TC correctly assessed Appellant's membership in the CC

891. First, Appellant wrongly contends that the TC erred in finding that he became a full-rights member of the CC during the Fourth Party Congress in January 1976.[3062] Appellant misrepresents the testimony of Stephen Heder, who explicitly explained that "there's a party congress in January 1976 at which [...] [Appellant] was elevated from alternate to full membership of the Central Committee."[3063] Appellant himself acknowledges that he became a full member between late 1975 and early 1976.[3064]

892. Second, Appellant erroneously contends that the TC extended the powers of the CC in

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3055 **E465** Case 002/02 TJ, paras 4262, 4271-4273.
3056 **E465** Case 002/02 TJ, paras 4314, 4265. 4270. *See also* paras 4266-4269.
3057 Ground 203: **F54** Appeal Brief, "*Member" of the CC and SC,* paras 1704-1754; **F54.1.1** Appeal Brief Annex A, p. 69-70 (EN), pp. 64-65 (FR), pp. 98-99 (KH).
3058 **E465** Case 002/02 TJ, paras 574, 600, 604.
3059 **E465** Case 002/02 TJ, paras 601-604.
3060 **E465** Case 002/02 TJ, paras 390-391, 399, 604, 4322, 4259.
3061 **F54.1.1** Appeal Brief Annex A, pp. 69-70 (EN), pp. 64-65 (FR), pp. 98-99 (KH).
3062 **F54** Appeal Brief, paras 1720-1721 *referring to* **E465** Case 002/02 TJ, paras 355, 574, 600, 3738.
3063 **E1/223.1** Stephen Heder, T. 15 July 2013, 11.08.55-11.11.28, p. 43, lines 2-8.
3064 **E1/198.1** Khieu Samphan, T. 29 May 2013, 14.42.41- 14.44.52 p. 87, lines 3-4. *See also* **E3/573** Notes of Ieng Sary Interview by Stephen Heder, EN 00427599 ("Khieu Samphan became a Central Committee member in 76, although already in 75 he was de facto involved in Central Committee Affairs").

order to link him to crimes through his membership.[3065] His claim rests on the incorrect argument that the CC had no effective power.[3066] Contrary to Appellant's claim,[3067] the TC relied on the totality of the evidence, not just the CPK Statute of 1971, to conclude that the CC had the responsibility to monitor the implementation of the Party policies,[3068] and had the power of appointment.[3069] Appellant fails to acknowledge the weight of evidence demonstrating that the CC monitored and implemented the CPK policies regarding worksites,[3070] cooperatives,[3071] security centres,[3072] purges,[3073] and measures against specific groups,[3074] through the circulation of instructions and decisions,[3075] the dissemination of work plans in the zones and sectors and through training sessions.[3076]

893. Regarding the CC's power of appointment, Appellant ignores numerous pieces of evidence of appointments by the CC.[3077] He also fails to demonstrate that it was unreasonable for the TC to find that the CC appointed him as President of the State Presidium on 30 March 1976, the PRA formally confirming that appointment in April 1976.[3078] There is no logic to Appellant's claim that the TC issued contradictory findings in concluding that (i) the CC appointed him as President of the State Presidium; and (ii) that the "Government Ministers and ministerial staff reported to and took directions from SC".[3079] These two findings were not mutually exclusive because the DK President was not a member of the government,[3080] and, even if he was subject to reporting to the SC, the CC did make some decisions.[3081] For example, the SC was the senior executive

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3065 **F54** Appeal Brief, para. 1706.
3066 **F54** Appeal Brief, para. 1710. Similar arguments were rejected by the SCC in Case 002/01; **F36** Case 002/01 AJ, paras 1045-1047.
3067 **F54** Appeal Brief, paras 1708-1709.
3068 **E465** Case 002/02 TJ, paras 355, 600.
3069 **E465** Case 002/02 TJ, para. 357.
3070 **E465** Case 002/02 TJ, paras 1224, 1476, 3922.
3071 **E465** Case 002/02 TJ, para. 971.
3072 **E465** Case 002/02 TJ, para. 2770.
3073 **E465** Case 002/02 TJ, paras 1464, 1468, 2278.
3074 **E465** Case 002/02 TJ, para. 3828.
3075 **E465** Case 002/02 TJ, paras 1468, 2770, 3828. On 20 June 1978, the CC issued guidance concerning the need to eliminate the enemies of the CPK, such as the CIA and KGB agents, the Vietnamese, and further distributed a circular with instructions on this matter.
3076 **E465** Case 002/02 TJ, paras 1476-1480.
3077 **E465** Case 002/02 TJ, paras 414, 596. The CC appointed for example, the President of the State Presidium, Prime Minister, Deputy Prime Minister for Foreign Affairs, Deputy Prime Minister for Economics and Finance, and Deputy Prime Minister of National Defence.
3078 **F54** Appeal Brief, para. 1693, *referencing* **E465** Case 002/02 TJ, para. 596. *See* response to Ground 17.
3079 **E465** Case 002/02 TJ, para. 416.
3080 **E465** Case 002/02 TJ, paras 412, 415-416, 418-419; **E3/259** DK Constitution, 5 Jan. 1976, art. 11 (DK has a State Presidium chosen and appointed by the PRA "once every five years").
3081 **E465** Case 002/02 TJ, para. 357. *See* **F36** Case 002/01 AJ, para. 1047. *See also* response to Ground 203.

branch of the CC, and its members were also nominated by the CC itself.[3082] As found by the TC,[3083] and upheld by the SCC in Case 002/01,[3084] the fact that it was the SC which, in practice, exercised effective control over the CPK, does not exclude that some decisions were indeed made by the CC.

894. Third, Appellant erroneously contends that the TC found he knew, intended and contributed to crimes as a consequence of the attribution of several important decisions made by the SC to the CC.[3085] Appellant fails to demonstrate that the TC erred in concluding that he was aware of the decisions to close markets, end the use of money and to establish cooperatives in the liberated zones initiated in May 1972 and confirmed one year later.[3086] His argument, that it was a decision of the SC rather than the CC, is without merit:[3087] if the TC did not provide explicit reasons for relying more on Philip Short's testimony than Nuon Chea's on this matter,[3088] the content of *RF*s show that the May 1972 – May 1973 decisions were taken by the entire Party, including the CC, and not solely the SC.[3089] Were these SC decisions, *arguendo,* Appellant fails to demonstrate that it was unreasonable to find he knew about these notorious decisions considering his GRUNK and CPK positions, his functions and close relationship with other CPK leaders.[3090]

895. Appellant also fails to demonstrate that the TC erred in concluding that by his CC membership, he assented to the 30 March 1976 decision concerning, in particular,

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3082 **E465** Case 002/02 TJ, paras 346 (The members of the SC, the highest decision-making body of the CPK, "were drawn from a larger body called the Central Committee"), 355 (The CC "was responsible for implementing the Party line and Statute throughout the CPK"), 357 ("Although the CPK Statute vested the highest level of operational authority in the Central Committee, effective control over the CPK was ultimately exercised by the Permanent Committee of the Central Committee […] the Central Committee would appoint the members of the Standing Committee").

3083 **E465** Case 002/02 TJ, paras 355, 357. *See also* **E313** Case 002/01 TJ, para. 847.

3084 **F36** Case 002/01 AJ, para. 1047.

3085 **F54** Appeal Brief, paras 1713, 1719.

3086 **E465** Case 002/02 TJ, para. 4207.

3087 **F54** Appeal Brief, para. 1714.

3088 **E465** Case 002/02 TJ, paras 227 (*citing* **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, EN 00396428 (*see also* EN 00396427, 00396430), *confirmed in* **E1/190.1** Philip Short, T. 7 May 2013, 11.12.34-11.17.46, p. 46, line 22-p. 49, line 3), 239 (*citing* **E1/35.1** Nuon Chea, T. 30 Jan. 2012, 09.16.29-09.18.24, p. 4, line 24-p. 5, line 5).

3089 **E169/4/1.1.2** *Revolutionary Flag*, Dec. 1975-Jan. 1976, EN 00865708-09 ("In the congress of the Party Centre in May 1972 […] the Party started the process of organizing the cooperative. […] Then, in mid-1973, the Party Centre held another congress"); **E3/10** *Revolutionary Flag*, Sept.-Oct.1976, EN 00450510 ("The Party made an assessment […] and decided to close the market in the liberated zones in 1972."), 00450511 ("in mid 1973 the Party decided to organize cooperatives throughout the country"). *See also* **E3/166** *Revolutionary Flag*, Feb.-Mar. 1976, EN 00517844 (refers to "Party" measures in mid-1972 and 1973), 00517819; **E3/50** Report on Third Anniversary of the organisation of peasant cooperatives, 20 May 1976, EN 00636009 ("In 1972 to 73, the Party took measures […] to cut off private trading, control traders […] organize cooperatives").

3090 *See e.g.* **E465** Case 002/02 TJ, paras 565-566, 572-580, 4207, 4257.

appointments to the government, establishment of a reporting system, and the power of enforcement.[3091] Appellant repeats unsubstantiated claims[3092] that the 30 March 1976 decision did not emanate from the CC and had no probative value.[3093] Appellant also incorrectly suggests that the TC found in Case 001 that this decision was issued by the SC.[3094] Rather, the TC found in Case 001 that it was a critical directive from the CC,[3095] a finding also confirmed in Case 002/02.[3096]

896. Appellant further fails to establish that the TC erred by attributing to the CC a June 1974 meeting in which the CC adopted both a plan for the final assault on and evacuation of Phnom Penh and the decision to close the door to Party membership in order to prevent the infiltration of spies.[3097] Contrary to Appellant's assertions,[3098] the TC correctly assessed the evidence *in toto*, including contemporaneous *RF* magazines, before determining that this meeting was a CC meeting and not a SC meeting.[3099]

897. Fourth, Appellant fails to demonstrate that the TC's findings on his attendance at the

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3091 **E465** Case 002/02 TJ, paras 414, 416, 596, 3739, 3855-3856, 3899, 4259-4260. Note that Appellant was appointed President of the State Presidium during that 30 March 1976 CC meeting: **E465** Case 002/02 TJ, para. 596.

3092 **F17** Case 002/01 Appeal Brief, paras 497-501. These claims were rejected by the SCC in **F36** Case 002/01 AJ, paras 1045-1047.

3093 **F54** Appeal Brief, para. 1717.

3094 **F54** Appeal Brief, para. 1717.

3095 **E188** Case 001 TJ, paras 102-103 (The TC attributed the decision to the CC despite the opinion of Expert Philip Short).

3096 **E465** Case 002/02 TJ, paras 414, 416, 536, 596, 971, 1126, 2068, 2278, 2284, 3048, 3739, 3771, 3899, 3955, 4125, 4259-4260. The document itself (**E3/12**, 30 Mar. 1976) is unambiguously and explicitly entitled "Decision of the *Central Committee* Regarding a Number of Matters" (emphasis added).

3097 **F54** Appeal Brief, para. 1715-1716.

3098 **F54** Appeal Brief, paras 1715 (The *RFs* discussing the mid-1974 decision to close the door to party membership do not refer to the CC, but to the "Party"), 1516 (According to Appellant, Nuon Chea testified it was an extraordinary session of the SC). Note that Nuon Chea's court testimony is inconsistent as he twice claims that it was a CC meeting, then mentioned it was an extraordinary session of the SC, and finally that it gathered both the SC members and a few CC members. *See* **E1/14.1** Nuon Chea, T. 22 Nov. 2011, 14.53.01-14.54.35, p. 94, lines 21-24 ("In late 1974, the Central Committee held an extraordinary meeting. The purpose was to decide on the day to attack and liberate Phnom Penh in 1975"), 15.13.45-15.16.34, p. 103, line 14-p.104, line 21 ("An extraordinary session of the Standing Committee was held in mid-1974"), 15.30.10-15.32.12, p. 110, line 21-p.111, line 3 ("The meeting asked members of the Central Committee who attended [...] to discuss with the Zone Committee Secretaries [...] to see how many evacuees each zone could receive"); **E1/22.1** Nuon Chea, T. 14 Dec. 2011, 09.05.46-09.09.59, p. 2, lines 1-4 ("regarding the evacuation of people. There was a meeting by the Standing Committee and members of the Central Committee in mid-1974"), p. 3, lines 2-7.

3099 **E465** Case 002/02 TJ, paras 230 (fns 547-549), 3880, 402 (fn. 1204), 3940. The evidence cited establishes that the meeting was a CC meeting: **E3/11** *Revolutionary Flag*, Sept. 1977, EN 00486247 ("Our Party's Central Committee, in the course of its June 1974 conference, resolved to mount the decisive offensive to liberate Phnom Penh [...] Carrying out the decision of the Party Central Committee"); **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, 00336456, 00336465-66 (explaining that Pol Pot summoned the CC in Meakk in September 1974 to take crucial decisions regarding the evacuation of the population of the towns, the money and the Party unity). *See also* **E3/5** *Revolutionary Flag*, Aug. 1978, EN 00401497; **E3/25** *Revolutionary Flag*, Dec. 1976-Jan. 1977, EN 00491423 ("We [...] the Party"), 00491428; **E3/746** *Revolutionary Flag*, July 1978, EN 00428293 ("our Party"); **E3/747** *Revolutionary Flag*, Aug. Mar. 1976, EN 00517844-45 ("The Party").

Fourth and Fifth Party Congresses were unreasonable.[3100] As established above, Appellant was appointed as a full-rights member during the Fourth Party Congress,[3101] thus, it was reasonable to conclude he was present.[3102] Appellant also fails to consider the totality of the evidence when contesting the TC's finding on his presence at the Fifth Party Congress.[3103] Sao Sarun stated that he saw Appellant among other CPK leaders at a Party Congress reuniting all sectors, divisions, and the CC, where he was appointed Sector 105 Secretary.[3104] Duch confirmed that the main purpose of the Fifth Congress was to formally appoint new zone (and autonomous sector) secretaries to replace many of them who had been purged.[3105] The Fifth Party Congress Meeting Minutes also corroborates that Appellant was present at this Congress, as he was appointed as a member of the Economic Committee of the CC.[3106]

The TC correctly assessed Appellant's participation in SC meetings

898. Appellant contests the TC's finding on his unique position in the Party, claiming that other non-members attended SC meetings.[3107] Appellant's argument fails to consider the totality of the evidence. In addition to his regular and active participation in SC meetings, the TC found Appellant had important functions within the CPK and GRUNK/DK government, and that he worked closely with CPK leaders, particularly Pol Pot and Nuon Chea.[3108] Appellant also fails to demonstrate that the TC erred in finding that he participated in several SC meetings where important issues were discussed, and crucial decisions were taken.[3109]

899. First, Appellant fails to show that it was unreasonable for the TC to find that he regularly attended and participated in SC meetings.[3110] His argument fails to identify an error in the TC's finding, but rather offers an alternative interpretation of the evidence already

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3100 **F54** Appeal Brief, paras 1724-1725 *referring to* **E465** Case 002/02 TJ, paras 4229, 4257, 4259-4260.
3101 **E465** Case 002/02 TJ, paras 355, 574, 600. *See also* **E3/573** Notes of Ieng Sary Interview by Stephen Heder, EN 00427599.
3102 *See* response to Ground 17.
3103 **F54** Appeal Brief, para. 1725.
3104 **E465** Case 002/02 TJ, paras 345 *citing* **E1/84.1** Sao Sarun, T. 11 June 2012, 09.45.27-09.47.05, p. 17, line 18-p. 18, line 6, 10.07.44-10.17.26, p. 25, line 24-p. 29, line 2.
3105 **E3/55** Kaing Guek Eav, T. 21 May 2009, 14.05.23-14.08.13, p. 13, lines 16-20. Duch also stated that Ke Pauk told him that Khieu Samphan was present at the time Vorn Vet was arrested (although he claims it was a CC meeting): **E3/394** Duch WRI, EN 00398234.
3106 **E465** Case 002/02 TJ, para. 3742, fn. 12486 *citing* **E3/816** Fifth Party Congress Meeting Minutes, 1-2, Nov. 1978, EN 00281339-41.
3107 **F54** Appeal Brief, para. 1746.
3108 **E465** Case 002/02 TJ, paras 589, 4230. *See* response to Ground 200.
3109 **E465** Case 002/02 TJ, paras 604, 624, 4208, 4382.
3110 **F54** Appeal Brief, paras 1731, 1737 *referring to* **E465** Case 002/02 TJ, paras 347, 357, 484, 602, 3740.

assessed by the TC.[3111] The TC properly found that of the 22 meetings minutes admitted by the TC containing attendee lists, 16 recorded "Comrade Hem" (Appellant) as having been present, making him the most frequent attendee after Nuon Chea and Pol Pot.[3112] Contrary to Appellant's claim,[3113] and as explained in the response to Ground 36,[3114] there is no error in relying on SC meeting minutes as they were authentic and had significant probative value. Appellant's claim that his interventions during the meetings were not related to a specific crime is irrelevant[3115] because his participation in the commission of crimes does not need to be direct, it can also be indirect.[3116]

900. Second, Appellant contends without merit that the TC could not infer any knowledge, intent or contribution to the crimes committed during the DK from his attendance at SC meetings.[3117] He challenges, specifically, the TC's reliance on his attendance in numerous SC meetings about the construction of KCA.[3118] Contrary to Appellant's contention,[3119] the TC reasonably found that Appellant participated in the SC meetings (i) in October 1975 about the construction of the airfield;[3120] and (ii) in May 1976 about the airfield organisation.[3121]As detailed in the response to Ground 215, the TC did not rely solely on this attendance but on the totality of the evidence to conclude that he was aware of crimes committed as part of the policy aimed at the creation and operation of KCA.[3122]

901. Appellant also contests the TC's reliance on his attendance at the SC meeting about agriculture, drought, and industry to conclude that he participated in furthering the common purpose.[3123] Contrary to Appellant's claim,[3124] the TC assessed the out-of-court statement from Ieng Sary in light of other corroborating evidence in order to find that

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3111 **F54** Appeal Brief, paras 1737, 1746.
3112 **E465** Case 002/02 TJ, para. 602.
3113 **F54** Appeal Brief, para. 1732.
3114 *See* response to Ground 36 (authenticity and probative value of 22 SC meeting minutes).
3115 **F54** Appeal Brief, para. 1737.
3116 *See* response to Ground 226 (TC's assessment of the significant contribution).
3117 **F54** Appeal Brief, para. 1740.
3118 **F54** Appeal Brief, paras 1741-1742.
3119 **F54** Appeal Brief, para. 1742.
3120 **E465** Case 002/02 TJ, para. 1723, fn. 5834. The meeting minutes indicate that he was appointed during this meeting to be responsible for the Front, Royal Government, Commerce, Accounting and pricing. *See* **E3/182** Minutes of Standing Committee Meeting, 9 Oct. 1975, EN 00183407.
3121 **E465** Case 002/02 TJ, para. 1723. The meetings minutes indicate he was appointed during this meeting to be in charge of the delegation of North Korea. *See* **E3/235** Minutes of Standing Committee Meeting, 19-21 Apr. 1976, EN 00183418.
3122 *See* response to Ground 215.
3123 **F54** Appeal Brief, para. 1744, *referring to* **E465** Case 002/02 TJ, paras 3981, 4258.
3124 **F54** Appeal Brief, para. 1744.

Appellant attended the SC meeting about agriculture, drought and industry.[3125] He also ignores the TC's finding on his attendance at SC meetings on (i) 30 May 1976 on the mandatory acquisition of rice from bases in the amount of 30 to 100 percent;[3126] and (ii) June 1976[3127] on the difficulties in reaching the target of three tonnes of rice per hectare by the end of the year.

The TC correctly assessed the principle of democratic centralism

902. Without merit, Appellant contends that the TC erroneously concluded he had the opportunity to participate during CC and SC meetings.[3128]

903. Regarding CC meetings, Appellant wrongly asserts that there is no evidence of his attendance or his intervention.[3129] As previously articulated, Appellant participated in CC meetings, such as the one on 30 March 1976, as well as Party Congresses.[3130] Appellant further ignores that, as a CC candidate member between 1971 and 1976,[3131] he could participate in the CC debates leading to decisions and influence others, while from January 1976 to 1979, he could both participate and vote.[3132] He also fails to acknowledge that Ieng Sary stated that by "1975 [Appellant] was *de facto* involved in [CC] affairs".[3133]

904. Regarding SC meetings, Appellant suggests without merit that the TC could not have found that he had the possibility to participate as he was not a formal member.[3134] Again, Appellant fails to acknowledge the evidence in its entirety. The TC found that he participated actively in various meetings by making reports and presentations.[3135] By actively participating and raising his voice, it was reasonable for the TC to conclude that Appellant, as a senior leader close to Pol Pot and Nuon Chea, had at the very least the possibility of influencing the decisions made, especially in light of the CPK principle of

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3125 **E465** Case 002/02 TJ, paras 3889-3891.
3126 **E465** Case 002/02 TJ, para. 4258, fn. 13893 *citing* **E3/224** Standing Committee Minutes 30 May 1976, EN 00182668.
3127 **E465** Case 002/02 TJ, para. 3901 fn. 1308 *citing* **E3/226** Standing Committee Minutes 10 June 1976, EN 00183369.
3128 **F54** Appeal Brief, para. 1749.
3129 **F54** Appeal Brief, para. 1750.
3130 **E465** Case 002/02 TJ, paras 4259-4260, *referring to* paras 600, 3899, 3771, 3955, 4229, and to Section 5.1.1 (Party Congress), Section 5.1.9 (Democratic Centralism).
3131 **E3/8380** 1971 CPK Statute, 3 July 1972, EN 00940569 (art. 3). *See also* **E313** Case 002/01 TJ, para. 997 (Appellant "had the right to participate in the debates of this Committee" "even if he had no formal decision rights").
3132 **E465** Case 002/02 TJ, para. 600.
3133 **E3/573** Ieng Sary Interview Notes by Stephen Heder, 4 Jan. 1999, EN 00427599.
3134 **F54** Appeal Brief, para. 1751.
3135 **E465** Case 002/02 TJ, para. 602.

democratic centralism.[3136]

905. Appellant further fails to demonstrate that the TC erred in finding that under the principle of democratic centralism, decisions were made collectively rather than exclusively by Pol Pot.[3137] As in Case 002/01, Appellant's unsubstantiated arguments fail.[3138] Appellant further fails to demonstrate that the meeting minutes contradict the TC's findings that decisions were made collectively.[3139] The fact that Pol Pot and/or Nuon Chea made remarks/expressed opinions in several[3140] of the 23 meeting minutes that the TC considered to be authentic and of significant probative value[3141] does not contradict the TC finding that the decisions were taken by the collective.[3142]

Ground 205: Member of Office 870[3143]

906. **Ground 205 should be dismissed as Appellant fails to establish that the TC erred in fact in its findings regarding Appellant's membership in Office 870.**

907. The ground fails with regard to the alleged factual error that Appellant became a member of Office 870 in or around October 1975.[3144] The TC relied on ample evidence, including Appellant's own admission, in establishing that Appellant joined Office 870 around October 1975[3145] and not in March-April 1976, as he contends.[3146]

908. This ground also fails with regard to the alleged factual error that the TC contradicted

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3136 **E465** Case 002/02 TJ, para. 392. *See also* regarding his ability to influence others in other contexts, paras 4320, 4383.

3137 **F54** Appeal Brief, para. 1752 *referring to* **E465** Case 002/02 TJ, para. 397.

3138 **F36** Case 002/01 AJ, para. 1050.

3139 **F54** Appeal Brief, para. 1752.

3140 *See e.g.* **E3/218** Minutes of Standing Committee Meeting, 26 Mar. 1976, EN 00182651; **E3/223** Minutes of Standing Committee Meeting, 17 May 1976, EN 00182708; **E3/225** Minutes of Standing Committee Meeting, 1 June 1976, EN 00182715; **E3/226** Minutes of Standing Committee, 10 June 1976, EN 00183363; **E3/1733** Minutes of Standing Committee Meeting, 9 Oct. 1975, EN 00183393-94.

3141 **E465** Case 002/02 TJ, paras 349-350, fns 965, 969.

3142 *Contra* **F54** Appeal Brief, para. 1753.

3143 Ground 205: **F54** Appeal Brief, *Member of Office 870*, paras 1763-1769, 1637-1639; **F54.1.1** Appeal Brief Annex A, p. 70 (EN), p. 65 (FR), pp. 99-100 (KH).

3144 Appellant misrepresents the Judgment as stating that he became a member of Office 870 in October 1975, when in fact the TC found that it was "around" October 1975: *see* **E465** Case 002/02 TJ, paras 364, 608; *contra* **F54** Appeal Brief, paras 1763, 1767. It must be noted that Appellant's arguments repeat unsuccessful assertions from Case 002/01: *See* **F36** Case 002/01 AJ, para. 1017, *dismissing* **F17** Case 002/01 Appeal Brief, paras 551-553.

3145 **E465** Case 002/02 TJ, paras 608 (fn. 1909), 364 (fn. 1040), *both citing* **E3/182** Standing Committee Minutes, 9 Oct. 1975, EN 00183393; **E3/37** Khieu Samphan WRI, EN 00156754; **E3/112** Khieu Samphan's Letter to OCIJ; **E3/18** Book by Khieu Samphan, *Cambodia's Recent History*, pp. 65-66. This evidence shows that Appellant acknowledged he became one of the two members of Office 870 around Oct. 1975; that Office 870 was an office of the SC; that he was, within Office 870, responsible for preparing price lists and distribution of goods within the country (and for ensuring the import of goods), tasks that were precisely assigned to him by the Standing Committee in Oct. 1975 (responsible "for Commerce for accounting and pricing").

3146 **F54** Appeal Brief, paras 1766-1767.

itself in characterising Doeun as Appellant's "predecessor" at Office 870.[3147] The TC thoroughly examined the evidence and, after rejecting six testimonies suggesting that Appellant became chairman of Office 870 after Doeun's arrest,[3148] concluded that it was unable to determine whether Appellant held a leadership role at Office 870 beyond his membership.[3149] The use of the term "predecessor" in the impugned paragraph[3150] can thus logically be interpreted as a typographical error, or confusion caused by the fact that Doeun was indeed Appellant's predecessor in the Commerce Committee.[3151] In any case, Appellant does not show that this typographical error is critical to the verdict reached and, therefore, occasions an actual miscarriage of justice.[3152]

909. Appellant further claims, without merit, that the TC erred by failing to distinguish between the different meanings of code "870" and Office 870.[3153] Contrary to his erroneous arguments regarding the alleged ambiguity of the exact addresses of some reports and telegrams,[3154] Appellant fails to establish that the TC's reliance on these documents in assessing his role in Office 870 and his contribution to the JCE was unreasonable.[3155] The TC did carefully distinguish between the various meanings of "870"[3156] and reasonably concluded that Appellant's membership in Office 870 gave him access to important confidential information, including information on crimes such as arrests and murders, in the form of reports and telegrams sent by zones and autonomous

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3147 **F54** Appeal Brief, paras 1768-1769 *citing* **E465** Case 002/02 TJ, para. 616.

3148 **E465** Case 002/02 TJ, paras 612 (TC rejecting Duch's testimony on this point), 613-614 (TC according little probative value to Heder's interview notes with Van Rith and Ieng Sary, nor to Phy Phuon's oral testimony), 615 (TC attributing little weight to the testimonies of Experts Philip Short and David Chandler on the replacement of Doeun by Khieu Samphan).

3149 **E465** Case 002/02 TJ, paras 364, 616. *See also* paras 4225 (Appellant remained "as one of the few *members* in Office 870 after Doeun's disappearance"), 4257, 4276 ('*member*' of Office 870).

3150 **E465** Case 002/02 TJ, para. 616 ("The precise contours of Khieu Samphan's responsibilities within Office 870, as distinct from those of his *predecessor* [...] remain unclear. [...] As a result of the paucity of evidence relating to his functions within Office 870, the Chamber is unable to conclude that Khieu Samphan served as the chairman of Office 870 or was in fact a "leading cadre" thereof." (emphasis added)).

3151 *See* **E465** Case 002/02 TJ, para. 4225, which distinguishes between Appellant's membership in Office 870 and his role in the Commerce Committee overseeing the Ministry's affairs and ensuring "that his *predecessor*'s [Doeun] responsibilities remained fulfilled after his removal" (emphasis added).

3152 **F54** Appeal Brief, para. 1768.

3153 **F54** Appeal Brief, para. 1637.

3154 **F54** Appeal Brief, para. 1638 (Appellant alleges that reports and telegrams were not addressed only to Office 870 but to many addressees, "namely committee 870, *Angkar* 870, Office 870, or sometimes Bang").

3155 **F54** Appeal Brief, paras 1637-1639 (Note that "Office 870" was erroneously translated in para. 1637 as "Bureau 870" in the English translation of Appellant's Appeal Brief). *See also* para. 1768 (Appellant claims that the TC extrapolated when it found that he had access to telegrams and reports as a result of his membership in Office 870. This argument is unsubstantiated).

3156 **E465** Case 002/02 TJ, paras 362 (various uses of "870" by the DK regime and different understandings by the witnesses), 363 (distinguishing between Committee 870 and Office 870), 365 (discussing whether Office 870 and Bureau 870 formed a single entity), 367 (distinguishing between Office 870 and S-71), 492 (telegrams marked "copied to the 'office'" were sent to Office 870).

sectors and addressed explicitly to "Office 870".[3157] Based on the testimony of Norng Sophang, the TC further clarified, that telegrams marked as having been copied to the "office" went effectively to Office 870.[3158]

910. Appellant leaves unchallenged the TC's findings that: (i) Office 870 was the organ responsible for overseeing the implementation of the SC decisions (its "executive arm");[3159] (ii) it continued to operate after Doeun's arrest in February 1977;[3160] and (iii) Appellant himself communicated with the lower echelons via telegrams sent from Office 870.[3161] Further, despite claiming that he only learned the true role of Office 870 after 1979, Appellant also admitted during the investigation that Office 870's role was "to monitor suspected members of the Party for the Standing Committee".[3162]

911. In addition, Appellant's argument fails as his Office 870 membership was only one among many factors[3163] upon which the TC relied to find Appellant knew of the

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3157 *See e.g.* **E465** Case 002/02 TJ, paras 362 (reports sent by zone and autonomous sectors' leaders to Office 870), 386 (letter of Office 870 ordering Division 117 & Sector 505 leaders to go to Phnom Penh where they were arrested), 493, 610 (telegrams addressed to M-870 in 1977 and 1978), 1240-1248 (CPK reports sent by M-560 to Office 870 regarding famine and other poor conditions in Sector 5, including at TTD Dam), 1242-1244 (court testimony of Son Em about reports sent from Office 560 with the mention "to Office 870" written on the envelope, not the document itself), 1250, 1459, 1466 (Ke Pauk reporting on enemies and traitors to Office 870), 1996 (Sao Phim communications with the SC through Office 870), 3035, 3040, 4048 (reports of arrest of ex-KR officials to Office 870), 4071 (Ke Pauk and Ruos Nhim reported to Office 870 about the construction and working conditions at 1JD and TTD worksites respectively). *See also* telegrams copied to Office 870 cited *inter alia,* in **E465** Case 002/02 TJ, fns 7813, 10039, 11506, 12999.

3158 **E465** Case 002/02 TJ, para. 492 *citing* the key court testimonies of Norng Sophang (who ran the telegram encryption and decryption unit at Sothearos School in Phnom Penh from 1975 onwards) and Duch. See examples of telegrams and reports copied to "Office" in **E465** Case 002/02 TJ, paras 1216 (fn. 4151), 1247 (fn. 4268), 1253 (fn. 4285), 3035 (fn. 10268)

3159 **E465** Case 002/02 TJ, paras 363-364, 608, 2188, fn.7349.

3160 **E465** Case 002/02 TJ, paras 364, 610, 4276.

3161 *See e.g.* **E465** Case 002/02 TJ, paras 493, 4276.

3162 **E465** Case 002/02 TJ, para. 4220 *citing* **E3/557** Khieu Samphan WRI, 19 Nov. 2007, EN 00153269; **E3/37** Khieu Samphan WRI, 14 Dec. 2007, EN 00156756. Paragraph 4220 was left out by Appellant in his Appeal Brief when discussing the role of Office 870). *See also* response to Ground 192.

3163 **E465** Case 002/02 TJ, paras 4389 (Appellant's contribution to the crimes and participation in the JCE was undertaken as member of the CC, member of Office 870, President of the State Presidium and highest official in GRUNK), 340 (Appellant was aware of the protected status of victims at S-21 due to his membership of CC and Office 870 but also to his unique standing within the Party as attendant at numerous SC meetings), 4225 (Appellant's knowledge of Doeun's arrest due to attendance at and participation in SC meetings, close relationship with Pol Pot and Nuon Chea, oversight responsibilities in the Commerce Committee and the fact he remained member of Office 870 for two years after Doeun's disappearance), 4257 (Appellant's support for CPK policies as CC member, President of State presidium, regular attendance at SC meetings where crucial decisions were made, membership of Office 870 and oversight of DK Commerce matters from October 1976 onwards), 4208 (Appellant had ongoing knowledge of development of plans, their implementation and likelihood crimes would occur due to close proximity with other senior members, attendance of SC meetings, travel through liberated zones, issuance of statements, presentation at training and indoctrination sessions), 4226 (Knowledge of the arrest of "traitors" as evidenced by Nuon Chea and Appellant's speeches at a 1976 political education session), 4229, 4253, 4277. About the SC meetings: **E465** Case 002/02 TJ, paras 4258 ("Khieu Samphan regularly attended and participated in Standing Committee meetings at which matters central to the common purpose were

crimes[3164] and contributed to them as a participant in the JCE.[3165]

Ground 200: Error regarding places of residence, of work and movements [3166]

912. **Ground 200 should be dismissed as Appellant fails to establish that the TC erred in its findings regarding Appellant's proximity with CPK leaders and his visits within DK, or in using these findings in analysing his knowledge of the crimes and his responsibility.**

913. First, Appellant erroneously suggests that the TC erred in finding that he was in close contact with Pol Pot, Nuon Chea and other CPK leaders throughout the DK because of his residence and working between offices K-1 and K-3.[3167] Appellant contends that after leaving K-1, he "lived in K-3 whereas Nuon Chea and Ieng Sary only came there from time to time while Pol Pot always resided in K-1".[3168] Appellant ignores the totality of evidence demonstrating that Appellant maintained close relationships throughout the DK with Pol Pot,[3169] Nuon Chea,[3170] and Ieng Sary,[3171] including the TC's findings that Pol Pot, Nuon Chea and Appellant often shared meals at K-3[3172] and were frequently seen

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discussed", including the identification and purge of enemies), 340, 4208, 4220, 4222-4223, 4225-4226, 4228, 4257, 4277, 4382.

3164 **E465** Case 002/02 TJ, paras 340, 4225, 4208 and, more generally, paras 4204-4254 (Knowledge relevant to the modes of liability), 4382.

3165 **E465** Case 002/02 TJ, paras 4257-4258, 4389 and, more generally, paras 4255-4308 (Commission through a Joint Criminal Enterprise), 4326, 4382-4383. *See also* paras 4230, 4236.

3166 Ground 200: **F54** Appeal Brief, *Error regarding places of residence, of work and movements,* paras 1683-1689; **F54.1.1** Appeal Brief Annex A, pp. 69-70 (EN), p. 64 (FR), p. 97 (KH).

3167 **F54** Appeal Brief, para. 1684. *Contra* **E465** Case 002/02 TJ, paras 484, 589.

3168 **F54** Appeal Brief, para. 1684 *referring to* **E465** Case 002/02 TJ, para. 484.

3169 **E465** Case 002/02 TJ, paras 589 (fn. 1845), 602 *See also* **E3/4044** Khieu Samphan Interview, EN 00789478 ("Knowing each other well, we would talk as normal"); **E1/55.1** Kaing Guek Eav, T. 28 Mar. 2012, 11.36.15-11.40.08, p. 51, lines 22-24, 11.51.52-11.54.24, p. 57, line 24-p. 58, line 17. (Appellant was "the head of Pol Pot's office. The student whom Pol Pot mentored and groomed"); **E3/355** Kaing Guek Eav, WRI, EN 00242877 ("Khieu Samphan had a special relationship with Pol Pot; the latter regarded him with esteem and perhaps was planning to make him his successor"); **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, EN 00396544 ("Pol placed growing trust in him. He appreciated his patience and perseverance, and the fact that when he was given a task, he would carry it out to the letter"), EN 00396521 ("Samphan was also entrusted with missions which Pol judged too sensitive for others to handle"); **E1/58.1** Kaing Guek Eav, T. 3 Apr. 2012, 14.13.38-14.18.48, p. 59, line 15-p. 60, line 15. ("Pol Pot would share important issues with him. […] he was allowed to know important information. Pol Pot entrusted him to keep documents […] All documents were in the hands of Khieu Samphan").

3170 *See e.g.* **E465** Case 002/02 TJ, paras 484, 589, 602 (SC meetings), 607 (lectures at political training sessions with Nuon Chea). *See also* **E3/278** FBIS, *Leaders Pay Respects to People's Republic of China's Chu Te,* 12 July 1976, EN 00167869-70; **E3/491** French Ministry of Foreign Affairs, *Cambodian Review September 1976,* 15 Nov. 1976, EN 00525813; **E3/299** BBC SWB, *Ne Win's Visit to Cambodia,* 30 Nov. 1977, EN 00008317-18; **E3/1414** BBC SWB, *Romanian President's Visit to Cambodia,* 1 June 1978, EN S 00010614; **E3/485** French Minister of Foreign Affairs, *Information and personal accounts on Cambodia,* 24 Jan. 1977, EN 00519825-28.

3171 *See* response to Ground 207.

3172 **E465** Case 002/02 TJ, para. 589. *See e.g.* **E1/126.1** Noem Sem, T. 25 Sept. 2012, 14.12.38-14.14.17, p. 66, line 18-p. 67, line 6; **E1/55.1** Kaing Guek Eav, T. 28 Mar. 2012, 13.33.36-13.41.52, p. 62, line 15-p.

together.[3173] Appellant acknowledged that Pol Pot, Nuon Chea and he "did nothing separately".[3174] Sa Vi, who worked at K-1, testified that he saw Nuon Chea, Ieng Sary and Appellant visiting Pol Pot's office at K-1 almost every day, and noted that Appellant visited more frequently than the others.[3175] Further, based on compelling evidence, the TC reasonably found that Appellant (i) left B-5 and entered Phnom Penh with Pol Pot and Nuon Chea in late April 1975, where they first lived and worked together successively at the railway station, Ministry of Finance, and Silver Pagoda;[3176] (ii) lived and worked with Pol Pot and other leaders for several months at K-1;[3177] and (iii) lived and worked at K-3 with Nuon Chea, Son Sen and Vorn Vet,[3178] as well as with Ieng Sary who also had an office at B-1.[3179]

914. Appellant also claims, without merit, that the TC erred by extrapolating on what Appellant would have known of plans and the likelihood of crimes because of his

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64, line 25 (heard from Son Sen that they ate at K-3 in a communal eating hall); **E1/205.1** So Socheat, T. 11 June 2013, 15.44.38-15.46.54, p. 88, line 19-p. 89, line 6 (she saw Pol Pot, Nuon Chea and Appellant eating together); **E1/206.1** So Socheat, T. 12 June 2013, 09.32.50-09.45.57, p. 12, line 2-p. 16, line 17; **E1/98.1** Rochoem Ton, T. 30 July 2012, 14.02.30-14.09.32, p. 65, line 16-p. 66, line 10 (Pol Pot, Nuon Chea, and Appellant worked together in offices close to each other, met frequently and ate together for breakfast and lunch).

3173 **E465** Case 002/02 TJ, paras 589, 3884, fns 1841, 1843, 1845, 12960, *citing* **E1/97.1** Rochoem Ton *alias* Phy Phuon, T. 26 July 2012, 14.00.40-14.14.24, p. 61, line 10-p. 65, line 6, 15.38.09-15.41.52, p. 88, line 1-p. 89, line 6; **E3/24** Phy Phuon WRI, EN 00223582 (Pol Pot, Nuon Chea, Khieu Samphan and Son Sen worked together every day); **E1/205.1** So Socheat, T. 11 June 2013, 14.33.40-14.35.55, p. 72, line 22-p. 73, line 9. (Appellant was always with Pol Pot, Nuon Chea; he and Nuon Chea were responsible when Pol Pot was absent); **E1/156.1** Sa Vi, T. 8 Jan. 2013, 09.42.35-09.47.08, p. 11, line 22-p. 13, line 4.

3174 **E3/3198** Transcript of video statement of Khieu Samphan, EN 00815884; **E3/3197R** Video statement of Khieu Samphan, at 00.38.48-00.42.42.

3175 **E465** Case 002/02 TJ, para. 484, fn. 1527 (*citing* **E1/156.1** Sa Vi, T. 8 Jan. 2013, 15.42.28-15.44.28, p. 85, lines 14-23; para. 589, fn. 1846 (citing witnesses Sa Vi, Oeun Tan and Leng Chhoeung).

3176 **E465** Case 002/02 TJ, para. 589, fn. 1841 *citing e.g.* **E3/27** Khieu Samphan WRI, 13 Dec. 2007, EN 00156745-46 ("Nuon Chea and Pol Pot brought me from Udong to Phnom Penh. They brought me to the buildings of the railway station and we stayed there a month before going to the Silver Pagoda and then to the Bassac waterfront"). Regarding the life and work of Appellant at B-5 with Nuon Chea and Pol Pot, *see* **E465** Case 002/02 TJ, paras 581, 584-585, fns 1822, 1832.

3177 **E465** Case 002/02 TJ, para. 589, fn. 1842.

3178 **E465** Case 002/02 TJ, para. 589, fns 1843-1844 and the references cited therein, *including* **E3/37** Khieu Samphan WRI, 14 Dec. 2007, EN 00156755 ("I lived in K3 after I had stayed at K1 for two or three months [...] In fact, most of the leaders lived in K3, Ieng Sary, Son Sen, Nuon Chea. As for Pol Pot, once in a while he stayed in K3 [...] He also lived in K1. The meetings of the standing committee were often held at K1 office but sometimes at K3 office, Pol Pot's house, and it could be held in the kitchen"); **E1/208.1** Leng Chhoeung, T. 17 June 2013, 09.42.05-09.48.12, p. 13, line 16-p. 14, line 22, 09.56.55-10.01.55, p. 18, lines 1-21.*Contra* **F54** Appeal Brief, para. 1685.

3179 **E465** Case 002/02 TJ, para. 589, fn. 1844 *citing e.g.* **E3/37** Khieu Samphan WRI, 14 Dec. 2007, EN 00156755 ("In fact, most of the leaders lived in K3, Ieng Sary, Son Sen, Nuon Chea."); **E1/71.1** Pean Khean, T. 2 May 2012, 14.15.48-14.17.36, p. 48, lines 3-5 (K-3 was a joint office where Pol Pot, Khieu Samphan, Ieng Sary and Son Sen worked); **E1/208.1** Leng Chhoeung, T. 17 June 2013, 09.42.05-09.48.12, p. 13, line 16-p. 14, line 22, 09.56.55-10.01.55, p. 18, lines 1-21 (Khieu Samphan, Nuon Chea and Ieng Sary had houses at K-3); **E1/86.1** Oeun Tan, T. 13 June 2012, 11.14.15-11.15.49, p. 40, line 25-p. 41, line 6 (Khieu Samphan and Nuon Chea stayed at K-3 while Pol Pot and Ieng Sary lived at K-1 and B-1, respectively; they met at K-1).

proximity to CPK leaders, contrary to the principle of secrecy.[3180] The TC did not extrapolate: the principle of secrecy did not apply to leaders such as Appellant.[3181] Appellant and the other CPK leaders did meet regularly, both formally at SC, CC and Party Congress meetings, where policies were discussed and crucial decisions made, and during large CPK gatherings and training sessions,[3182] or more informally, at K-1 and K-3, where they lived and worked. For those reasons, there is no doubt, as the TC found, that Appellant was not only close physically to the other CPK leaders but, as a member of the CC and of Office 870, participant in SC meetings, President of the State Presidium, highest official in GRUNK, and responsible for overseeing commerce matters, he was part of the senior executive organs of the CPK, the Party Centre.[3183] The TC thus reasonably found Appellant had ongoing knowledge of the development of plans, their implementation and the likelihood that crimes would occur.[3184]

915. Second, the ground also fails as Appellant does not demonstrate that the TC's findings regarding his site visits were unreasonable. Contrary to Appellant's claim that the TC considered his visits to the countryside "a common habit", the TC specified that Appellant visited worksites in January and February 1976.[3185] Further, in disputing the TC's reasonable finding that he observed the abject living and working conditions of worker-peasants, including starvation, illness and disease, during these visits,[3186] Appellant ignores Sihanouk's declaration in 2000, where he clarified what he saw during his travels with Appellant:

> "I [...] travelled through my country, through Cambodia, together with

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3180 **F54** Appeal Brief, para. 1684.

3181 *See* response to Ground 195 (principle of secrecy).

3182 *See e.g.* **E465** Case 002/02 TJ, paras 355, 357, 345, 600-604, 607, 624. See also paras 4253, 4257-4260, 4262, 4271-4273.

3183 *See e.g.* **E465** Case 002/02 TJ, paras 4257 (Appellant's support for CPK policies as CC member, President of State presidium, regular attendance at SC meetings where crucial decisions were made, membership of Office 870 and oversight of DK Commerce matters from October 1976 onwards), 4258.

3184 **E465** Case 002/02 TJ, paras 4208 (Appellant had ongoing knowledge of development of plans, their implementation and likelihood crimes would occur due to close proximity with other senior members, attendance of SC meetings, travel through liberated zones, issuance of statements, presentation at training and indoctrination sessions), 4389 (Appellant's contribution to the crimes and participation in the JCE was undertaken as member of the CC, member of Office 870, President of the State Presidium and highest official in GRUNK), 340 (Appellant was aware of the protected status of victims at S-21 due to his membership of CC and Office 870 but also to his unique standing within the Party as attendant at numerous SC meetings), 4225 (Appellant's knowledge of Doeun's arrest due to attendance at and participation in SC meetings, close relationship with Pol Pot and Nuon Chea, oversight responsibilities in the Commerce Committee and the fact he remained member of Office 870 for two years after Doeun's disappearance), 4226 (Knowledge of the arrest of "traitors" as evidenced by Nuon Chea and Appellant's speeches at a 1976 political education session), 4229, 4253, 4277, 4382.

3185 **E465** Case 002/02 TJ, para. 606. *Contra* **F54** Appeal Brief, para. 1686.

3186 **F54** Appeal Brief, para. 1686 *referring to* **E465** Case 002/02 TJ, para. 4314.

> Khieu Samphan. I saw that the communes were concentration camps. I saw how work went on day and night. When the moon shone, people could not sleep. Sleep was not allowed. People had to work. I saw what people ate, for there was no rice. The rice was mixed with maize and other things, beans, even leaves, the chopped-up stalks of banana plants. The diet was very, very bad".[3187]

916. Appellant further fails to acknowledge that, along with his own admissions of visiting canals and dams, including TTD,[3188] Im Chaem stated that Appellant personally observed the workers at TTD and urged them to work hard.[3189]

Ground 201: Deputy Prime Minister, Minister of National Defence, and Commander-in-Chief of CPNLAF[3190]

917. **Ground 201 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that the three national / FUNK congresses in 1975, which he reportedly chaired, legitimised the CPK's political line internationally, and that he took part in important military meetings and gatherings.**

918. Firstly, the ground fails as Appellant wrongly contends that the TC's finding on the uncertainty of the occurrence of the two national congresses in April and December 1975 and one FUNK congress in February 1975[3191] prevented it from finding that his alleged participation in these congresses, during which resolutions were reportedly adopted, legitimised the CPK's agenda internationally.[3192] Appellant misrepresents the TC's findings and fails to establish any factual error. Indeed, if the TC did not conclude that those three 1975 congresses genuinely took place or that Appellant effectively co-chaired them,[3193] it did not prevent the TC from reasonably making other findings, including that: (i) the content of the congresses' communiqués and resolutions reportedly adopted

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3187 **E465** Case 002/02 TJ, para. 4265, fn. 13920 *citing* **E3/3113R**, *The Jungle War*, 1 Aug. 2000, EN V00172509, 00.29.32-00.30.26; **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, EN 00396541.

3188 **E465** Case 002/02 TJ, para. 1254, fn. 4286, *citing* **E1/198.1** Khieu Samphan, T. 29 May 2013, 10.06.46-10.08.50, p.21, line 22-p. 22, line 11; **E3.18** Khieu Samphan, *Cambodia's Recent History*, EN 00103780.

3189 **E465** Case 002/02 TJ, para. 1254, fn. 4286 *citing* **E3/5657** Im Chaem DC-Cam Statement, EN 00089778 ("Chinese and uncle Khieu Samphan also came and visited there. [...] Pol Pot visited occasionally but Khieu Samphan did often. […] While seeing human forces working at the dam and at the rice field, [Khieu Samphan] urged [us] to continue to work hard.").

3190 Ground 201: **F54** Appeal Brief, *Deputy Prime Minister, Minister of National Defence, and Commander-in-Chief of CPNLAF,* paras 1690-1691; **F54.1.1** Appeal Brief Annex A, p. 69 (EN), p. 64 (FR), p. 98 (KH).

3191 **F54** Appeal Brief, para. 1690 *citing* **E465** Case 002/02 TJ, para. 593.

3192 **F54** Appeal Brief, para. 1690 *citing* **E465** Case 002/02 TJ, paras 3735, 4262.

3193 **E465** Case 002/02 TJ, paras 412 (fn. 1234), 581 (fn. 1820), 593 (fn. 1860), 3735 (fn. 12458), 3897 (fn. 12991), 4262 (fn. 13908).

reflected the CPK political line at the time,[3194] and was corroborated by Pol Pot,[3195] Appellant,[3196] and by the fact that the new DK Constitution, allegedly decided during the national congress of December, was promulgated in January 1976;[3197] (ii) the communiqués and resolutions were officially radio-broadcast;[3198] and (iii) the attribution of such events (and the communiqués and speeches discussing them) by the regime to Appellant contributed, due to his popularity,[3199] giving credit to and legitimising the CPK political line both domestically and internationally.[3200] Appellant, as GRUNK Deputy Prime Minister and FUNK representative, accepted being described in such official radio broadcasts as chairman and/or prominent participant in those congresses, and therefore promoted, confirmed and endorsed the CPK political line and common purpose.[3201]

919. The ground also fails as Appellant does not substantiate his claim that the TC erred in finding that he attended important military meetings and gatherings (in 1975).[3202] Contrary to Appellant's assertions, the TC never concluded that this factual element constituted evidence that led it to find that Appellant promoted, confirmed, and endorsed the common purpose.[3203]

3194 **E465** Case 002/02 TJ, paras 593, 3735, 4262 (fn. 13908), 3897.

3195 **E465** Case 002/02 TJ, para. 3884, fn. 12961 *citing* **E3/5713** *Pol Pot Interview by Yugoslavian Journalists*, 20 Mar. 1978, EN 00750098 (following "a special national congress in late April 1975", the CPK determined "to build a prosperous and happy Cambodian society [...] free from all class or individual forms of exploitation, in which everyone strives to increase production and to defend the country").

3196 **E465** Case 002/02 TJ, para. 581, fn. 1821 *citing* **E3/273** FBIS, *Khieu Samphan Report*, 5 Jan. 1976, EN 00167810-17 (In his speech, Appellant referred to the three 1975 national or FUNK congresses held in February, April, and December 1975 and their content, showed his knowledge of the Constitution's content, and proclaimed the commitment to the construction of a classless society, free from exploitation, striving to build and defend the country – which perfectly reflects the CPK's political line at the time), para. 4027, fn. 13340 ("The Chamber could not conclusively determine whether this 'National Congress' took place but has accepted that the decisions allegedly reached therein were representative of other pronouncements by Khieu Samphan").

3197 *See e.g.* **E465** Case 002/02 TJ, para. 412 (fns 1234-1235 *citing* **E3/273** FBIS, *Radio Editorial Hails Promulgation of New Constitution*, 8 Jan. 1976, EN 00167822; **E3/259** DK Constitution), 3738 (fn. 12465).

3198 **E465** Case 002/02 TJ, paras 231, fn. 556 (*citing* **E3/117** & **E3/488** FBIS, *Khieu Samphan Chairs NUFC Congress Session: Communique Issued*, 26 Feb. 1975, EN 00166772-75), 412, (fn. 1234 *citing* **E3/273** FBIS, *Phnom Penh Reportage on Third National Congress: Khieu Samphan Report*, 5 Jan. 1976, EN 00167810-17), 581 (fn. 1819), 593, (fn. 1858 *citing* **E3/118** FBIS, *'Special National Congress' Retains Sihanouk, Penn Nouth*, 28 Apr. 1975, EN 00167012). *See also* paras 4028 (fn. 13442), 4047 (fn.13399) (both citing other CPK sources referring to decisions taken at the second national congress regarding the traitors and urging people to follow them).

3199 *See e.g.* **E465** Case 002/02 TJ, paras 570-571, 577, 582, 624.

3200 **E465** Case 002/02 TJ, para. 593, *see also* paras 598, 4027 (fn. 13340), 4262.

3201 **E465** Case 002/02 TJ, para. 4262.

3202 **F54** Appeal Brief, para. 1691.

3203 **F54** Appeal Brief, para. 1691, fn. 3262 *citing* **E465** Case 002/02 TJ, para. 4262. In fact, Appellant misinterprets the TC Judgment as nowhere in para. 4262 does the TC refer to the participation of Appellant in important military gatherings as described in para. 510, but only to national congresses, meetings at the Silver Pagoda, and his acts and conducts as President of the State Presidium from 1976-1979. The comparison Appellant makes with Norodom Sihanouk (who did not take part in any national/FUNK

920. Appellant fails to demonstrate that it was unreasonable for the TC to find that as GRUNK Deputy Prime Minister, Minister of National Defence, and Commander-in-Chief of Cambodian People's National Liberation Armed Forces ("CPNLAF"), he legitimised the implementation of the common purpose both domestically and internationally by: (i) lauding the new Constitution which excluded the right to worship to "reactionary religion",[3204] and promoted the CPK objective of transforming the entire population into a society of worker-peasants in which all citizens would strive to build and defend the country; [3205] and (ii) being presented as the chairman of the national congresses.[3206] Through his positions, he also fortified the FUNK and GRUNK façade that obscured the CPK's operations,[3207] *inter alia* against the Buddhists.[3208]

Ground 202: President of the State Presidium[3209]

921. **Ground 202 should be dismissed as Appellant fails to establish that the TC erred in its analysis of his appointment, roles and speeches as President of the State Presidium and its relevance to his criminal responsibility.**

922. First, Appellant fails to demonstrate that the TC erred by finding that he was appointed by the CC at its 30 March 1976 meeting (and formally confirmed by the PRA in mid-April), and not by the SC, although the TC recognised that after the government was created, ministers had to report and take directions from the SC.[3210] Appellant claims that the appointment decision was taken by the SC.[3211] However, Appellant misconstrues the status of the DK President as he was not a member of the government;[3212] the title of the 30 March 1976 decision clearly indicates it was issued by the CC;[3213] being submitted to SC's effective authority after the creation of the State Presidium and government does

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congress or in the Silver Pagoda meetings with Appellant and was confined in his Palace from 1976 onwards) is therefore totally irrelevant.

3204 **E465** Case 002/02 TJ, para. 4241.

3205 **E465** Case 002/02 TJ, paras 4259, 4262.

3206 **E465** Case 002/02 TJ, para. 4262.

3207 **E465** Case 002/02 TJ, para. 4208.

3208 **E465** Case 002/02 TJ, paras 4241, 4275.

3209 Ground 202: **F54** Appeal Brief, *President of the State Presidium,* paras 1692-1703; **F54.1.1** Appeal Brief Annex A, p. 66 (EN), p. 64 (FR), p. 98 (KH).

3210 **F54** Appeal Brief, para. 1693 *referencing* **E465** Case 002/02 TJ, paras 414-416, 596. *See* **E3/12** Decision of the Central Committee Regarding a Number of Matters, 30 Mar. 1976, EN 00182813.

3211 **F54** Appeal Brief, para. 1693.

3212 **E465** Case 002/02 TJ, paras 412, 415-416, 418-419; **E3/259** DK Constitution, 5 Jan. 1976, art. 11 (DK has a State Presidium, including President, chosen and appointed by the PRA "once every five years.").

3213 **E3/12** Decision of the Central Committee Regarding a Number of Matters, 30 Mar. 1976. It remains unclear whether Appellant disputes the fact that the 30 March 1976 decision was issued by the CC and not the SC.

not exclude an initial appointment by the CC.[3214]

923. Second, Appellant claims the TC contradicted itself by considering the President's position as "largely symbolic" while still relying on this position in making findings on his responsibility and considering it to be an aggravating factor, but fails to demonstrate how the TC erred.[3215] Appellant states that the TC ignored the CPK's alleged "mistrust" of him, evidenced by the nomination of his two Vice-Presidents and his late promotion in 1976 as full member of the CC.[3216] Appellant omits that Article 11 of the DK Constitution mandates two Vice Presidents[3217] and that the nominal 'Vice-Presidents' Sao Phim and Ruos Nhim never acted as such during the DK period, and were ultimately purged.[3218] He also omits that, between 1971 and 1976, there was no Party Congress to promote him to full-rights CC member.[3219] Appellant merely disagrees with the TC's interpretation of the evidence, which demonstrated that he had a close and trusting relationship with the other CPK leaders, as his numerous other functions in the DK further illustrate, such as CC member, attendee and participant to SC meetings, member of Office 870, overseer of commerce matters and lecturer at political training sessions.[3220] Appellant baselessly complains that the TC failed to explain what 'CPK line' he promoted as President, and incorrectly offers his interpretation of a non-criminal Party line.[3221] He ignores the TC's findings, however, regarding the objective of the common purpose, the intrinsically linked criminal policies, and discipline promoted in the CPK Statute and by the Party Centre,[3222] including by Appellant in his speeches and lectures, *inter alia*, on establishing and operating the cooperatives and worksites,[3223] and

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3214 **E465** Case 002/02 TJ, para. 357. *See* **F36** Case 002/01 AJ, para. 1047. Regarding the power of appointment of the CC. S*ee also* response to Ground 203.

3215 **F54** Appeal Brief, paras 1694, 1703, *referring to* **E313** Case 002/01 TJ, para. 381 and **E465** Case 002/02 TJ, para. 599 (diplomatic duties and general promotion of the CPK line). *See also* **E465** Case 002/02 TJ, paras 597 (detailing his diplomatic and ceremonial functions), 598 (Appellant delivered speeches promoting and endorsing all CPK policies), 4242, 4257, 4262, 4265, 4268, 4389.

3216 **F54** Appeal Brief, para. 1694.

3217 **E3/259** DK Constitution, 5 Jan. 1976, art. 11.

3218 Sao Phim committed suicide right before his arrest while Ruos Nhim was imprisoned and executed at S-21. *See e.g.* **E465** Case 002/02 TJ, paras 358, 374, 378, 558, 1231, 2051-2054, 2220, Section 12.1.5 (1977 Events – Division 310 and the Northwest Zone (Ruos Nhim), Section 12.1.6 (1978 Events - East Zone and Sao Phim), Section 12.2.8.4 (arrest of Ruos Nhim).

3219 **E465** Case 002/02 TJ, paras 226, 345 ("the Party Congress only met once every four years [...] The role of the Congress was to [...] select and appoint the members of the Central Committee"), 355, 574, 600.

3220 *See* response to Ground 200. *See e.g.* **E465** Case 002/02 TJ, paras 589, 594, 596-599, 600-604, 607-608, 616-621, 624, 4207-4208, 4225, 4230, 4253, 4257-4260, 4262, 4272-4273, 4275-4277, 4313.

3221 **F54** Appeal Brief, para. 1696.

3222 *See e.g.* **F54** Appeal Brief, paras 345, 355, 416, 477, 599, 624, 1056, 3400, 3547, 3618, 3734-3742, 3765, 3843, 3877, 3955, 4080, 4133, 4158, 4257-4263, 4262, 4265.

3223 **E465** Case 002/02 TJ, paras 3916 (fn. 13067), 3400, 3877, 4263, 4265-68, 4272. *See also* response to Ground 182.

identifying enemies and traitors.[3224]

924. Third, Appellant alleges a series of factual errors regarding his public speeches/statements as President of the State Presidium, which he erroneously contends impacted the TC's conclusion on his contribution to the common purpose.[3225]

925. Appellant contends that the TC erred in relying on a speech he made before his appointment as President of the State Presidium,[3226] to conclude that he endorsed as President "the CPK's policies, such as the use of cooperatives, food rationing, child labour and worksites".[3227] Appellant fails to acknowledge that the TC's finding was not solely based on his speech of January 1976, but also on his speech of 15 April 1977 during which he urged workers to "struggle even harder" than the past year to "overfulfil the 1977 plan", adding "now we can feed our people a sufficient ration allocated by the state" and justifying the use of child labour to fulfil Party plans, asserting that children were happy "collecting natural fertilizer and helping to build dams and embankments and dig reservoirs and ditches."[3228] In any event, Appellant's claim fails to demonstrate any error, as the TC examined the totality of the speeches during the DK period, not just those made during his presidency.

926. Appellant further argues that the TC erred in relying on an uncorroborated FBIS document concerning an interview transcribed in September 1976,[3229] but fails to demonstrate its impact on the TC's conclusion about his contribution to the common purpose. Appellant's piecemeal approach ignores the totality of the evidence regarding his knowledge that crimes were committed during the DK regime, including those against Buddhists.[3230] Indeed, his statements on the fact that "even Buddhist monks have the duty

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3224 **E465** Case 002/02 TJ, paras 607, 3399-3400, 3960, 3967, 4027, 4269, 4271-4273, 4285, 4292, 4306. *See also* response to Ground 204.

3225 **F54** Appeal Brief, paras 1698-1703.

3226 **F54** Appeal Brief, para. 1702.

3227 **E465** Case 002/02 TJ, para. 598.

3228 **E465** Case 002/02 TJ, para. 598, fn. 1879 *citing* **E3/201** Khieu Samphan Speech, 15 Apr. 1977, EN 00419513. *See also* **E3/200** BBC SWB *Khieu Samphan's Speech at Anniversary Meeting*, 15 Apr. 1977, EN 00004164-70; **E3/712** International Herald Tribune, *Cambodian Chief Vows more Toil Discipline,* 18 Apr. 1977, EN 00005979; **E3/3376** New York Times, *Cambodian Leader Cites Progress,* 19 Apr. 1977, EN 00445301-04; **E3/709** The Sunday Star, *Machineless Society Hailed by President,* 17 Apr. 1977, EN 00005970.

3229 **F54** Appeal Brief, para. 1701 *citing* **E465** Case 002/02 TJ, paras 4241, 4253 (*citing* **E3/608** FBIS, *Khieu Samphan interviewed on executions, national problems*, EN 00419841-43).The interview E3/608 was made in Colombo, Sri Lanka (likely in August 1976 during the 5th Non-Aligned Summit Conference: *see e.g.* **E3/279** FBIS, *Khieu Samphan departs, Khieu Samphan addresses Colombo Non-Alignment Summit, Delegation returns*, EN 00167692-93, 00167697-98; **E3/549** Khieu Samphan Speech, 16-19 Aug. 1976, EN 00644934) and published in Italy in the newspaper *Famiglia Cristiana* on 26 Sep 1976 then in FBIS (Asia and Pacific) on 22 Oct. 1976.

3230 **E465** Case 002/02 TJ, paras 4240, 4243, 4250-4254.

and obligation to work",[3231] and "traitors who remained in Democratic Kampuchea have been executed"[3232] were just two of many pieces of evidence that the TC relied on.

927. Appellant's claim that the TC erroneously attributed to him a speech made between 11 and 13 April 1976 at the PRA[3233] does not warrant appellate intervention as it had no impact on the verdict. First, Appellant attended the first session of the PRA, during which this speech was delivered by the unnamed chairman of the conference, and unanimous decisions on nominations and policies were made and endorsed by the Assembly, including Appellant.[3234] Second, the TC found that by 17 April 1975 and until 6 January 1979, CPK leaders, including Appellant, shared the same common purpose of rapidly implementing the socialist revolution in Cambodia through a "great leap forward".[3235] Contrary to Appellant's suggestion, the TC's finding did not rest solely on the speech made between 11 and 13 April 1976, but also on (i) his participation in CC and SC meetings discussing the implementation of the Party's political line,[3236] as well as the Party Congresses;[3237] (ii) his attendance and lectures at mass study sessions conveying the CPK policy;[3238] and (iii) his numerous speeches in which he promoted, confirmed, supported and endorsed the Party line.[3239]

928. Finally, Appellant challenges the TC's reliance on Appellant's speeches on the 17 April anniversaries in 1976, 1977, 1978[3240] and those about the Vietnamese aggression,[3241] but fails to substantiate his claim. Appellant's mere allegation of the TC's biased and partial assessment of evidence is insufficient to demonstrate an error in the TC's findings.

Ground 206: Supervision of the Committee of Commerce[3242]

929. **Ground 206 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that he exercised considerable oversight and was apprised of DK**

3231 **E465** Case 002/02 TJ, para. 4241, fn. 13844.
3232 **E465** Case 002/02 TJ, para. 4253, fn. 13875.
3233 *See* response to Grounds 17, 176; **F54** Appeal Brief, paras 1699-1700.
3234 **E465** Case 002/02 TJ, para. 3739, *citing* **E3/165** Document on Conference of Legislature, 11-13 Apr. 1976, EN 00184065-77 (discussing the Party lines of defending and building the country "even faster in a great and miraculous leap" at EN 00184070, 76).
3235 **E465** Case 002/02 TJ, para. 3743.
3236 **E465** Case 002/02 TJ, paras 3736, 3740.
3237 **E465** Case 002/02 TJ, paras 3738, 3742.
3238 **E465** Case 002/02 TJ, paras 340, 607, 3390, 3517, 3736, 3739, 3968, 4208, 4253, 4262, 4271.
3239 **E465** Case 002/02 TJ, paras 3734, 3742, fn. 12489.
3240 **F54** Appeal Brief, para. 1702.
3241 **E465** Case 002/02 TJ, para. 598, fn. 1800.
3242 Ground 206: **F54** Appeal Brief, *Supervision of the Committee of Commerce,* paras 1770-1798; **F54.1.1** Appeal Brief Annex A, p. 71 (EN), p. 65 (FR), p. 100 (KH).

trade and commerce between October 1976 and early 1979.

930. This ground should be dismissed as Appellant does not demonstrate that the TC erred in assessing the evidence and finding he had considerable oversight over DK's commercial and trade affairs, and was thoroughly apprised of those matters, both domestic and international.[3243] Appellant fails to establish that the TC erred in relying on (i) the numerous reports sent to him by the Commerce Committee; (ii) the instructions required from him by the Commerce Committee; (iii) his visits to state warehouses; and (iv) his trainings on sound management of the warehouses.[3244]

931. First, Appellant erroneously contends that the TC's assessment of the commerce reports addressed to him was biased and unreasonable,[3245] without demonstrating any such bias or error on the part of the TC.[3246] Appellant baselessly claims that the reports sent to him by the Commerce Committee were limited to trade relations, within the "limited scope" of his duties in the SC, and thus do not demonstrate significant oversight authority.[3247] The abundance of reports he received was not limited to the sale of merchandise, but rather demonstrate that Appellant was involved in a variety of commerce-related matters,[3248] including a trade agreement with PRK,[3249] the rice production in DK,[3250] and the installation of traditional medicine refineries by the Chinese.[3251] As such, Appellant has not demonstrated that the TC's finding that he exercised considerable oversight authority in this role is unreasonable.

932. Appellant further fails to demonstrate that the TC erred in finding that, by late October 1976, the Commerce Committee's reporting lines had shifted from Doeun to him.[3252] The

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3243 **F54** Appeal Brief, paras 1770, 1776-1798 *referring to* **E465** Case 002/02 TJ, paras 619-621. Similar Appellant's arguments (regarding Accused 's oversight, role of Van Rith, probative value of Witness Sar Kimlomouth, alleged absence of decision-making authority, TC's alleged extrapolations or distortions) have been rejected by the SCC in Case 002/01: **F36** Case 002/01 AJ, para. 1018 ("Khieu Samphan merely proposes alternative interpretation of the evidence, without demonstrating that the Trial Chamber's interpretation was unreasonable"), *rejecting* **F17** Case 002/01 Appeal Brief, paras 555-559.

3244 **F54** Appeal Brief, paras 1770, 1776-1798 *referring to* **E465** Case 002/02 TJ, paras 619-621.

3245 **F54** Appeal Brief, paras 1771, 1785.

3246 *See* response to Ground 4.

3247 **F54** Appeal Brief, paras 1787, 1790.

3248 **E465** Case 002/02 TJ, para. 619, fn. 1956 *citing* **E3/2059** Import Statistics (from January to September) and Export Statistics in 1978 (from January to September), EN 00583646-52; **E3/3533** Commerce Committee Export Statistics, 4 June 1978, EN 00770005, 00770013.

3249 **E465** Case 002/02 TJ, paras 618-619, fns 1951, 1955 *citing* **E3/304** Commerce Committee Report, 9 Nov. 1976, EN 00323002-03; **E3/2041** Commerce Committee Report, 1 Nov. 1976, EN 00334993-94.

3250 **E465** Case 002/02 TJ, para. 619, fn. 1956 *citing* **E3/3511** Commerce Committee Report, 8 Mar. 1977, pp. 1-3, EN 00742408-10.

3251 **E465** Case 002/02 TJ, para. 619, fn. 1955 *citing* **E3/3510** Commerce Committee Report, 22 Feb. 1977, EN 00539057.

3252 **F54** Appeal Brief, para. 1774 *referring to* **E465** Case 002/02 TJ, para. 618.

fact that Doeun still gave a speech before the Yugoslav trade delegation in early 1977 as chairman of the Commerce Committee does not contradict the TC's finding that reports were now sent to Appellant.[3253] In fact, Appellant does not contest that reports from the Commerce Committee were sent to him by late October 1976.[3254] He also left unchallenged the TC's finding that, of all documents put before it relating to commercial matters, only a few were sent only to Vorn Vet – who was in charge of the Economic portfolio – and not to Appellant.[3255] Inversely, the TC found that Vorn Vet was frequently included as a second recipient,[3256] or not included at all in some of the reports that were sent to Appellant by the Commerce Committee.[3257] His claim that the TC extrapolated in finding that Vorn Vet was often included as a second recipient,[3258] ignores that numerous reports cited by the TC were addressed expressly to him and only copied to Vorn Vet.[3259] Appellant's mere assertion that the TC erred in finding that he continued receiving reports and letters on trade matters, following Vorn Vet's arrest,[3260] does not meet the standard of appellate review.

933. Second, Appellant fails to demonstrate that the TC erred in finding that the Commerce Committee had frequently sought instruction from him,[3261] as he merely proposes an alternative interpretation of the evidence, without demonstrating that the TC's interpretation was unreasonable. Appellant also states, without substantiation, that the

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3253 **F54** Appeal Brief, para. 1774.

3254 **F54** Appeal Brief, para. 1774 *referring to* **E465** Case 002/02 TJ, paras 618, 4225. *See also* **E465** Case 002/02 TJ, Section 8.3.4.2 (Khieu Samphan: Oversight of Commerce, including paras 618-20, fn. 1951, 1955-59, 1963), *citing e.g.* **E3/2040**, Commerce Committee Report, 29 Oct. 1976; **E3/2041** Commerce Committee Report, 1 Nov. 1976; **E3/2042** Commerce Committee Report, 4 Nov. 1976; **E3/304** Commerce Committee Report, 9 Nov. 1976; **E3/3413** Commerce Committee Report, 20 May 1977; **E3/3564** Commerce Committee Report, 1 Nov. 1977; **E3/3457** Commerce Committee Report, 14 Feb. 1978; **E3/3510** Commerce Committee Report, 22 Feb. 1977; **E3/1616** Commerce Committee Report, 18 Oct. 1977; **E3/3516** List of Purchase Requests, Feb. 1978; **E3/3461** Commerce Committee Report, 28 Apr. 1978; **E3/3534** Commerce Committee List of Materials Imported, 29 Dec. 1978

3255 **E465** Case 002/02 TJ, para. 620, fn. 1961.

3256 **E465** Case 002/02 TJ, para. 620, fn. 1960.

3257 **E465** Case 002/02 TJ, paras 618-619, fns 1951, 1955-1956 *citing* **E3/2040** Commerce Committee Report, 29 Oct. 1976, EN 00332554-56; **E3/2041** Commerce Committee Report, 1 Nov. 1976, EN 00334993-94; **E3/2042** Commerce Committee Report, 4 Nov. 1976, EN 00323940-42; **E3/1616** Commerce Committee Report, 18 Oct. 1977, EN 00590298-99; **E3/3533** Commerce Committee Export Statistics, 4 June 1978, EN 00770005-13; **E3/1640** Commerce Committee Letter to the Embassy of Yugoslavia, 15 July 1978, EN 00767226-28; **E3/311** Commerce Committee Report, 8 Mar. 1977, EN 00742408-10.

3258 **F54** Appeal Brief, para. 1788.

3259 **E465** Case 002/02 TJ, paras 618-619, fns 1951, 1954, 1958 *citing* **E3/3457** Commerce Committee Report, 14 Feb. 1978, EN 00647731-32; **E3/3461** Commerce Committee Report, 28 Apr. 1978, EN 00711449-50; **E3/1615** Commerce Committee Report, Sept. 1977, EN 00234312; **E3/325** Commerce Committee Report, 15 Aug. 1977, EN 00685473-82.

3260 **F54** Appeal Brief, para. 1789. *See also* **E465** Case 002/02 TJ, para. 620, fn. 1963.

3261 **F54** Appeal Brief, paras 1777-1780, 1785-1790 *referring to* **E465** Case 002/02 TJ, para. 619, fn. 1954.

requests for guidance addressed to him in the reports were just mere formalities.[3262]

934. Third, Appellant fails to demonstrate that the TC erred in finding he visited the state warehouses with Van Rith, where he inspected products destined for export.[3263] He claims that the TC erred in relying on Yen Kuch's statement,[3264] but fails to acknowledge that the TC cited this witness' statement as an additional source and primarily relied on the in-court testimonies of Ruos Suy and Sim Hao.[3265] Appellant fails to demonstrate any abuse of discretion in the TC's assessment of the evidence provided by Ruos Suy and Sim Hao; he simply asks the SCC to substitute his preferred assessment of the evidence for that of the TC.

935. Fourth, Appellant fails to demonstrate that the TC erred in finding that he conducted meetings with workers and commerce cadres, instructing them on leadership, discipline and morality, and denouncing "those who were lazy to work"[3266] as enemies of the Party. Appellant's claims that the TC erred in relying on the testimony of Bit Na fail as they are, in essence, mere disagreements with the TC's assessment of the evidence, based on his failure to acknowledge the TC's broad discretion to assess the reliability and credibility of evidence.[3267] Appellant erroneously asserts that Bit Na's testimony was uncorroborated, [3268] ignoring that Ruos Suy[3269] and Sim Hao[3270] also mentioned that they participated in sessions for economic cadres chaired by Appellant, giving instructions on how to ensure the sound management of the warehouse[3271] and discussing the political situation in Cambodia.[3272] Contrary to Appellant's claim,[3273] there is no contradiction in Bit Na's previous statements that Appellant denounced the attitude of laziness during his meetings.

936. Appellant's arguments fail to demonstrate that it was unreasonable to conclude that,

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3262 **F54** Appeal Brief, para. 1779.
3263 **F54** Appeal Brief, para. 1791.
3264 **F54** Appeal Brief, para. 1793.
3265 **E465** Case 002/02 TJ, para. 620, fn. 1964.
3266 **F54** Appeal Brief, para. 1794, *citing* **E465** Case 002/02 TJ, para. 620, fn. 1965.
3267 *See* response to Ground 17.
3268 **F54** Appeal Brief, para. 1794.
3269 **E1/184.1** Ruos Suy, T. 25 Apr. 2013, 11.08.08-11.11.45, p. 37, lines 2-15, 11.18.00, p. 41, lines 8-23, 11.31.45-11.38.22, p. 46, line 3-p. 47 line 18, 11.39.29-11.48.34, p. 48, line 11-p. 51, line 20; **E3/4594** Ruos Suy DC-Cam Statement, EN 00710554.
3270 **E1/207.2** Sim Hao, T. 13 June 2013, 14.15.56- 14.26.40 p. 16, line 4-p. 20, line 3; **E3/4623** Sim Hao DC-Cam Statement, EN 00679721-22.
3271 **E1/184.1** Ruos Suy, T. 25 Apr. 2013, 11.08.08-11.11.45, p. 37, lines 2-6, 11.18.00-11.20.27, p. 41, lines 8-17.
3272 **E1/184.1** Ruos Suy, T. 25 Apr. 2013,11.31.45-11.38.22, p. 46, line 3-p. 47, line 17; **E3/4623** Sim Hao DC-Cam Statement, EN 00679721-22; **E1/207.2** Sim Hao, T. 13 June 2013, 14.15.56-14.26.40, p. 16, line 4-p. 20, line 3.
3273 **F54** Appeal Brief, para. 1796.

through his role as Commerce Committee overseer he (i) promoted and instructed the implementation of the common purpose by leading indoctrination sessions for cadres at Ministry of Commerce;[3274] (ii) controlled the implementation of the common purpose by personally enabling the smooth functioning of the DK trade and commerce to the detriment of its population;[3275] and (iii) knew about food shortages,[3276] and incidents that occurred at the Ministry of Commerce such as the mass purges[3277] and the celebration of forced marriages that he instructed.[3278]

Ground 207: Responsibility for the MFA[3279]

937. **Ground 207 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that Appellant may have provided periodic and limited assistance to the Ministry of Foreign Affairs ("MFA"), and did receive letters from Amnesty International.**

938. First, the ground fails as Appellant does not demonstrate that the TC's assessment of the evidence of Saloth Ban, Long Norin, and Suong Sikoeun, used to support the finding that Appellant may have provided limited periodic assistance to MFA, was partial and insufficient.[3280] Appellant merely disagrees with the TC's interpretation of evidence without demonstrating how this finding was unreasonable. As to Saloth Ban *alias* So Hong, Appellant argues without merit that the TC distorted and misrepresented his testimony in finding that Appellant held meetings at the MFA about foreigners, while he would actually meet only "with the intellectual group".[3281] Appellant omits portion of Saloth Ban's testimony, as the latter precisely stated he saw Appellant meeting "with the intellectual groups regarding the foreigners",[3282] which is consistent with the TC's finding. As to Long Norin, Appellant incorrectly notes that the TC ignored that Appellant could not make a decision in Ieng Sary's absence but would only welcome visitors.[3283] This is irrelevant as the TC never found Appellant substituted for Ieng Sary in his absence

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3274 **E465** Case 002/02 TJ, paras 4262, 4272.

3275 **E465** Case 002/02 TJ, para. 4276.

3276 **E465** Case 002/02 TJ, para. 628, fn. 1951 *citing* **E3/2041** Report from Commerce Committee to Brother Hem, 1 Nov. 1976, EN 00334994 (noting that Kampuchean people were facing a "food shortage" that year).

3277 **E465** Case 002/02 TJ, para. 4225, fns 13786-13787.

3278 **E465** Case 002/02 TJ, paras 3570, 4227, 4273.

3279 Ground 207: **F54** Appeal Brief, *Responsibility of the MFA,* paras 1799-1803; **F54.1.1** Appeal Brief Annex A, p. 71 (EN), pp. 65-66 (FR), p. 101 (KH).

3280 **F54** Appeal Brief, para. 1802. As to bias, *see* response to Ground 4; **F36** Case 002/01 AJ, para. 112.

3281 **F54** Appeal Brief, para. 1802 *referring to* **E465** Case 002/02 TJ, para. 623.

3282 **E1/68.1** Saloth Ban *alias* So Hong, T. 23 Apr. 2012, 11.12.50-11.16.01, p. 41, lines 17-25.

3283 **F54** Appeal Brief, para. 1802.

or made any decisions, but instead occasionally provided limited assistance.[3284] This evidence, combined with the testimony of Suong Sikoeun, who stated that he twice met with Appellant at the MFA to discuss the drafting of a news article,[3285] provides a reasonable, unbiased, and substantial basis to support the TC's finding that Appellant provided some assistance to the MFA, albeit limited.

939. Second, the ground also fails in relation to the TC's finding that Appellant knew that crimes had been committed against civilians and ex-KR soldiers through two letters addressed to him,[3286] and two public reports,[3287] all from Amnesty International in 1976-1978.[3288] Appellant contests without merit the TC's finding that he could not ignore these reports considering his strong connection to Ieng Sary and the MFA.[3289]

940. The TC properly found, based on the totality of the evidence, that Appellant knew about Amnesty International's letters and reports and the commission of crimes.[3290] It is reasonable to conclude that the letters addressed to Appellant were received by him in the normal course of business, like other letters of credentials and diplomatic messages sent to Appellant as President of the State Presidium.[3291] The evidence further demonstrates that the Amnesty International reports resulted in action from the CPK government. Following the September 1978 decision of the UN to investigate the human rights situation in DK, which stemmed from Amnesty International's reports,[3292] Ieng Sary sent two notes, (i) one to the Secretary-General of the United Nations ("UNSG") in which he denounced "an international campaign of denigration and calumny" conducted under the "human rights" issue by imperialists, expansionists, and annexationists, including the UK;[3293] and (ii) another to a UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, characterising its decision to investigate DK

3284 **E465** Case 002/02 TJ, para. 623.

3285 **F54** Appeal Brief, para. 1802.

3286 **E465** Case 002/02 TJ, para. 4048, fn. 13405 *citing* **E3/4520** Amnesty International Report 1975-1976, May 1976, EN 00002901 (mentioning a letter sent on 11 May 1976 to Appellant regarding summary executions, requesting inquiries); **E3/3864** Amnesty International Letter, 28 Feb. 1977, EN 00498337-38.

3287 **E465** Case 002/02 TJ, para. 4048, fn. 13406 *citing* **E3/3311** Amnesty International Press Release, 8 May 1977, EN 00419521, and **E3/4492** Los Angeles Times, *Cambodians: An Endangered Species*, 7 May 1978, EN 00445239. *See also* **E3/4521** UN ECOSOC, *Submission from Amnesty International under Decision 9 (XXXIV)*, 15 Aug. 1978, EN 00076007.

3288 **E465** Case 002/02 TJ, para. 4250.

3289 **F54** Appeal Brief, para. 1803.

3290 **E465** Case 002/02 TJ, para. 4250.

3291 **E465** Case 002/02 TJ, para. 597, fns 1871, 1874.

3292 **E465** Case 002/02 TJ, para. 3834.

3293 **E465** Case 002/02 TJ, para. 3825, fn. 12784 *citing* **E3/1385** Ieng Sary Statement, Letter to the U.N. Secretary General, 22 Apr. 1978, EN 00235721-28.

"as support for the activities of traitors and American Imperialists".[3294] In October 1978, Ieng Sary also invited the UNSG to visit the country to see the truth regarding the human rights charges.[3295] As Head of State, involved in the activities of the MFA, and in charge of receiving international delegations,[3296] it is unlikely that Appellant would not have been aware of these letters and reports, given the need for him to be prepared to respond on some level if the concerns were raised by foreign delegates. Further, based on ample evidence, the TC rightfully considered that Appellant and Ieng Sary had a strong relationship since the 1950s,[3297] and that they worked closely together prior and after 17 April 1975 in the diplomacy and foreign affairs area, visiting countries,[3298] attending numerous meetings[3299] and receptions with foreign delegations;[3300] they also lived next to each other at K-3[3301] and, as seen above, Appellant provided some assistance to the MFA in Ieng Sary's absence. This strong connection, as well as the necessity for Appellant to be informed of the accusations made by international NGOs to fulfil adequately his diplomatic functions as President, would have made him inevitably aware

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3294 **E465** Case 002/02 TJ, para. 3834, fn. 12816 *citing* **E3/4605** DK Telegram, 16 Sept. 1978, EN 00095649.

3295 **E3/627** Los Angeles Times, *U.N. Chief invited to Cambodia to Check on rights*, 10 Oct. 1978, EN 00004325-29; **E3/654** International Herald Tribune, *Cambodia Invites Westerners for Visit to Counter Criticisms*, EN 00013708.

3296 **E465** Case 002/02 TJ, para. 597.

3297 **E465** Case 002/02 TJ, paras 565, 573. *See also* **E3/111** Ieng Sary interview, 31 Jan. 1972, EN 00762419; **E3/659** Ieng Thirith interview, Oct. 1980, EN 00182310-11.

3298 **E465** Case 002/02 TJ, paras 534, 597. *See also e.g.* **E3/488** FBIS, *AKI Hails DRV-RGNUC relations*, 14 Feb. 1975, EN 00166754; **E3/113** *Nouvelles du Cambodge No 693*, 4 Apr. 1974, EN 00280539-46; **E3/114** *Nouvelles du Cambodge No 696*, 7-8 Apr. 1974, EN 00280552-55; **E3/115** *Nouvelles du Cambodge No 708*, 23 Apr. 1974, EN 00280594-96; **E3/3312** *April 30 EA Press Summary,* 30 Apr. 1974, EN 00412747; **E3/3724** *Premier Chou Meets Khieu Samphan*, 16 Aug. 1975, EN S 00003606; **E3/273** FBIS, *Lao Delegation Meets Cambodian Government,* 17 Dec. 1975, EN 00167585; **E3/278** FBIS, *Leaders Pay Respects to PRC's Chu Te,* 12 July 1976, EN 00167869.

3299 **E465** Case 002/02 TJ, paras 583, 597. *See also* **E3/1238** *Nouvelles du Cambodge No 691,* 2 Apr. 1974, EN 00278739-43; **E3/5** *Revolutionary Flag*, Aug. 1975, EN 00401488 (military rally at the Olympic stadium); **E3/89** Ieng Sary Interview, 17 Dec. 1996, EN 00417600 (meeting in September 1975); **E3/182** CPK Standing Committee Meeting Minutes, 9 Oct. 1975, EN 00183393; **E3/1372** BBC/SWB, Dec. 1977, EN 00419566; **E3/3741** *Cambodian Capital Ghost City, Diplomat Says*, 23 Jan. 1978, EN 00122151-52; **E3/1413** BBC/SWB, *Yugoslav Foreign Secretary's Southeast Asian Tour*, 6 May 1978, EN S 00009960; **E3/1252** BBC/SWB, *Romanian President in Cambodia*, 28 May 1978, EN 00010608-12.

3300 **E465** Case 002/02 TJ, paras 597, 1495, fns 1872-1873. *See also* **E3/273** FBIS, *Ieng Sary Hosts Reception for Diplomats*, 1 Jan. 1976, EN 00167799-800; **E3/277** FBIS, *Khieu Samphan Receives Foreign Ambassadors*, 14 June 1976, EN 00167900; **E3/491** *French Ministry of Foreign Affairs Cambodian Review Sept. 1976*, 15 Nov. 1976, EN 00525813; **E3/1339** FBIS, *Lao Envoy Hosts Reception Marking LPDR National Day*, 5 Dec. 1977, EN 00168319-20.

3301 **E465** Case 002/02 TJ, para. 534. *See also* **E3/37** Khieu Samphan WRI, 14 Dec. 2007, EN 00156755; **EI/208.1** Leng Chhoeung, T. 17 June 2013, 09.29.32-09.31.10, p. 9, lines 14-23; **E3/5748** Duch WRI, 22 Nov. 2007, EN 00153570; **EI/71.1** Pean Khean, T. 2 May 2012, 15.57.40-15.59.06, p. 70, lines 16-20.

of these letters and reports.[3302]

Ground 190: Party Centre[3303]

941. **Ground 190 should be dismissed as Appellant fails to establish the TC erred by using the term "Party Centre" in such a way that Appellant was included in an indefinite collective entity, thus artificially linking him to all CPK decisions.**

942. Similar to Case 002/01,[3304] the ground fails, as Appellant does not demonstrate that the TC erred in defining the terms "Party Centre". Based on testimonial and documentary evidence,[3305] the TC found that 'Party Centre' referred to the senior executive organs of the CPK based in Phnom Penh, including the SC, CC, Military Committee, Office 870, and Government Office (S-71).[3306] Appellant erroneously submits that the TC issued contradictory findings on his affiliation to the Party Centre.[3307] In fact, the TC consistently found that he was a senior leader with a unique standing within the Party Centre or the CPK, as a CC member who attended and participated in numerous SC meetings.[3308] Appellant further claims that the TC ignored exculpatory evidence from Oeun Tan;[3309] his testimony, however, does not support Appellant's claim, indicating rather that he was part of the leadership and worked closely with Pol Pot, Ieng Sary, and Nuon Chea before and during the DK.[3310]

943. Appellant further fails to demonstrate any error in the TC's use of the term "Party

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3302 **E465** Case 002/02 TJ, paras 4250, 4253. *See also* para. 484, fn. 1527 *citing* **E1/66.1** Saloth Ban *alias* So Hong, T. 23 Apr. 2012, p. 72 (confirming that Ieng Sary, Nuon Chea, and Khieu Samphan met with each other at K-1).

3303 Ground 190: **F54** Appeal Brief, *Party Centre,* paras 1618-1632; **F54.1.1** Appeal Brief Annex A, p. 66 (EN), p. 61 (FR), p. 93 (KH).

3304 **F36** Case 002/01 AJ, para. 1072, *rejecting* **F17** Case 002/01 Appeal Brief, paras 140-141, 144.

3305 **E465** Case 002/02 TJ, para. 360, fns 1026-1027. *Contra* **F54** Appeal Brief, paras 1619-1620.

3306 **E465** Case 002/02 TJ, para. 361.

3307 **F54** Appeal Brief, para. 1631 *referring to* **E465** Case 002/02 TJ, para. 4208. (Appellant misrepresents the TC's finding in para. 4208 of the judgment. By stating that he was close to the Party Centre, the TC did not infer that he was not part of it, but simply meant that his physical proximity and closeness to the other CPK leaders who were based in Phnom Penh offices K-1 and K-3 "ensured Appellant's ongoing knowledge of the development of plans, their implementation and the substantial likelihood that crimes within the scope of Case 002/02 would occur").

3308 *See e.g.* **E465** Case 002/02 TJ, paras 624 ("notwithstanding his assertions that he did not exercise any function within the *Party Centre*, the Chamber found that Khieu Samphan was not only placed within a small group of well-informed CPK members as a result of his membership of the Central Committee, but was also in a position of unique standing within the Party by virtue of his attendance at Standing Committee meetings, where important matters were discussed and crucial decisions were made") (emphasis added), 4236 ("as a senior leader with unique standing in the Party Centre"), 340, 604, 624, 4224, 4230, 4277, 4316.

3309 **F54** Appeal Brief, para. 1624.

3310 **E1/86.1**, Oeun Tan T. 13 June 2012, 11.14.15-11.23.32, p. 40, line 25-p. 45, line 1, 11.44.27-11.50.06, p. 52, line 25-p. 54, line 18, 15.44.51-15.47.20, p. 97, line 4-11.

Centre".[3311] He erroneously claims that, in finding that the zones and autonomous sectors reported directly to the Party Centre, the TC ignored evidence demonstrating he was not a direct recipient.[3312] Appellant fails to acknowledge that many telegrams sent to the Party Centre were "copied to the office",[3313] which the TC found to mean "Office 870",[3314] of which Appellant was one of very few members.[3315]

944. Appellant also erroneously states that the TC distorted the evidence in support of its finding that there was a system of communication between the zones and the CPK leadership, without explaining how the TC distorted any evidence.[3316] The TC noted that telegrams sent from the zones or autonomous sectors to the Party Centre were generally addressed to 'Committee 870' or *Angkar*,[3317] but also found that lists of recipients on many telegrams indicated that copies were sent to various CPK leaders and to Office 870.[3318] The TC also considered the evidence of witnesses who testified that CPK telegraph offices of the Party Centre, including K-18, an office within Sothearos School and K-1, were established in Phnom Penh after 17 April 1975 for long-distance communication, and that this system remained in place until the arrival of the Vietnamese in 1979.[3319]

945. His remaining arguments regarding the TC's findings on (i) the lateral communications within the Party Centre;[3320] (ii) the CC's plan to evacuate Phnom Penh;[3321] and (iii) the

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3311 **F54** Appeal Brief, paras 1621-1631.

3312 **F54** Appeal Brief, para. 1625, *referring to* **E465** Case 002/02 TJ, para. 487.

3313 *See e.g.* **E3/888** DK Telegram, 26 Oct. 1977, EN 00183615; **E3/889** DK Telegram, 26 Oct. 1977, EN 00183616; **E3/914** DK Telegram, 31 Dec. 1977, EN 00183641; **E3/949** DK Telegram, 9-10 May 1978, EN 00003533; **E3/978** DK Telegram, 5 Nov. 1977, EN 00324808; **E3/996** DK Telegram, 19 Mar. 1978, EN 00436995; **E3/1077** DK Telegram, 10 Apr. 1978, EN 00340539; **E3/1144** DK Telegram, 5 Sept. 1977, EN 00517923; **E3/1209** DK Telegram, 6 May 1976, EN 005522888; **E3/254** DK Telegram, 20 Mar. 1978, EN 00377840 (stating that the office 870 has received a report from the East Zone).

3314 **E465** Case 002/02 TJ, paras 492, 608, 616, fn. 1553 *citing* **E1/120.1**, Norng Sophang, T. 3 Sept. 2012, 11.27.38-11.30.05, p. 39, lines 7-9 (stating that the annotation "office" in "the copy lines means that a copy of that message would be maintained at Office 870"), 13.52.27-13.55.57, p. 60, lines 8-19; **E3/37** Khieu Samphan WRI, EN 00156754 ("[Office 870] had only two members, Doeun and me).

3315 **E465** Case 002/02 TJ, paras 364, 608, 616; **E3/37** Khieu Samphan WRI, EN 00156754. ("[Office 870] had only two members, Doeun and me). *See* response to Ground 205.

3316 **F54** Appeal Brief, para. 1629 *citing* **E465** Case 002/02 TJ, paras 3899, 3962-3963.

3317 **E465** Case 002/02 TJ, para. 492.

3318 **E465** Case 002/02 TJ, paras 389, 492.

3319 **E465** Case 002/02 TJ, para. 457 (*citing* Norng Sophang's and Kung Sokha's testimonial evidence).

3320 **F54** Appeal Brief, paras 1621-1623 *citing* **E465** Case 002/02 TJ, paras 483-484. Appellant fails to demonstrate any error, but simply disagrees with the TC's conclusion that the CC and SC met regularly and that he, Pol Pot, and Nuon Chea met at K-1 and K-3. Further, Appellant claims regarding the Goscha documents that they lack credibility and therefore cannot be used to establish the frequency of the CC and SC meetings. *See* response to Ground 11 (Admission of Goscha documents).

3321 **F54** Appeal Brief, para. 1627 *citing* **E465** Case 002/02 TJ, para. 3879. The TC properly found that Appellant participated in finalising the plan to evacuate Phnom Penh in April 1975, *see* response to Ground 199.

Party Centre's instructions relating to the working hours at 1JD[3322] should be dismissed as Appellant fails to demonstrate any error in the TC's use of the term "Party Centre" that would have erroneously engaged his criminal liability.

Ground 191: Angkar[3323]

946. **Ground 191 should be dismissed as Appellant fails to establish that the TC used the term "*Angkar*" in such a way that he was artificially linked to the crimes.**

947. The ground fails as Appellant selectively reads the Judgment[3324] in stating that the TC should have provided more reasoning and context in interpreting the term *Angkar*.[3325] Contrary to Appellant's assertion, the TC carefully distinguished the CPK definition of *Angkar,* which referred to the Party, and the practical use of this term during the DK period.[3326] In the context of written communications, the TC consistently found that telegrams and reports sent with the annotation "to *Angkar*" were addressed to the Party Centre[3327] and, contrary to Appellant's claim,[3328] not to Pol Pot.[3329] When the TC concluded that communications were sent to Pol Pot, it was because the telegram indicated that it was addressed to "Brother Pol",[3330] or "Brother Pa(r)",[3331] not *Angkar*.

948. Appellant also erroneously claims that the TC used the term *Angkar* as a synonym of CC and SC.[3332] His contention rests on the incorrect claim that the TC's findings on the SC's

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3322 **F54** Appeal Brief, para. 1628 *citing* **E465** Case 002/02 TJ, paras, 1277, 1509, 3911. Appellant claims that this finding is not established as the instructions came from "different identified bodies" and no source refers to the terms "Party Centre". He ignores that the TC found that 'Party Centre' referred to various senior executive organs of the CPK based in Phnom Penh, which included the SC, CC, Military Committee, Office 870, and Government Office (S-71) and therefore correctly stated that it is "the Party Centre" that issued instructions concerning working hours at the 1JD worksite. *See* **E465** Case 002/02 TJ, para. 361.

3323 Ground 191: **F54** Appeal Brief, *Angkar,* paras 1633-1636; **F54.1.1** Appeal Brief Annex A, p. 66 (EN), p. 61 (FR), pp. 93-94 (KH).

3324 *See* Standard of Review (Reasoned Decision).

3325 **F54** Appeal Brief, para. 1635. Similar contentions have been rejected by the SCC in Case 002/01 (**F36** Case 002/01 AJ, para. 1072 *rejecting* **F17** Case 002/01 Appeal Brief, para. 144).

3326 **E465** Case 002/02 TJ, para. 389.

3327 **E465** Case 002/02 TJ, paras 491 (fns 1544-1546), 492, 3899 (fn. 12999), para. 3966 (fn. 13186), para. 396 (fns 13187-13188).

3328 **F54** Appeal Brief, para. 1634, fn. 3117 *citing* **E465** Case 002/02 TJ, para. 3916, fn. 13065.

3329 **E465** Case 002/02 TJ, para. 388, fns 1166, 1168. Saut Toeung and Duch sometimes used *Angkar* to refer to Pol Pot, but not in the context of communications between zones/autonomous sectors and the Party Centre.

3330 **E3/154** DK Telegram, 30 Nov. 1975, EN 00185064; **E3/885** DK Telegram, 24 Sept. 1977, EN 00233793; **E3/886** DK Telegram, 26 Sept. 1977, EN 00185252-53; **E3/1062** DK Telegram, 8 April 1978, EN 00322059.

3331 **E3/244** DK Telegram, 23 Jan. 1978, EN 00182755-56; **E3/921**, DK Telegram, 27 Jan. 1978, EN 00183646-47; **E3/922** DK Telegram, 29 Jan. 1978, EN 00183648; **E3/988**, DK Telegram, 22 Dec. 1977, EN 00305260.

3332 **F54.1.1** Appeal Brief Annex A, p. 66 (EN), p. 61 (FR), pp. 93-94 (KH).

involvement in the campaign to identify and eliminate enemy networks,[3333] and the monitoring and implementation of CPK policies by the CC and the SC,[3334] were solely based on telegrams dispatched to *Angkar*, thus ignoring the totality of the evidence relied on by the TC.[3335] Appellant fails to demonstrate any error in the TC's definition and use of the term *Angkar* that would invalidate the finding that he encouraged and incited the implementation of the common purpose by promoting the general population to "fulfil or overfulfill" *Angkar's* Four Year Economic plan[3336] and called on the population to divest themselves of personal sentiment in favour of *Angkar*.[3337]

Ground 194: Military structures and communications[3338]

949. **Ground 194 should be dismissed as Appellant fails to establish that the TC erred in finding that there was a hierarchical relationship between the military, the CC, and the Party Centre.**

950. The ground fails as Appellant fails to demonstrate any errors, and merely repeats his disagreement with the TC's definition of the Party Centre, which includes the Military Committee.[3339] Though the TC acknowledged that Appellant did not have operational military authority,[3340] it nevertheless held that he was aware of certain military matters through his attendance at SC meetings,[3341] large meetings or rallies in Phnom Penh,[3342] and reports from the zones to the Party Centre concerning the "national defence" situation.[3343]

951. First, Appellant fails to show that the TC erred in finding that military matters were

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3333 **F54** Appeal Brief, para. 1634, *referring to* **E465** Case 002/02 TJ, para. 3962.

3334 **F54** Appeal Brief, para. 1634, *referring to* **E465** Case 002/02 TJ, para. 3964.

3335 *Contra* **F54** Appeal Brief, para. 1548. SC's involvement in the campaign to identify and eliminate enemy networks: **E465** Case 002/02 TJ, paras 603, 2313, 3769-3770 (SC meetings attended by Appellant, "Comrade Hem" in which enemies were discussed), 3775 (SC meeting attended by Appellant), 3955-3965, 3967-39772, 4208, 4219-4235, 4258, 4260-4261, 4269-4270, 4272, 4277, 4283-4287. CC's role of monitoring and implementing CPK's policies: **E465** Case 002/02 TJ, paras 355, 3961. *See also* response to Ground 203.

3336 **E465** Case 002/02 TJ, para. 4267.

3337 **E465** Case 002/02 TJ, paras 4268, 4304.

3338 Ground 194: **F54** Appeal Brief, *Military structures and communications,* paras 1644-1649; **F54.1.1** Appeal Brief Annex A, p. 67 (EN), p. 62 (FR), pp. 95-96 (KH).

3339 **F54** Appeal Brief, paras 1644, 461-462. *See* response to Ground 190.

3340 **E465** Case 002/02 TJ, para. 595.

3341 **E465** Case 002/02 TJ, para. 4258 (In particular, Appellant attended several meetings where KCA was discussed), 508 (Son Sen attended SC meetings where he reported on military affairs and national defence, *citing* **E3/229** SC Meeting Minutes, 22 Feb. 1976; **E3/217** SC Meeting Minutes, 11 Mar. 1976). *See* response to Ground 215.

3342 **E465** Case 002/02 TJ, para. 510, fn. 1596.

3343 **E465** Case 002/02 TJ, paras 3962-3964.

reported to the Party Centre.[3344] Appellant erroneously contends that reports from Son Sen and Division 920 addressed to *Angkar* were sent only to Pol Pot.[3345] As noted above, the term *Angkar* did not refer uniquely to Pol Pot, but to the Party Centre,[3346] and further, based on a review of the evidence *in toto*, many of the telegrams were copied to various CPK leaders and Office 870.[3347] Appellant further ignores relevant findings, such as the fact that Son Sen kept CPK leaders informed of military affairs and matters of national defence.[3348] Appellant also ignores the credible testimony of Sao Sarun,[3349] who explicitly stated that "the central division report[ed] to the centre".[3350]

952. Second, Appellant fails to demonstrate that the TC erred in finding that, through the formation of the RAK, a number of zone military divisions were brought under the direct control of the CC and, specifically, the General Staff.[3351] Appellant misrepresents testimony,[3352] as each Kung Kim, Lonh Dos, and Stephen Heder did in fact state that certain military units ("centre divisions") were under the supervision of the General Staff.[3353] Appellant also fails to consider all the evidence relied upon by the TC, ignoring Duch's testimony, noting the hierarchy of the military in relation to the General Staff and the CC,[3354] as well as documentary evidence supporting the finding that the formation of the RAK brought some military divisions under the CC's control.[3355]

C. JOINT CRIMINAL ENTERPRISE

953. The TC correctly found that Appellant committed the crimes of genocide, CAH and GB through a joint criminal enterprise[3356] as a result of (i) his participation with others in the

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3344 **F54** Appeal Brief, paras 1646-1647 *referring to* **E465** Case 002/02 TJ, paras 508, 3047, 4070.
3345 **F54** Appeal Brief, paras 1646-1648. *See* response to Ground 191.
3346 *See* response to Ground 191. *Contra* **F54** Appeal Brief, para. 1646.
3347 *See* response to Ground 190.
3348 This finding was based on the minutes of SC meetings, *see* **E465** Case 002/02 TJ, para. 508, fn. 1588.
3349 **E465** Case 002/02 TJ, para. 3040 *citing* **E1/83.1** Sao Sarun, T. 7 June 2012, 10.12.12-10.13.00, p. 27, lines 4-5.
3350 **E1/83.1** Sao Sarun, T. 7 June 2012, 10.12.12-10.13.00, p. 27, lines 4-5.
3351 **F54** Appeal Brief, para. 1645 *citing* **E465** Case 002/02 TJ, para. 424. *See also* para. 427.
3352 **F54** Appeal Brief, para. 1645.
3353 *See* **E1/138.1** Kung Kim, T. 24 Oct. 2012, 15.34.51-15.47.27, p. 111, line 6-p. 115, line 24; **E3/70** Lonh Dos WRI, 20 Nov. 2009, EN 00407789-90; **E1/222.1** Stephen Heder, T. 11 July 2013, 14.07.21-14.08.41, p. 80, line 22- p. 81, line 8.
3354 **E1/53.1** Kaing Guek Eav, T. 26 Mar. 2012, 10.13.51-10.14.59, p. 27, lines 10-11.
3355 **E465** Case 002/02 TJ, para. 424, fn. 1282 *citing* **E3/49** Timothy Carney, 'The Organization of Power' in Karl Jackson (eds), *Cambodia 1975-1978: Rendezvous With Death*, EN00105137; **E3/1593** Book by Benedict Kiernan, *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-79*, EN 00678542. *See also* **E3/5** *Revolutionary Flag*, Aug. 1975, EN 00401488; **E3/405** Chhaom Se WRI, A1; **E3/407** Chhaom Se WRI, A4; **E1/159.1** Chhaom Se, T. 11 Jan. 2013, 13.52.10-14.06.23, 14.09.49-14.11.50.
3356 **E465** Case 002/02 TJ, paras 4306.

common purpose[3357] which involved the commission of the crimes of which he has been convicted pursuant to JCE;[3358] (ii) his significant contribution to the commission of these crimes;[3359] and (iii) his shared intent with other JCE members to participate in the common purpose and commit the crimes underlying and encompassed by it.[3360] The TC correctly found further that the crimes charged were committed pursuant to CPK policies which in turn were intrinsically linked to the common purpose.[3361]

954. In challenging his convictions based on JCE liability, Appellant's legal analysis of the elements of JCE confines itself to a JCE in which the common purpose *amounts to* commission of a crime[3362] rather than considering the JCE of which he was a member, which *involved* the commission of crimes.[3363] As previously held by the SCC, and as Appellant recognises,[3364] the common purpose will *involve* the commission of crimes, even if the primary objective of the common purpose is non-criminal, where a crime is a *means* to achieve that ulterior objective.[3365] Thus, the objective of achieving a socialist revolution must be assessed along with the means by which it was to be achieved: the CPK policies that were the subject of Case 002/02.[3366]

955. Throughout his brief, Appellant advances a confused and erroneous interpretation of the common purpose by referring *solely* to its objective, ignoring its means. His attempts to sever the policies from the revolution itself, however, result in an illogical and artificial distinction, as the common purpose is comprised of *both* the objective and the means. Nowhere in his lengthy arguments[3367] does he explain how the TC's determination that

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3357 **E465** Case 002/02 TJ, paras 4306.
3358 **E465** Case 002/02 TJ, paras 4306, 4331.
3359 **E465** Case 002/02 TJ, paras 4306.
3360 **E465** Case 002/02 TJ, paras 4279-4305.
3361 **E465** Case 002/02 TJ, paras 4068. The Co-Prosecutors note an ambiguity in the TC's use of the term "common purpose" to refer to both (i) the primary objective of the common purpose (*see e.g.* **E465** Case 002/02 TJ, paras 3928, 3987, 3998, 4012, 4022, 4061, 4067, 4068, 4256) and (ii) the common criminal purpose as a whole *i.e.* the primary objective and the criminal means, being the five policies, by which the CPK sought to achieve that primary objective (*See e.g.* **E465** Case 002/02 TJ, paras 3708-3712, 4068, 4073). Unless quoting the TC, the Co-Prosecutors will use these terms - as the SCC did in **F36** Case 002/01 AJ, paras 789, 807-808, 815-816 – in the second sense, where the "common purpose" encompasses both the primary objective *and* the criminal means to achieve that objective.
3362 *See* response to Ground 189; **F54** Appeal Brief, para. 1594 *impugning* **E465** Case 002/02 TJ, paras 4068-4074.
3363 **E465** Case 002/02 TJ, paras 3708-3709 (The common purpose must either have as (one of) its primary objective(s) the commission of (a) crime(s) (*i.e.* "amounts to") or must contemplate the commission of (a) crime(s) as a means to achieve an objective that is not necessarily criminal (*i.e.* "involves")).
3364 **F54** Appeal Brief, paras 1941-1942, 1951.
3365 **F36** Case 002/01 AJ, paras 789, 807-810; *Sesay* AJ, para. 300; *Brima* AJ, paras 76, 80; *Kvočka* AJ, para. 46.
3366 **F36** Case 002/01 AJ, para. 815.
3367 **F54** Appeal Brief, paras 1975, 1981-2000.

the criminality of the enterprise was manifested in the policies that "were *intrinsically linked* to the common purpose *and involved the commission of crimes*"[3368] could possibly fail to fulfil the legal requirement that the common plan *involve* the commission of crimes. It defies common sense and as Appellant concedes,[3369] in Case 002/01, the SCC already sanctioned this formulation.[3370]

956. As detailed below, Appellant fails to demonstrate that the TC erred in fact or law in its findings in relation to the common purpose, his significant contribution to the crimes, and his intent to participate in the crimes underlying the common purpose.

1. COMMON PURPOSE

957. The TC correctly analysed the common purpose objective of rapidly implementing socialist revolution in Cambodia through a "great leap forward" which was designed to build the country, defend it from enemies, and radically transform the population into an atheistic and homogenous Khmer society of worker-peasants.[3371] Further, based on an extensive evidentiary record, it correctly found that the five criminal policies,[3372] i.e., the means by which the objective was to be carried out, were intrinsically linked to the common purpose.

958. Appellant's 10 grounds regarding the common purpose fail.[3373] While he attempts to portray himself as the loyal subject of a benevolent political project that only intended the best for the Cambodian people, his arguments ignore the depth and breadth of the evidence, and merely disagree with the TC's conclusions. In particular, Appellant insistently and wrongly maintains that, because the primary objective of the common purpose did not amount to the commission of crimes, he was wrongly convicted of JCE liability and the TC must have been out to implicate him. This misapprehension causes him to repeatedly accuse the TC of bias, sweepingly alleging that it ignored context and exculpatory evidence and manipulated the law to convict him, without ever rebutting the presumption of judicial impartiality.[3374]

3368 **E465** Case 002/02 TJ, para. 4068 (emphasis added).
3369 **F54** Appeal Brief, paras 1987-1990.
3370 **F36** Case 002/01 AJ, para. 815. *See further* para. 816 ("Put differently, given that the common purpose was to be achieved through the commission of crimes, as encompassed by the policies, the objective of implementing a rapid socialist revolution in Cambodia was indeed criminal.")
3371 **E465** Case 002/02 TJ, paras 4068.
3372 **E465** Case 002/02 TJ, paras 3733-4074.
3373 Grounds 175-179, 180-181, 183-184, 189.
3374 *See* response to Grounds 189, 175, 176, 177 & 224.

Grounds 189, 175, 176, 177 & 224: Errors regarding the alleged common purpose and the CPK's socialist revolution project [3375]

959. **Each of Grounds 189, 175, 176, 177 and 224 fail as Appellant has not demonstrated that the TC (i) erroneously defined the "common purpose" of the JCE;[3376] (ii) erred in finding that crimes were encompassed by the common purpose; (iii) misconstrued evidence or entered unreasonable findings; (iv) was biased in examining evidence; or (v) exceeded its *saisine*.[3377]**

The TC correctly defined the common purpose[3378]

960. The TC, guided in part by Appellant's own words, correctly defined the common purpose:[3379] to rapidly implement socialist revolution in Cambodia through a "great leap forward" designed to build the country, defend it from enemies, and radically transform the population into an atheistic and homogenous Khmer society of worker-peasants.[3380]

3375 Ground 189: **F54** Appeal Brief, *Errors Regarding the Alleged Common Purpose*, paras 1593-1603; **F54.1.1** Appeal Brief Annex A, p. 65 (EN), p. 60 (FR), pp. 92-93 (KH); Ground 175: **F54** Appeal Brief, *Errors Concerning the CPK's Socialist Revolution Project*, paras 1399-1407; **F54.1.1** Appeal Brief Annex A, *Errors with Respect to the Law*, p. 61 (EN), p. 56 (FR), pp. 86-87 (KH); Ground 176: **F54** Appeal Brief, *Errors Regarding the Content of the "Socialist Revolution"*, paras 1409-1427; **F54.1.1** Appeal Brief Annex A, p. 61 (EN), p. 56 (FR), p. 87 (KH); Ground 177: **F54** Appeal Brief, *Communicating the "Socialist Revolution" Political Project*, paras 1428-1437; **F54.1.1** Appeal Brief Annex A, pp. 61-62 (EN), pp. 56-57 (FR), pp. 87-88 (KH); Ground 224: **F54** Appeal Brief, *The criminal purpose at the heart of the actus reus,* paras 1938-1956 and *Order of Events of the JCE and Definition of the Common Purpose*, paras 1966-2000, 2004-2007; **F54.1.1** Appeal Brief Annex A, p. 75 (EN), p. 70 (FR), p. 108 (KH). Note: the aspects of Ground 224 which deal with Appellant's contribution to the common purpose are responded to in the context of Ground 226.

3376 **E465** Case 002/02 TJ, paras 3728, 4068-4074. Appellant repeatedly advances an erroneous interpretation of the "common purpose", focusing only on the component relating to the *objective* of achieving a socialist revolution, while ignoring the component relating to the *means* by which that objective was to be achieved. Where, as in this case, a JCE that *involves* the commission of crimes may have a primarily non-criminal objective yet still be criminal, where a crime is a *means* to achieve that ulterior objective *see* response to Ground 178, *citing* **F36** Case 002/01 AJ, paras 789, 807-810; *Sesay* AJ, para. 300; *Brima* AJ, paras 76, 80; *Kvočka* AJ, para. 46.

3377 **F54** Appeal Brief, paras 1401-1402. Appellant's assertion that the TC exceeded its *saisine* is unpersuasive, *see* Section VI. *Saisine* and Scope of Trial. As the judges were properly seised, they could consider the facts Appellant impugns (*see* **F54** Appeal Brief, fn. 2642, *citing* his paras 380-549, *responded to* in responses Grounds 41-84, above) in defining the common purpose. His claim that the TC incorrectly recharacterised the crime of rape outside of forced marriage also fails, as the TC clearly stated that using evidence of rape outside of forced marriage to support any criminal charge "would amount to [an impermissible recharacterisation of the facts" (*see* **E465** Case 002/02 TJ, para. 188), and therefore properly limited its use of this evidence. *Contra* **F54** Appeal Brief, paras 1407, 1402, fn. 2646 *citing* his paras 1262-1263. *See* response to Grounds 3, 170.

3378 *Concerning* Grounds 189, 175, 176, 224. *See e.g.* **F54** Appeal Brief, paras 1593, 1400, 1424, 1426, 1427, 1938-1956, 1966-2000, 2004-2007.

3379 *Contra* **F54** Appeal Brief, paras 1594-1595.

3380 **E465** Case 002/02 TJ, paras 3743, 4068. *See also* paras 3735-3742, *particularly* 3735 (the CPK political line was to construct a classless society, defend the country), 3736 (at a 10-day meeting at the Silver Pagoda, priority was given to rapidly build and defend the country by creating cooperatives and constructing dams and canals; at another meeting, Pol Pot and other senior leaders instructed on categories of enemies and their treatment), 3739 (Appellant promoted the goal of achieving a great and magnificent

The TC recognised that the socialist revolution itself was not criminal[3381] and then engaged in an extensive evidentiary analysis to determine if it nevertheless *involved* the commission of crimes,[3382] which it did.[3383] Given the widespread pervasiveness of the crimes, the similar methods used to carry out those crimes, the iron grip that the top leaders held over their subordinates, the diversified and hierarchical communication structure, and the statements and actions engendering fear and hatred of specific groups, the TC reasonably found that the common purpose was implemented across DK by the Party's entire administrative network through the execution of five policies.[3384] These policies were intrinsically linked to the common purpose, and involved the commission of the crimes for which Appellant stands convicted.[3385] As the implementation of the common purpose was indivisible from the crimes, it was thus criminal in character.[3386]

961. Appellant's fixation on an alleged benevolent non-criminal common purpose, and that any crimes were "deviations" from the common purpose[3387] is abstract, irrelevant, and ignores reality. The CPK focused on securing complete control in line with its ideology, so the CPK leaders embarked on a mission of indoctrination: holding mass rallies in front of tens of thousands of people and education sessions for cadres in which the common purpose was repeated *ad infinitum*;[3388] implementing measures to incite revolution to achieve the common purpose;[3389] decreeing all State organisations subordinate to the Party;[3390] and "absolutely oppos[ing]" counter-revolutionary classes.[3391] Appellant was among the Party leaders engaged in the relentless propagandisation of the common

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leap), 3741 (at a 27 September 1977 rally reportedly attended by CC members, Pol Pot confirmed the development of the worker-peasant state built on collectivism and socialist class struggle, the need to build and defend the country "through cooperatives and construction initiatives, and opposition to imperialists, feudalists, capitalists, reactionaries, counter-revolutionaries and enemies generally"), 3742 (this Party line was endorsed by senior leaders, including Appellant).

3381 **E465** Case 002/02 TJ, para. 3743.

3382 **E465** Case 002/02 TJ, Sections 16.3 (Real or Perceived Enemies), 16.4 (Implementation of the Common Purpose), particularly 16.4.1.2, 16.4.2.2, 16.4.3.1.2, 16.4.3.2.2, 16.4.3.3.2, 16.4.3.4.2 and 16.4.4.2, which all discuss criminality of the policy.

3383 **E465** Case 002/02 TJ, paras 3728, 4068-4074.

3384 **E465** Case 002/02 TJ, para. 4068. The existence and implementation of the policies are detailed below, *see* response to Grounds 178, 179, 180, 181, 183, 184-188.

3385 **E465** Case 002/02 TJ, paras 4068-4074.

3386 **E465** Case 002/02 TJ, para. 4068. *See also* response to Ground 178.

3387 *See e.g.* **F54** Appeal Brief, paras 1425-1426, 1432, 1594-1595, 1598.

3388 *See e.g.* **E465** Case 002/02 TJ, paras 3736, 3741.

3389 *See e.g.* **E465** Case 002/02 TJ, para. 3739, fn. 12470 (The Assembly "unanimously resolved to mobilise 'the entire people' to maximise rice production 'ever higher and ever faster' to build the country 'in a great and miraculous leap'").

3390 *See e.g.* **E465** Case 002/02 TJ, para. 3739 ("On 30 March 1976, the CPK Central Committee declared all state organisations, including the government, subordinate to the Party").

3391 *See e.g.* **E465** Case 002/02 TJ, paras 3738-3739.

purpose, delivering speeches from 21 April 1975 through 1 January 1979 to endorse the Party line.[3392]

962. CPK leadership was fanatical in its approach to achieving the common purpose. Whether it was proselytising to take "major strides in the socialist revolution";[3393] mobilise "ever higher and ever faster";[3394] be "on the offensive";[3395] "defend and build the country quickly";[3396] or continue "rapidly striving";[3397] the Party sought to attain its "great and miraculous leap".[3398] Appellant himself instructed on the realisation of this goal – not through benevolent means, but by fulfilling the Party line "*at all costs*".[3399] As demonstrated in this Response, that cost was dreadfully high, and the entirety of the Cambodian population was forced to pay.

963. In articulating the common purpose, the Chamber specifically relied on Appellant's own testimony,[3400] testimony from numerous witnesses,[3401] interviews, speeches and statements of Appellant and other CPK leaders,[3402] witness interviews,[3403] and contemporaneous documents from the DK era, such as, *inter alia*, the CPK Statute, minutes of SC meetings, CPK propaganda publications, and FBIS reports.[3404] To provide context to the development of the common purpose, the TC also examined contemporaneous documents, publications, and statements made by Appellant and other senior CPK leaders predating 17 April 1975.[3405]

964. To determine the link between "the reality in the field" and CPK instructions,[3406] the TC

3392 **E465** Case 002/02 TJ, para. 3742, fn. 12489 and all citations therein.

3393 **E465** Case 002/02 TJ, para. 3738, fn. 12466 and all citations therein.

3394 **E3/165** Document on Conference of Legislature, 11-13 Apr. 1976, EN 00184071, 00184076, *cited in* **E465** Case 002/02 TJ, para. 3739, fn. 12470.

3395 **E465** Case 002/02 TJ, para. 3739, fns 12471, 12472 and all citations therein.

3396 **E465** Case 002/02 TJ, paras 3736, 3741, fns 12459, 12483 and all citations therein.

3397 **E465** Case 002/02 TJ, para. 3738, fn. 12466 *citing* **E3/130** CPK Statute, undated (arts 1-5).

3398 **E3/165** Document on Conference of Legislature, 11-13 Apr. 1976, EN 00184076, *cited in* **E465** Case 002/02 TJ, para. 3739, fn. 12470.

3399 **E1/115.1** Em Oeun, T. 27 Aug. 2012, 11.23.53-11.25.32, p. 46, line 18-p. 47, line 2 (emphasis added), *cited in* **E465** Case 002/02 TJ, para. 3739, fn. 12473.

3400 **E465** Case 002/02 TJ, para. 3736, fn. 12459 and all citations therein.

3401 *See e.g.* **E465** Case 002/02 TJ, para. 3736, fn. 12461 *citing* **E1/82.1** Sao Sarun, T. 6 June 2012, 13.40.28-13.44.32, p. 60, line 16-p. 61, line 10; para. 3739, fn. 12473 *citing* **E1/100.1** Rochoem Ton alias Phy Phuon, T. 1 Aug. 2012, 15.31.08-15.33.48, p. 95, line 20-p. 96, line 5; **E1/124.1** Chea Say, T. 20 Sept. 2012, 10.17.55-10.52.48, p. 29, line 23-p. 34, line 3; para. 3943, fn. 13149 *citing* **E1/502.1** Bit Boeurn, *alias* Bit Na, T. 28 Nov. 2016, 10.2.33-10.45.14, p. 27, line 20-p. 28, line 4.

3402 *See e.g.* **E465** Case 002/02 TJ, paras 3734, 3735, 3742, fns 12456, 12457, 12489 and all citations therein.

3403 *See e.g.* **E465** Case 002/02 TJ, para. 3736, fn. 12461 and all citations therein.

3404 *See e.g.* **E465** Case 002/02 TJ, paras 3765 (fns 12547-12550), 3737 (fn. 12464), 3739 (fns 12471-12472) and all citations therein.

3405 **E465** Case 002/02 TJ, para. 3733 *citing* paras 196-204, 206, 208-210, 212, 214-215, 220-223, 226-227, 229-230, 233, 235. *See* all citations therein.

3406 *See* response to Ground 177. *Contra* **F54** Appeal Brief, para. 1437. *See e.g.* **E465** Case 002/02 TJ, 1283-1287 (the TC recognised that there were "deviations" at the local level at TTD that resulted in extremely

also conducted a comprehensive review of the CPK administrative and communication structures,[3407] examining telegrams, reports, official correspondence, articles, and speeches[3408] as well as corroborative testimony explaining how the communication system operated, including dissemination of information and the meaning of terms contained in the documents.[3409] The evidence makes clear that information was sent upward from lower echelons to higher echelons as part of a regularised communication system,[3410] and that the Party used numerous forms of communication to disseminate instructions back down the chain of command.[3411]

965. Appellant's claims of benign objectives and rogue actors[3412] completely ignore, or often misstate, this substantial evidentiary record. Whether a crime was encompassed by the common purpose is primarily a question of fact, assessed in light of all relevant circumstances, including the overall objective of the common purpose and the likelihood that it may be attained only through the commission of crimes.[3413] Moreover, the TC correctly found that the crimes encompassed by the common purpose may evolve over time and that this may be established by circumstantial evidence.[3414] The TC's thorough

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hard conditions for workers, but also found that the Party Centre knew of these conditions and did nothing to change or address the situation), 1509, 3931. The extensive analysis of the communication structures renders further artificial Appellant's piecemeal consideration of the flow of information, and his argument that the dissemination of information was ineffective due to poor radio coverage or illiteracy is likewise devoid of merit, *see* **F54** Appeal Brief, paras 1434, 1436.

3407 Specifically responding to Ground 177. *See e.g.* **E465** Case 002/02 TJ, paras 360-365 (Party Centre, Office 870, Committee 870), 388-389 (*Angkar*), 455-516 (Communication Structures), 542 (particularly the evidence in fn. 1690), 607, 1476-1480, 2161-2180, 3390 (particularly the evidence in fn. 11436), 3556, 4038, 4080, 4129, 4208, 4271.

3408 *Contra* **F54** Appeal Brief, para. 1428.

3409 **F54** Appeal Brief, fn. 2694 *citing* **E465** Case 002/02 TJ paras 469-472. *See also* **E465** Case 002/02 TJ, paras 479 (mindful of possible propaganda in *RF* and *RY*), 35-82 (general evidentiary and procedural principles, particularly paras 55-59 re. these principles in relation to documentary evidence).

3410 *See e.g.* **E465** Case 002/02 TJ, paras 482-501, 507-516.

3411 **E465** Case 002/02 TJ, paras 455-479.

3412 **F54** Appeal Brief, paras 1594-1595 (crimes as deviations), 1595 (benign explanations for policies – *but see* **E465** Case 002/02 TJ, paras 3866-3929 (cooperatives and worksites) and response to Grounds 181, 183), 1596 (senior CPK leaders' speeches as responses to military attacks – *but see* **E465** Case 002/02 TJ, paras 582, 598, 607 (Roles and functions, speeches), 4202-4246 (Appellant's criminal liability including his speeches, publications), 4257-4277 (contribution to JCE) and response to Grounds 27, 159, 177-179, 185, 222), 1597 (challenging criminal characterisation of the treatment of targeted groups such as the Cham, Buddhists, ex-KR officials, and NP – *but see* **E465** Case 002/02 TJ, paras 3934-3965, 3973-3987 (Security centres and execution sites), 3744-3863 (real or perceived enemies), 3988-4061 (targeted groups), 4068-4074 (JCE common purpose and implementation), and response to Grounds 179, 184).

3413 **F36** Case 002/01 AJ, para. 808.

3414 *Contra* **F54** Appeal Brief, paras 1954-56. Appellant fails to demonstrate that the TC erred in finding that "liability arises when JCE members, while knowing that new types of crime are included in the common plan, have taken no effective measures to prevent the recurrence of such new types of crime and have subsequently persisted in the implementation of the common purpose" (**E465** Case 002/02 TJ, para. 3709, fn. 12361). Appellant ignores that the finding in *Krajišnik*, upon which the TC relied, was upheld on appeal (*Krajišnik* AJ, paras 163, 170-171), and applied in later ICTY cases (*Prlić* TJ para. 212; *Prlić* AJ, paras 802-803; *Popović* TJ, para. 1028).

examination of the record *in toto* proves a pattern of conduct implementing the common purpose through the identified policies,[3415] which involved the commission of the same crimes, in the same manner, perpetrated across the CPK structure and at all locations within the *saisine*. This was regularly reported to senior leadership, of which Appellant was a member, and in response, the senior echelon provided instructions and guidance.[3416] The similarity, scale, and duration of the crimes – with an informed upper echelon not punishing, but supporting those crimes – can only be reasonably explained as the execution of senior-level policies created to implement the common purpose. In that regard, Appellant's assertion of a legal error in the TC's finding that a link must be established between a JCE member and any direct perpetrator who does not belong to the JCE simply misunderstands the Judgment.[3417]

966. Contrary to Appellant's oft-repeated claims, the TC's examination of the evidence was thorough, objective, and well-reasoned. The TC correctly applied the law to find Appellant individually responsible for committing crimes through a JCE.[3418] Appellant was not convicted for his participation in a benevolent enterprise to improve life for Cambodians and foreigners in Cambodia, nor could such a benevolent enterprise be said to have existed, given the realities of the regime. As detailed in this Response,[3419] Appellant stands convicted through JCE because of his multi-faceted significant contribution to the CPK's common purpose, which undoubtedly involved the commission of crimes.[3420]

3415 **E465** Case 002/02 TJ, Sections 16.3 (Real or perceived enemies), 16.4 (Implementation of the common purpose).

3416 **E465** Case 002/02 TJ, Sections 5.1 (Structure of the CPK), 6 (Communication Structures).

3417 At **F54** Appeal Brief, paras 1952-1953, Appellant alleges that the TC committed an error in its finding that "[p]articipants in a JCE can incur liability for crimes committed by direct perpetrators who were not JCE members, provided that it has been established that the crimes can be imputed to at least one JCE participant and that this participant, when using *a direct perpetrator*, acted to further the common purpose" (**E465** Case 002/02 TJ, para. 3711 (emphasis added)). When referring to "a direct perpetrator", the TC simply meant, exactly as Appellant wishes, that the crime committed by any ("each") direct perpetrator must, in general terms, be imputed to a JCE member acting pursuant to the common purpose. There is however, no requirement the precise identity of each direct perpetrator be established; it is sufficient to refer to categories or groups of perpetrators (*see Martić* AJ, para. 169; *Krnojelac* AJ, para. 116; *see also* **F36** Case 002/01 AJ, para. 420).

3418 **E465** Case 002/02 TJ, paras 4201-4308 (Appellant's criminal responsibility based on JCE), 4326-4327. *See also* response to Grounds 190-191, 194, 202-203, 205-206 (roles and functions); Grounds 193, 195-197, 208-209, 211-217, 220-223, 232-236, 238-243 (Appellant's knowledge and intent).

3419 *See* Section VIII.B Roles and Functions, Section VIII.C. 2 Significant contribution, Section VIII.C. 3 Intent, Section VIII.D Aid and Abet.

3420 *See* response to Ground 178.

The TC objectively analysed the Great Leap Forward and the context that led to it[3421]

967. The TC consistently articulated the common purpose throughout the Judgment,[3422] and Appellant's unfounded suggestion that the TC's use of the words "primary objective" resulted in bias[3423] ignores that the TC was simply following wording established by the SCC.[3424] It is likewise clear from the evidentiary analysis that the TC did not evaluate the common purpose only through the "prism of 'destroying the enemy'".[3425] The TC repeatedly considered the impetus of the "socialist revolution project",[3426] and, notably, distinguished between military enemies and ideological enemies who had no association with the conflict but were arrested because they were perceived to oppose CPK ideology.[3427] The reality established by the evidence was that the CPK's implementation of the common purpose involved eliminating a broadly-defined category of enemies.[3428]

968. Despite Appellant's allegations otherwise, the TC properly took into account the armed conflicts facing the CPK, distinguished between military and non-military enemies, and

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3421 *Concerning* Grounds 189, 176, 177. *See e.g.* **F54** Appeal Brief, paras 1595-1599, 1416, 1431, 1436.

3422 *Concerning* Ground 189. *See e.g.* **E465** Case 002/02 TJ, paras 321, 3743, 3918, 4068, 4117, 4256. *Contra* **F54** Appeal Brief, para. 1594 (the TC's "many variations" in defining the common purpose "attest" to its bias, making it "able to include the criminal policies" within the common purpose). Appellant repeatedly attributes malice to the TC in his Brief despite being cautioned against such discourteous language in **F51/3** Additional Evidence Admission Decision, para. 39. *See also e.g.* **F54** Appeal Brief, paras 1441 (CPK leaders' speeches were taken out of context "to be given a biased interpretation to make them say exactly what the Chamber needed to conclude for the criminal character of the CPK's policies"), 1446 ("Knowingly, to allow the confusion to reign between military enemies and enemies as political adversaries, the Chamber notably ignored the armed hostility context as well as the Marxist rhetoric of the time"), 1600 (the TC decided to create criminal policies to make a conviction stick), 1601 (the purpose of the TC's biased examination of the CPK communications and administrative network was to lead to the "knock-on effect" of implicating Khieu Samphan due to being unable to prove his contribution to a criminal aspect of the common purpose).

3423 *Concerning* Ground 176; **F54** Appeal Brief, para. 1426. *See also* response to Grounds 189, 183.

3424 *See e.g.* **E465** Case 002/02 TJ, paras 3708-3709, particularly fn. 12356 *citing* **F36** Case 002/01 AJ, paras 807-808. *Contra* **F54** Appeal Brief, para. 1426. Regardless, the TC's conclusion was based on an objective evidentiary evaluation and step-by-step analysis, *see also* response to Ground 189, **E465** Case 002/02 TJ, paras 3732, 3864. *Contra* **F54** Appeal Brief, para. 1593.

3425 *Concerning* Ground 189. *Contra* **F54** Appeal Brief, para. 1593.

3426 *Concerning* Ground 176. *See e.g.* **E465** Case 002/02 TJ, paras 619 (distribution of imported goods), 968 (part of the cooperatives' production sent to the State for machinery and other items), 1011 (Chinese aid in TK district), 1313-1314 (re. medicine received from China), 1318, 1397, 1594 (rice exportation to finance modernisation of Cambodia's agriculture), 1678, 1763, 3870 (submissions re. agriculture being the only available means of capital generation), 3890, 3893 (rapidly fulfilling economic targets key to improving living standards and was to be achieved without foreign assistance), 3907, 3914 (re. DK export and import totals), 3916 (reconstruction of the economy), 4214 (Appellant tasked buy medicines from abroad that were approved by the SC), 4266 (Appellant called for increased output so as to export more rice to generate capital), fns 1459 (Chinese and Korean visitors helped connect telephone lines), 5100 (re. tractors and lorries from Yugoslavia), 5210. *Contra* **F54** Appeal Brief, para. 1418.

3427 *See e.g.* **E465** Case 002/02 TJ, paras 3752, 3764 (re. military enemies), 3765 (1976 CPK Statute re. counter-revolutionary ideologies and behaviour), 3770, 3835 (meaning of enemies depends on the context in which they are discussed), 3847-3855, 3863.

3428 *See e.g.* **E465** Case 002/02 TJ, paras 3840 (categories of enemies), 3842 (internal *vice* external enemies), 3845-3846 (counter-revolutionary enemies, behaviour).

considered the CPK's Marxist-Leninist approach to Communism.[3429] The TC repeatedly noted the central importance the CPK placed on being independent of Vietnam,[3430] never insinuating that the CPK's reaction to the hostilities with its neighbour was merely a "form of Party paranoia".[3431] References throughout the Judgment further disprove that the TC failed to consider that the country's resources had been devastated or ignored the importance of collectivisation and accelerated production for survival.[3432]

969. Appellant's assertion that the TC denied him adversarial debate on evidence regarding the CPK's political project[3433] is contradicted by reference to the numerous opportunities he was given to comment on such evidence before hearings commenced and throughout trial.[3434] Nothing more was required of the TC.[3435]

The dissemination of information was varied and extensive[3436]

970. Appellant attacks the TC's reasonable finding that the CPK revolutionary magazines

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3429 *Concerning* Ground 189. **E465** Case 002/02 TJ, paras 3744-3863 (Real or perceived enemies), 3836-3845 (armed conflicts and Marxist-Leninist approach to Communism), 3930-3987 (security centres and execution sites), 3989-4012 (Targeted groups – Cham and Vietnamese), 4023-4061 (ex-KR soldiers and officials). *See also* paras 296, 318, 2983, 2996, 3139 (armed conflict). *Contra* **F54** Appeal Brief, para. 1598, fn. 3046.

3430 *Concerning* Ground 176. *Contra* **F54** Appeal Brief, para. 1416 (stating that the TC "never discussed that independence was central for the CPK" or took the context of 1975 into account). The TC further did not base the finding of a policy against the Vietnamese solely on the pre-April 1975 relationship between the countries, *contra* 1413, but simply analysed it as a part of the historical context, *see* **E465** Case 002/02 TJ, para. 3382. The TC was also mindful that the Black Paper contained propaganda and was thus cautious in its assessment, *see* **E465** Case 002/02 TJ, paras 282, 2474, fn. 733. *Contra* **F54** Appeal Brief, para. 1410.

3431 *See e.g.* **E465** Case 002/02 TJ, paras 202 (noting the Party's efforts in late 1959 to create a party devoid of Vietnamese influence), 204 (the Party was rebranded as the WPK to "assert its independence and distance itself from the Vietnamese communists"), 226 (the pragmatic line of good relations with Vietnamese communists was reversed in September 1971 when CPK leaders "resolved that Vietnam was the long term 'acute enemy' of Kampuchea"), 228 (re. deterioration of the relationship), 230 (Nuon Chea and Khieu Samphan both insisted that it was necessary to liberate Phnom Penh before North Vietnam captured Saigon in order to prevent Vietnam from taking control of Cambodia), 240, 1313 (self-reliance was considered the founding principle for ensuring DK independence and sovereignty), 3382, 3385, fn. 410. *Contra* **F54** Appeal Brief, para. 1416 (pointing to no passage that would indicate the TC held the "paranoia" view).

3432 *Concerning* Ground 176. **F54** Appeal Brief, paras 1420-1425 *impugning* **E465** Case 002/02 TJ, paras 3738-3739. *See e.g.* **E465** Case 002/02 TJ, paras 229, 3382 (re. damage caused by US bombings), 240, 940, 971, 3884 (re. leaders – pooling labour resources maximised production to rebuild the country quickly), 241 (civil war led to severe commodity shortages and inflation), 1312 (war affected healthcare system), 1418, 1832 (resources were scarce due to the war, but authorities could have better alleviated the impact). *See also concerning* Ground 181, particularly regarding benign motives behind the cooperatives policy.

3433 *Concerning* Ground 175. *Contra* **F54** Appeal Brief, para. 1405.

3434 *See e.g.* **E465** Case 002/02 TJ, paras 36-37, 57-59, 143-148, 3731, 3932, 3956.

3435 **F36** Case 002/01 AJ, paras 185 ("The principle of adversarial proceedings requires foremost that all Parties are given an opportunity to comment on the evidence adduced at trial and on the opposing party's submissions, with a view to influencing the court's decision. This principle does not require [...] that a party actually make submissions in relation to a given piece of evidence"), 495 (finding there was no breach of this principle in the TC's reliance on a WRI instead of in-court testimony where the TC carefully assessed the evidence and provided a reasoned opinion on why it relied on that evidence).

3436 *Concerning* Ground 177.

were widely distributed,[3437] relying on only one portion of one witness' testimony and ignoring the testimony of that witness, and others, that the magazines *RF/RY* were widely disseminated across the country.[3438] His attempts to disprove the magazines' widespread influence and resultant indoctrination[3439] are likewise belied by the evidence. For example, to demonstrate disparities, he cites a witness who testified that "discipline could be harsher in one location than at another" but also stated that the "*plan* was similar in *all* places".[3440] Appellant claims that illiteracy meant few people could read and understand the CPK message, but ignores that the contents of the magazines were regularly taught in study sessions specifically to help cadres and civilians understand the Party line.[3441] Finally, the 8 March 1976 SC meeting minutes, which he claims show communication difficulties,[3442] in fact demonstrate a wide-ranging discussion based on information reported from multiple sources across the country, proposing a weekly status report to keep the SC informed and enable it to issue timely instructions.[3443]

971. Appellant further disputes the extent of the dissemination of information, falsely claiming that the TC stated that confessions of Vietnamese soldiers were widely broadcast to the entire population.[3444] In fact, the TC was mindful that ordinary Cambodians did not have free access to radio during the DK regime and merely found that such confessions were "broadcast at least partially in Vietnamese".[3445]

The TC properly analysed official correspondence[3446]

972. Appellant's repeated complaint that he was denied access to all original evidence in the Case File and that the TC erred in giving a presumption of authenticity to DC-Cam documents[3447] has been rejected by the TC and SCC and should once again be

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3437 **F54** Appeal Brief, para. 1435 *impugning* **E465** Case 002/02 TJ, para. 475. *See* response to Ground 193 (*RF/RY* magazines).

3438 *See e.g.* **E465** Case 002/02 TJ, paras 474 (noting that the same witness who could not precisely estimate the number printed did recall "seeing 'stacks of magazines' being prepared for delivery"), 475, fns 1490-1492 and the evidence cited therein. *Contra* **F54** Appeal Brief, para. 1435 (regarding witness Kim Vun).

3439 **F54** Appeal Brief, para. 1436 *impugning* a conclusion that he does not identify with specificity.

3440 *See e.g.* **F54** Appeal Brief, fn. 2710 *citing* **E1/178.1** François Ponchaud, T. 9 Apr. 2013, 16.06.11-16.08.11, p. 104, lines 17-19 (emphasis added).

3441 *See e.g.* **E465** Case 002/02 TJ, paras 475, 477 (particularly the fn. 1501 evidence), 1028, 2165, 2207, 2907.

3442 **F54** Appeal Brief, fn. 2711 *citing* **E3/232** SC Meeting Minutes, 8 Mar. 1976, EN 00182633-34.

3443 **E3/232** SC Meeting Minutes, 8 Mar. 1976.

3444 **F54** Appeal Brief, para. 1434.

3445 **E465** Case 002/02 TJ, paras 466, 468. *See also* paras 2472-2473, 3457.

3446 *Concerning* Ground 177.

3447 **F54** Appeal Brief, para. 1429.

rejected.[3448] With regard to telegrams, Appellant has not demonstrated that the TC relied on "local" telegram exchanges as evidence of national policy with no proof that the information "reached Phnom Penh".[3449] To the extent Appellant is asserting an error of fact, the paragraphs he cites to support his assertion[3450] either do not articulate this particular error or are without merit when they do, as discussed elsewhere in this Response.[3451] Appellant also fails to specify what resulting "negative findings" occasioned an actual miscarriage of justice or would invalidate the Judgment.[3452]

The TC objectively assessed CPK documents[3453]

973. Appellant does not establish that the TC's assessment of CPK documents was systematically selective or partial.[3454] First, the examples he summarily cites have been shown to be without merit in the sections of the Response addressing them.[3455] Second, his claim that the minutes of the SC meeting dated 8 March 1976 could not be "analysed as part of a communications campaign"[3456] ignores that it was not the minutes themselves that were disseminated, as Appellant suggests, but the *decisions* of the SC.[3457] Thus, the decision to order frequent radio broadcasts about elections[3458] to dispel the perception

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3448 Party may not merely repeat arguments that did not succeed at trial on appeal, Case 001-**F28** *Duch* AJ, paras 17, 20; party disputing authenticity of a document must rebut *prima facie* presumption of authenticity, Case 001-**F28** *Duch* AJ, paras 17, 20. *See also* response to Grounds 15, 31, 35; **F36** Case 002/01 AJ, para. 375. *Note* that Appellant has not indicated that he sent a member of his Defence team to DC-Cam to review the originals of the disputed documents despite the SCC's indication in Case 002/01 that such a step was one possible way to rebut the presumption.

3449 **F54** Appeal Brief, para. 1430. His assertion ignores the TC's extensive analysis of the communication structure noted above, as well as the lines of communication within that structure, including the information flow to and from the upper and lower echelons, as required by the CPK Statute. *See* **E465** Case 002/02 TJ, paras 455-516; **E3/130** CPK Statute, undated, art. 6.

3450 **F54** Appeal Brief, para. 1430, fn. 2699 *citing* his paras 1090-1091, 1542, 1614, 1624-1626, 1629, 1634, 1646, 1649, 1711.

3451 *See* response to Grounds 159 (re. **F54** Appeal Brief paras 1090-1091), 184 (re. para. 1542), 190, 216 (re. para. 1614), 190 (re. paras 1624-1626, 1629), 191 (re. para. 1634), 205 (re. para. 1639), 194 (re. paras 1646, 1649), 203 (re. para. 1711).

3452 **F54** Appeal Brief, para. 1430 (stating without substantiation that the TC erred in fact and in law by using these documents only for making negative findings regarding CPK policy).

3453 *Concerning* Ground 177.

3454 **F54** Appeal Brief, paras 1430-1431, 1433, 1435, 1437.

3455 For allegations summarily referenced in **F54** Appeal Brief, para. 1431, *see* response to Grounds 193 (failing to show "selective" use of *RF* and *RY* magazines), 159 (failing to establish improper "extrapolation" of speeches involving the Vietnamese), 165 (re. an *RY* article relating to marriage being considered as "nothing better than propaganda").

3456 **F54** Appeal Brief, para. 1432.

3457 *Contra* **F54** Appeal Brief, para. 1432 (the minutes only concern CPK members and were not to be communicated outside). *See* **E465** Case 002/02 TJ, para. 466 *citing* **E3/231** SC Meeting Minutes, 8 Mar. 1976, EN 00183360 ("In March 1976, the Standing Committee ordered frequent radio broadcasts about upcoming 'elections', observing that if did not broadcast [enemies] would say are dictators and is no democracy'.").

3458 *See e.g.* **E465** Case 002/02 TJ, para. 413 and the evidence cited therein regarding the SC's deception about the PRA and the elections.

that the DK regime was a dictatorship was reasonably analysed in the context of a propagandistic communications campaign.

974. Further, Appellant's mere assertion that the TC wrongly ignored a portion of the same SC meeting minutes indicating that the DK Constitution "was supposed to be known by the population" offers no proof that the TC ignored this evidence, or that the TC erred by not accepting everything in the DK Constitution as true.[3459] More specifically, it does not demonstrate that the TC erred in finding the existence of a policy targeting the Cham on racial or religious grounds,[3460] as this finding was based on a holistic and thorough assessment of the evidence.[3461] Appellant fails to demonstrate that the impugned passage renders the TC's finding regarding the CPK policy unreasonable or shows that the TC selectively assessed CPK documents.

The TC entered reasonable findings based on an impartial application of the law to a proper and objective assessment of the evidence[3462]

975. Appellant also makes sweeping unsubstantiated complaints of TC bias that are simply his disagreements with the conclusions reached after a reasoned assessment of the evidence.[3463] He does not prove that the TC "completely concealed" exculpatory evidence.[3464] Even though a Chamber is not required to justify why it rejected some evidence while relying on others,[3465] a fair reading of the Judgment makes clear that the TC considered potentially exculpatory evidence as it directed itself to do,[3466] and made

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3459 *Contra* **F54** Appeal Brief, para. 1432. *See also* response to Ground 179 (fails to show biased interpretation of the DK Constitution).

3460 **E465** Case 002/02 TJ, para. 3228. *Contra* **F54** Appeal Brief, para. 1432.

3461 The TC based its finding on a holistic assessment of the evidence, which repeatedly demonstrated that many of the Constitution's provisions (including religious protection) were either never fully realised, or were disregarded or disingenuous, while ample evidence showed that Islam was considered a "reactionary religion" that was "absolutely forbidden. *See e.g.* **E465** Case 002/02 TJ, paras 341, 412-413, 417, 1093, 3215, 3227, 3230-3231, 3234-3236, 3242, 3275, 3279, 3285, 3287-3304, 4241. *See also* response to Ground 186.

3462 *Concerning* Grounds 189, 175, 176, 177. Appellant's claim of bias, which runs throughout this section and his Appeal Brief, is without merit as it fails to overcome the strong presumption of judicial impartiality (*see* response to Ground 4). **F54** Appeal Brief, paras 1405-1406, 1435, 1437, 1593-1594, 1598-1601, 1603.

3463 *Concerning* Grounds 175, 176, 189. **F54** Appeal Brief, paras 1417, fn. 2669 (Appellant claims that the TC's characterisation of the Party's suppression of its origins denotes bias when the finding was firmly supported by the evidence, *see* **E465** Case 002/02 TJ, para. 3741, fns 12484-12485), 1433 (Appellant claims the TC assessed meeting minutes, FBIS/SWB documents, and "other" telegrams in a partial fashion) 1593-1594, 1598-1601, 1603. *See* response to Ground 4.

3464 *Concerning* Ground 189. **F54** Appeal Brief, para. 1599.

3465 **F36** Case 002/01 AJ, paras 304, 495; *Ngirabatware* AJ, para. 97; *Karera* AJ, para. 21; *Setako* AJ, para. 31.

3466 **E465** Case 002/02 TJ, para. 65. *See e.g.* **E465** Case 002/02 TJ, paras 1373 (in re. TTD), 3378 (testimony that Pol Pot's "One v. 30" speech was meant to encourage soldiers), 3379 (the TC explains why it concludes the evidence does not support this view), 3404 (the TC explains why isolated documents calling for friendship with Vietnam do not raise reasonable doubt re. targeting of the Vietnamese), 3427 (the TC

findings in favour of Appellant.[3467] Appellant's arguments, such as those relating to the regulation of marriage, are misplaced, as he does not demonstrate errors representative of any sort of inculpatory approach.[3468] Appellant also fails to establish that the TC abused its discretion when it assessed the reliability and credibility of the evidence and determined which evidence it found most persuasive.[3469] Appellant makes multiple claims that are mere reiterations of those already shown in this Response to be without merit.[3470] Finally, Appellant baselessly claims that the TC violated the principle of legality.[3471] As demonstrated in this Response, the law the TC applied was established in international criminal law before the impugned crimes were committed.[3472]

976. Appellant's unwarranted claims of bias are exemplified in his dispute with the TC's consideration of a reported resolution, which was found to represent the Party line.[3473] Appellant falsely states that the TC found he had "chaired [some] congresses";[3474] when the TC carefully stated that, between 25 and 27 April 1975, Appellant "reportedly" chaired a Special National Congress, noting it was unsure whether it had actually taken place.[3475] As CPK media broadcasts and articles reported Appellant's chairmanship of

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explains why three instances where the children of a Vietnamese father were not targeted does not call targeting based on matrilineal ethnicity into question), 3617 (consent for marriage).

3467 *See e.g.* **E465** Case 002/02 TJ, paras 364 (not satisfied Appellant succeeded Doeun as Office 870 chairman), 595 (satisfied Appellant did not have operational military authority), 1135 (not satisfied Appellant visited Ou Chambak canal worksite, TK District, in 1977), 1387, 1667 (not satisfied extermination was established at TTD and 1JD), 3135 (agreeing there was insufficient evidence to prove torture at PK security centre), 3855 (agreeing that CPK references to foreign intelligence agents were not to be taken literally), 4290, 4319 (no liability of Appellant for genocide of Cham under any mode of liability).

3468 *Concerning* Ground 189. *Contra* **F54** Appeal Brief, para. 1599, fn. 3049 *citing* his paras 1189-1280. *See* response to Grounds 164-170 (regulation of marriage).

3469 *Concerning* Ground 189. *See* Standard of Review (**F36** Case 002/01 AJ, paras 97-98; *S. Milošević* AC Defence Counsel Assignment Decision, paras 9-10).

3470 *Concerning* Ground 176. His claim regarding the 11 April 1976 speech (*see* **F54** Appeal Brief, para. 1421) is addressed in response to Ground 17. *See also* response to Grounds 27, 184, 203 (date of the Fourth Congress when Appellant became a full-rights member of the CC; *contra* **F54** Appeal Brief, fn. 2675). Likewise, his complaints regarding the TC's reliance on the evidence of Em Oeun and Ek Hen (*contra* **F54** Appeal Brief, para. 1424) is addressed in response to Ground 204, and his dispute regarding the TC's proper application of the CPK notion of "purity" as involving an ethnic discrimination component is addressed in the response to Ground 179 (*contra* **F54** Appeal Brief, para. 1427).

3471 *Concerning* Ground 189. **F54** Appeal Brief, para. 1599, fn. 3048 *citing* his paras 642-657 (re. elements of persecution).

3472 *See* response to Grounds 94-96 (persecution).

3473 *Concerning* Ground 176. The findings regarding the Party line were further corroborated by ample evidence. *See e.g.* **E465** Case 002/02 TJ, paras 3735 (stating that the Congress declared the new government's commitment to a classless society which would strive to build and defend the country), 3737-3739, 3884 (particularly the evidence cited in fn. 12961), 4262. *See also* response to Ground 201.

3474 *Concerning* Ground 176. **F54** Appeal Brief, para. 1417 *impugning* **E465** Case 002/02 TJ, para. 3735.

3475 **E465** Case 002/02 TJ, para. 3735 (*note* that the TC also referenced para. 593 in fn. 12458).

the meeting and other evidence indicates that the meeting *did* occur,[3476] this nuanced finding has not been shown to be unreasonable.[3477]

977. Appellant claims that the TC was biased for allegedly not following the methodology it set out for itself to analyse the common purpose.[3478] He fails to appreciate that the TC is in no way required to follow a specific order of events when conducting its analysis or setting out its conclusions. The order chosen by the TC does not show any bias and Appellant fails to rebut the strong presumption of judicial impartiality.[3479]

Ground 178: Erroneous approach for examining the policies[3480]

978. **Ground 178 fails as Appellant has not established that the TC erred by finding that the CPK's political purpose was implemented through five policies which involved the commission of crimes.**

979. It is clear that the TC found the CPK policy of the movement of the population (limited to Cham, MOP Phase 2) was intrinsically linked to the revolution, as a means to "control" and "capture the people",[3481] to fulfil the objectives of defending the country against enemies and radically transforming the population into an atheistic and homogenous Khmer society within the context of the CPK socialist revolution.[3482] The TC found that the CPK ordered forced transfers "to disperse the Cham"[3483] and that, after the transfers, they were forced to live among Khmer people and follow Khmer customs,[3484] "in order for their communities to be broken up"[3485] so they would "fully assimilate [...] into a single Khmer nation and identity."[3486] The TC reasonably found that this policy

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3476 In addition to the evidence cited in the impugned Judgment paragraph, *see also* **E465** Case 002/02 TJ, para. 593 (particularly the media articles cited in fn. 1858 reporting Appellant's chairmanship of the meeting), 1086 (discussing evidence indicating that a special congress took place on those dates); **E3/259** DK Constitution, preamble (discussing the resolution of the Special National Congress held on 25-27 April 1975). Pol Pot's failure to mention Appellant's name to Yugoslavian journalists when discussing this Congress does not render this finding unreasonable in light of the evidence *in toto*. *Contra* **F54** Appeal Brief, para. 1417.

3477 *Concerning* Ground 176. *Contra* **F54** Appeal Brief, para. 1417.

3478 *Concerning* Ground 175. **F54** Appeal Brief, paras 1404 (summarising the TC's stated methodology – did charged common purpose exist, examine policies to implement common purpose, was crime base attributable to the policies and thus furthered or implemented the common purpose), 1406. *See* **E465** Case 002/02 TJ, para. 3732.

3479 *Concerning* Ground 175. *See e.g.* **11** Special Panel Decision re. Six Appeal Judges, para. 64; *Karemera & Ngirumpatse* AJ, para. 24.

3480 Ground 178: **F54** Appeal Brief, *Erroneous approach for examining the policies,* paras 1438-1447; **F54.1.1** Appeal Brief Annex A, p. 62 (EN), p. 57 (FR), p. 88 (KH).

3481 **E465** Case 002/02 TJ, paras 3866-3867, 3991.

3482 **E465** Case 002/02 TJ, paras 3995, 3997.

3483 **E465** Case 002/02 TJ, para. 3262.

3484 *See e.g.* **E465** Case 002/02 TJ, paras 3261, 3263, 3264.

3485 **E465** Case 002/02 TJ, para. 3268.

3486 **E465** Case 002/02 TJ, para. 3217.

encompassed the commission of crimes.[3487]

980. The TC unambiguously found that the CPK policy to establish and operate cooperatives and worksites was intrinsically linked to the revolution, as it served to "control" and "capture the people",[3488] thereby "fulfilling economic and ideological goals" within the context of the CPK socialist revolution.[3489] The TC found that this policy supported every objective of the common purpose: build the country, defend it against enemies, and radically transform the population into a homogenous society of worker-peasants.[3490] The TC found that cooperatives were "the primary instrument for waging class struggle", which "pav[ed] the way for a new socialist order",[3491] and noted that Pol Pot described the forced movement of the people to the countryside as "one of the important factors for the success of the revolution".[3492] The cooperatives further "depriv[ed] the enemy of human and economic resources"[3493] and "transform[ed]" the country's agricultural system.[3494] The TC reasonably found that this policy encompassed the commission of crimes.[3495]

981. The TC found that the CPK policy to establish and operate security centres and execution sites to identify, arrest, isolate and smash enemies and reeducate "bad elements" was intrinsically linked to the revolution, and clearly a means of fulfilling the objectives of defending the country against enemies and radically transforming society within the context of the CPK socialist revolution.[3496] The TC found that Appellant "instructed cadres to transform their behaviour *in order to achieve the Party's goals* and identify enemies",[3497] and noted his testimony acknowledging "that the Party's regime of reeducation through criticism and self-criticism meetings was ideologically fundamental to the class struggle".[3498] The TC also found that the operation of security centres was "a

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3487 *See* response to Grounds 83 & 150, 142.
3488 **E465** Case 002/02 TJ, para. 3877. *See also* paras 3866-3867.
3489 **E465** Case 002/02 TJ, para. 3916.
3490 **E465** Case 002/02 TJ, para. 3918.
3491 **E465** Case 002/02 TJ, para. 3874.
3492 **E465** Case 002/02 TJ, para. 3881. *See also* paras 3884 ("the Party's priority was to rapidly build a self-reliant, independent and classless country and defend it from enemies. [Appellant] explained that, in order to build the country quickly and solve food shortages occasioned by civil war, people needed to be coerced to join cooperatives"), 3885.
3493 **E465** Case 002/02 TJ, para. 3879. *See also* paras 3875, 3878, 3898.
3494 **E465** Case 002/02 TJ, para. 3889. *See also* paras 3879, 3901, 3906.
3495 *See* response to Grounds 181 and 183.
3496 **E465** Case 002/02 TJ, paras 3973, 3976, 3978-3981, 3983, 3985-3987.
3497 **E465** Case 002/02 TJ, para. 3942 (emphasis added). *See also* para. 3960 (Appellant calling on the Party to "wipe out" enemies).
3498 **E465** Case 002/02 TJ, para. 3967.

nationwide enterprise",[3499] with at least 200 security centres operating across the DK,[3500] and that the system by which enemies were condemned to detention and death in security centres was constitutionally legitimised and implemented pursuant to Party decree.[3501] The TC reasonably found that this policy encompassed the commission of crimes.[3502]

982. The TC also found that the CPK policy targeting specific groups, including the Cham, Vietnamese, Buddhists, and ex-KR officials was intrinsically linked to the revolution, and was adopted to achieve the objective of defending the country against enemies and radically transforming society within the context of the CPK socialist revolution.[3503] The groups targeted as "enemies" during the DK regime, including ex-KR officials, Cham, Vietnamese civilians, "traitorous" CPK cadres, and anyone connected to them, were viewed as a threat to the political and ideological goals of the revolution,[3504] including its economic objectives.[3505] The TC further made findings regarding the CPK's desire to preserve the "Kampuchean race" and develop a single homogenous Khmer nation and identity, which coincided with the Party's priority to defend against all enemies.[3506] The TC reasonably found that this policy encompassed the commission of crimes.[3507]

983. The TC plainly found that the CPK policy on the regulation of marriage was intrinsically linked to the revolution, and supported every objective of the common purpose: build the country, defend it against enemies, and radically transform society.[3508] The TC found that the CPK "considered family and marriage as crucial to building a new society which would accord with the ideological standards of its socialist revolution", with *Angkar* placed above parents as part of a "new social scheme".[3509] The TC considered testimony indicating that Appellant specifically lectured on the regulation of marriage "so that the couples could produce children and there would be more forces to defend the

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3499 **E465** Case 002/02 TJ, para. 3959.
3500 **E465** Case 002/02 TJ, para. 3954.
3501 **E465** Case 002/02 TJ, para. 3955.
3502 *See* response to Ground 184.
3503 **E465** Case 002/02 TJ, paras 3993, 3994, 3996, 3997, 4003-4005, 4007-4009, 4011, 4021, 4053, 4056, 4060.
3504 *See e.g.* **E465** Case 002/02 TJ, paras 1410, 1466, 1642-1643, 1646-1647, 1660-1663, 1690, 1929, 1945, 2016-2021, 2030-2038, 2069, 2072, 2329-2335, 2478, 2480, 2482, 2486-2490, 2492, 2527, 2531, 3219, 3228, 3274-3281, 3285-3304, 3306-3308, 3311-3313, 3389-3390, 3396, 3398, 3402, 3407-3410, 3416-3417, 3744, 3752, 3789-3790, 3847, 3860, 3924-3925.
3505 *See e.g.* **E465** Case 002/02 TJ, paras 3755, 3757, 3759, 3772.
3506 *See e.g.* **E465** Case 002/02 TJ, paras 3216-3219, 3228, 3286, 3387, 3390, 3393, 3400, 3412, 4015.
3507 **E465** Case 002/02 TJ, para. 4067. *See generally* Section *VII. Crimes: C. Treatment of Targeted Groups.*
3508 **E465** Case 002/02 TJ, para. 4066.
3509 **E465** Case 002/02 TJ, para. 3539. *See also* para. 3610 ("One of the objectives of the revolution was for youths to abandon private ownership, which according to the CPK ideology, included the relationship with their parents").

country".[3510] The TC also noted CPK propaganda stating that "family building" was "inseparable from matters of the entire nation and people [...] so that the revolution may achieve its highest mission [...] and then advance toward socialism and communism".[3511] The TC reasonably found that this policy encompassed the commission of crimes.[3512]

984. The reasonableness of the TC finding that each of the five policies involved crimes, and were intrinsically linked to the implementation of the socialist revolution in the DK, is thus evident.[3513] It is clear that the CPK's socialist revolution was, at its core, criminal, as it was designed to be achieved through the Party's policies involving the commission of crimes which were thereby encompassed by the common purpose.

Ground 179: Errors concerning the concept of enemies of the CPK[3514]

985. **Ground 179 should be dismissed as Appellant fails to establish that the TC erred in law and in fact when it found that the CPK policy was characterised by the fight against "enemies", a concept that evolved over time.**

986. After reviewing the totality of the evidence, the TC correctly found that in order to rapidly implement the socialist revolution in Cambodia through a "great leap forward", anyone who was perceived to be opposed to the revolution either in fact or in ideology was considered an "enemy".[3515] People who were associated or perceived to be associated with groups that were more resistant to the revolution's ideas were also vulnerable to being deemed "enemies".[3516] Events on the ground dictated who fell into this category, so the concept evolved over time in response to people engaging in real or perceived

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3510 **E465** Case 002/02 TJ, para. 3s569. *See also* paras 3350-3352, which describes various members of Party leadership stating the goal of rapidly increasing the population; 3556-3557, where the TC refers to multiple witnesses, who stated they were told to produce as many children as possible for *Angkar*, both to increase the population in the provinces and because Vietnam had a larger population.

3511 **E465** Case 002/02 TJ, para. 3540, *citing* **E3/775** *Revolutionary Youth,* June 1975, EN 00417942-43. The TC also noted that the selection of spouses was regulated, as, "in order to ensure the success of the class struggle, it was necessary to keep those constituting the proletarian forces as pure as possible", *see* para. 3559.

3512 *See* response to Grounds 168, 167, 166.

3513 **E465** Case 002/02 TJ, paras 3728, 3743. *See also* paras 3260-3268, 3991, 3995, 3997 (MOP Phase 2 (limited to the Cham)); 3919-3928 (establishment of worksites and cooperatives); 3973-3987 (establishment and operation of security centres/enemies policy); 3991-3998, 4001-4012, 4018-4022, 4050-4061 (targeting of specific groups; Cham, Vietnamese, Buddhists, and ex-KR officials, respectively), 4064-4067 (regulation of marriage), 4068-4074 (legal findings on implementation of the common purpose).

3514 Ground 179: **F54** Appeal Brief, *Errors concerning the concept of enemies of the CPK*, paras 1448-1488, **F54.1.1** Appeal Brief Annex A, *Errors with Respect to the CPK Enemy Design*, p. 62 (EN), p. 57 (FR), p. 88 (KH).

3515 *See e.g.* **E465** Case 002/02 TJ, paras 319, 3744, 3760, 3763, 3765-3766, 3793, 3810, 3812, 3839, 3845.

3516 *See e.g.* **E465** Case 002/02 TJ, paras 1064, 1641, 1644, 3214, 3744, 3797, 3839, 3845-3846, 3848.

"counter-revolutionary behaviour".[3517] As detailed in this Response, enemies were imprisoned, interrogated, tortured, subjected to inhumane conditions, forced to do hard labour, and often disappeared or were executed, all without due process.[3518]

987. The evidence clearly establishes that the vast majority of people treated as "enemies" during the DK regime were political and ideological enemies inside Cambodia, not military enemies. Ultimately, these enemies included ex-KR officials, Cham, Vietnamese civilians, "traitorous" CPK cadres, and anyone connected to them, whom the CPK targeted as enemies.[3519] The category also included people, particularly in vulnerable groups, who did anything perceived to go against the revolution or its progress, such as stealing food from the collective or expressing dissatisfaction with the regime.[3520]

988. The evidence that led the TC to these conclusions is vast and strongly corroborated. It is also diverse. It includes minutes from upper echelon meetings, official correspondence such as reports and telegrams, CPK publications, speeches, surviving prison records, and witness testimony from numerous sources, including victims and former cadres.[3521] It establishes patterns across the country that were so widespread and so similarly carried out that they cannot be explained by anything but the implementation of a national policy advocated by the highest levels of CPK leadership, particularly in light of the administrative and reporting hierarchy that required strict adherence to the Party line.[3522]

989. In this ground, Appellant raises contextual issues that, he alleges, would have changed the TC's analysis if they had been properly considered[3523] and adopts a piecemeal approach to challenge the probative value of individual pieces of evidence. His arguments fail to displace the strength of the evidentiary record because they either contravene established jurisprudence, misrepresent the TC's analysis, or ignore the totality of the evidence. As a result, Appellant fails to demonstrate any error that would

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3517 *See e.g.* **E465** Case 002/02 TJ, paras 295, 1060, 1892, 1894-1896, 1898, 2838, 3228, 3744, 3752, 3763, 3765, 3772, 3779, 3784, 3793 (political opposition equated with enemy activity), 3839-3840, 3844, 3846.

3518 *See* response to Ground 184.

3519 *See e.g.* **E465** Case 002/02 TJ, paras 1410, 1466, 1642-1643, 1646-1647, 1660-1663, 1690, 1929, 1945, 2016-2021, 2030-2038, 2069, 2072, 2329-2335, 2478, 2480, 2482, 2486-2490, 2492, 2527, 2531, 3219, 3228, 3274-3281, 3285-3304, 3306-3308, 3311-3313, 3389-3390, 3396, 3398, 3402, 3407-3410, 3416-3417, 3752, 3789-3790, 3847, 3860, 3924-3925.

3520 *See e.g.* **E465** Case 002/02 TJ, paras 1080, 1153, 1177, 1363, 1367, 1409-1410, 1648, 1652, 1688, 3426, 3744, 3793, 3846, 3848-3850, 3857.

3521 *See e.g.* **E465** Case 002/02 TJ, paras 1208, 1438, 1717, 2086-2091, 2115-2119, 2644-2647, 2860-2862, 3020-3021, 3361-3362, 3744-3745, 3747-3748.

3522 *See e.g.* **E465** Case 002/02 TJ, paras 294-296, 317-322, 390-391, 397, 482-501, 507-516, 3304, 3547, 3974-3976, 4045, 4056, 4059, 4081, 4207-4208.

3523 **F54** Appeal Brief, paras 1446, 1450, 1458, 1460-1461, 1465, 1467-1478, 1485, 1488; **F54.1.1** Appeal Brief Annex A, p. 62 (EN), p. 57 (FR).

warrant SCC intervention, including findings regarding his intent to commit crimes against "enemies" and the finding that "elimination of enemies" by murder was a means by which the CPK's objective of a socialist revolution was to be achieved.[3524]

The TC correctly placed the evidence in its proper context

990. **Pre-1975 and 1975:** Appellant erroneously complains that the TC failed to put speeches and documents into their proper context, allegedly distorting its view of the CPK's political foundations and leading to inaccurate and biased generalisations about enemies.[3525] He relies on only one example, an order to execute 17 former Lon Nol soldiers, to support his claim that the TC erroneously used internal RAK documents concerning field decisions not indicative of CPK policy.[3526] However, the order, signed by Comrade Pin, clearly indicates on its face that the Party made the decision to execute.[3527] Other than Appellant's innuendo, no evidence suggests that Comrade Pin was even suspected of being part of an alleged "pocket of resistance".[3528] Finally, the TC considered that the execution order was corroborative of Duch's testimony and also based its findings regarding the CPK's policy toward ex-KR officials on a holistic assessment of the evidence.[3529]

991. Regarding the distinction between ideological and military enemies, Appellant does not substantiate or even identify where or how the TC allegedly failed to distinguish between them for the period of 1975 as discussed in the *RF* magazines.[3530] Absent such indication, Appellant's mere assertion that the TC erred fails. Similarly, Appellant merely asserts based on one document that the TC was obliged to recognise that NP and monks were not considered enemies.[3531] This not only fails to meet the appellate standard but also

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3524 *Contra* **F54.1.1** Appeal Brief Annex A, p. 62 (EN), p. 57 (FR).

3525 *See e.g.* **F54** Appeal Brief, paras 1440-1442, 1445-1447, 1450-1452.

3526 **F54** Appeal Brief, para. 1454.

3527 **F54** Appeal Brief, para. 1454 *impugning* **E465** Case 002/02 TJ, para. 3752, fn. 12517 *citing* **E3/832** Execution Order, 4 June 1975, EN 00068915 and noting only Pin signed the order and no one was copied. But the order clearly states "*the Party has decided* that [these 17 persons] are to be smashed. The comrades are asked to implement this *policy of the Party*." (emphasis added).

3528 In fact, Pin was trusted by the Party throughout the regime, including in December 1978 when he led troops on the East Zone battlefield. *See e.g.* **E465** Case 002/02 TJ, fn. 5847.

3529 *See e.g.* **E465** Case 002/02 TJ, paras 2487 (order corroborated Duch's testimony that Pin and Hor both told him that Lon Nol soldiers were systematically eliminated), 959-961, 963-967, 1062-1063, 1077, 1080, 1175, 1660-1663, 1690, 2486-2492, 2791, 2795-2801, 2813, 2839-2841, 3982, 4039-4049.

3530 **F54** Appeal Brief, para. 1454 *impugning* **E465** Case 002/02 TJ, para. 3746, fn. 12495, which refers to Ieng Sary's Diary that covers 1976-1979, not 1975.

3531 **F54** Appeal Brief, paras 1454 (*citing* **E465** Case 002/02 TJ, para. 3757, part of a multi-para. chronological overview of real and perceived enemies evidence relating to 1975, paras 3744-3748, 3751-3763), 1477 (citing nothing).

misinterprets the TC's findings regarding the two groups, as addressed elsewhere in this Response.[3532]

992. Appellant's assertion that the TC should be sanctioned for its "totally biased assessment" of the DK Constitution ignores reality.[3533] The TC correctly assessed this document alongside other evidence, which showed that many of the Constitution's provisions were either never fully realised, or were disregarded or disingenuous.[3534]

993. Appellant's other claims fail as well. The TC *never* asserted that the expression "Lon Nol traitors" originated from the CPK,[3535] it merely noted that the August 1975 *RF* repeatedly used the phrase.[3536] Moreover, the TC considered the context of the times when it stated that FUNK had denounced Lon Nol as one of the seven traitors responsible for the coup against Norodom Sihanouk.[3537] Similarly, Appellant's argument that the TC took a 20 May 1976 document out of context is also without merit, as it misrepresents the content of the document.[3538] While the document did discuss the importance of cooperatives after the *coup* as Appellant alleges,[3539] it did not confine the discussion to 1970. Rather, it emphasised the cooperatives' strategic importance to construction both "at present and

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3532 The CPK viewed Buddhism and the practice of Buddhism as incompatible with the revolution, thus practising monks were targeted based on their religious identity. *See e.g.* **E465** Case 002/02 TJ, paras 1088, 1093, 1098-1100, 1103-1108, 3757 (noting that 90-95% of monks had abandoned their monkhood and religious practice had disappeared so this "special layer" of society would no longer cause worry), 3850, 4015-4022; response to Grounds 108, 188. The CPK continually referred to NP as a distinct category of persons who were untrustworthy and incompatible with the CPK's ideological goals, thus they were at risk of being branded enemies more quickly than BP and targeted on political grounds. *See e.g.* **E465** Case 002/02 TJ, paras 1080, 1174, 1177, 1340, 1342-1344, 1641 (fn. 5577), 1653, 3848; response to Grounds 118-119.

3533 **F54** Appeal Brief, para. 1455 *impugning* **E465** Case 002/02 TJ, para. 3763.

3534 For evidence supporting the finding in **E465** Case 002/02 TJ, para. 3763 that there was "the highest level of punitive sanction for hostile acts" as indicated in **E3/259** DK Constitution, art. 10, *see e.g.* **E465** Case 002/02 TJ, paras 244-250 (pre-1975), 294-295, 358, 376-377, 379-382, 386, 2069, 2072, 2135-2143, 2149, 2161-2180, 2233-2243, 2255-2260, 2265-2328, 2350-2351, 2377-2399, 2402, 2412-2423, 2502-2518, 2522-2531, 2714-2729, 2742-2774. For evidence contradicting the Constitution's art. 20 guarantee of "freedom of religion", *see* **E465** Case 002/02 TJ, paras 264 (pre-1975), 1087-1109, 3215, 3230-3250. For other guarantees in the Constitution that were never put into practice, *see e.g.* **E3/259** DK Constitution, arts 5-7 re. powers vested in the People's Representative Assembly ("PRA") in contrast with the evidence that it was a façade (**E465** Case 002/02 TJ, paras 412-415, 419, 537, 596); **E3/259** DK Constitution, art. 9 re. justice to be administered under the DK legal system that never eventuated (*see* **E465** Case 002/02 TJ, paras 276, 412-413, 417-418). *See also* evidence of the CPK's efforts to obscure its internal workings to deceive the public (**E465** Case 002/02 TJ, paras 342, 413, 3938, 362, 4208, 4268). *See further* response to Ground 177 re. Appellant's allegation that the TC used a double standard to analyse the DK Constitution.

3535 *Contra* **F54** Appeal Brief, para. 1456. The TC did not assert this in the impugned paragraph or in its other references to the phrase. *See* **E465** Case 002/02 TJ, paras 3755, 3773, 3813, 3829, 3847, 4107, 4168.

3536 **E465** Case 002/02 TJ, para. 3755.

3537 **E465** Case 002/02 TJ, para. 231. *Contra* **F54** Appeal Brief, para. 1456 (stating that the TC erred in part because it was "fundamental that this context should have been advanced").

3538 **F54** Appeal Brief, para. 1456 *impugning* **E465** Case 002/02 TJ, para. 3776 (discussing **E3/50** Third Year Anniversary of the Organization of Peasant Cooperatives, 20 May 1976, pp. 2-4, 10).

3539 **F54** Appeal Brief, para. 1456.

in future",[3540] progressing from being support bases to being "a strong country defense" that "[n]o enemy shall be able to enter".[3541] The TC's inclusion of this document in its chronological overview of the CPK's notion of enemies in 1976 was reasonable and accurately represented the document's contents.

994. **1976 to 1978:** Appellant's assertion that the TC erred in fact by not placing Duch's testimony in proper context also fails.[3542] Overwhelming evidence of the Party Centre's extensive authority over decisions at S-21 disproves his arguments regarding the effect of the secrecy of S-21 training activities, the military's alleged direct responsibility over S-21,[3543] and Son Sen's autonomous decision-making authority there.[3544] These claims are disproven by evidence that, for example, (i) Son Sen oversaw S-21 in his capacity on the SC, not his General Staff position;[3545] (ii) Duch only received orders from and sent reports about security to the Standing Committee, "870", or *Angkar,* which in practice was limited to Son Sen, Nuon Chea, and Pol Pot, and, per Nuon Chea's instructions, S-71 Chairman, Pang;[3546] (iii) Duch was not allowed to send S-21 reports or confessions to the Committee of the General Staff;[3547] (iv) only the SC could disseminate S-21 documents to the confessees' superiors;[3548] (v) Duch's superiors were kept apprised of prisoner confessions, were fully informed of the use of torture during interrogations at S-21, and instructed Duch on how to proceed;[3549] and (vi) the Party Centre was privy to secret information that the lower echelons were not.[3550] In light of such evidence, the

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3540 *See e.g.* **E3/50** Third Year Anniversary of the Organization of Peasant Cooperatives, 20 May 1976, pp. 8 ("Cooperatives were not just bases of support that played important roles in achieving Great Victory on 17 April 1975. Cooperatives ensure the great victory of the great socialist revolution and socialist construction at present and in future."), 9-10.

3541 *Note* that this quote appeared in the section entitled "Cooperatives are a country's line of defense at present and in future." *See* **E3/50** Third Year Anniversary of the Organization of Peasant Cooperatives, 20 May 1976, pp. 9-10.

3542 **F54** Appeal Brief, para. 1460.

3543 *See r*esponse to Ground 184 regarding Appellant's incorrect argument of military control over S-21, particularly the TC's finding that the General Staff's sole responsibility was to provide operational support whereas the SC issued instructions regarding security issues such as interrogations and executions.

3544 **F54** Appeal Brief, para. 1460 *impugning* **E465** Case 002/02 TJ, paras 3767-3768.

3545 **E465** Case 002/02 TJ, paras 2188, 2197-2198, 2209.

3546 *See e.g.* **E465** Case 002/02 TJ, paras 362, 2183, 2186, 2189-2190, 2197, 2199-2202, 2206, 2209-2215, 2217, 2220-2224, 2226-2232, 2261-2262, 2268, 2270, 2273-2275, 2279, 2281, 2287-2289, 2311, 2316-2318, 2323, 2331-2332, 2412, 2452, 2457, 2462, 2467, 2473, 2475, 2497-2498, 2503, 2509, 2527, 2554-2557.

3547 *See e.g.* **E465** Case 002/02 TJ, para. 2217. *See also* paras 2189, 2191, 2197.

3548 **E465** Case 002/02 TJ, paras 2217, 2224, 2233-2235.

3549 *See e.g.* **E465** Case 002/02 TJ, paras 2202, 2220-2229, 2232-2233, 2273-2275, 2280-2282, 2286-2289, 2291, 2306, 2311, 2313-2318, 2321, 2323, 2373, 2412-2423, 2491, 2589.

3550 *See e.g.* **E465** Case 002/02 TJ, paras 3760, 3793, 3862, 3958. *See* response to Ground 195 (principle of secrecy).

TC's findings cannot be said to be unreasonable.[3551]

995. Appellant's arguments that the TC failed to consider context when it came to vocabulary is also devoid of merit. Regarding the meaning of "smash", the TC expressly acknowledged that the meaning depended on the context in which it was used.[3552] However, documents and witnesses from across the country clearly indicated that "smash" was widely understood to mean "kill" or "execute", even outside of S-21.[3553] The TC's conclusion was reasonably based on such evidence. Appellant's allegation that the TC took the term "purity" out of context to introduce a racial vision of discrimination toward the Cham and Vietnamese is also without merit.[3554] As Appellant concedes, the TC fully acknowledged the notion advanced by the CPK Statute to keep the Party clean.[3555] However, ample testimonial and documentary evidence clearly demonstrated that this was not the sole application of the term "purity" as the CPK sought to establish

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3551 *See further* response to Ground 184 re. Appellant's argument that the TC erred in making general findings from military-specific decisions at S-21 and other security centres (*contra* **F54** Appeal Brief, para. 1462).

3552 **E465** Case 002/02 TJ, paras 3801, 3858, 3896 (example of an instance where the context seemed to concur with Pech Chim's definition). *Contra* **F54** Appeal Brief, paras 1460-1461 (asserting "smash" meant execution only at S-21, suggesting elsewhere it meant "to get rid of [a class] mindset" as explained by Pech Chim).

3553 *See e.g.* **KTC: E465** Case 002/02 TJ, paras 871, 2669-2670, 2772 ("Guard Van Soeun testified that loud music was played over 'two small speakers' when 'they smashed the prisoners'. […] Hun Kimseng told the OCIJ that loudspeakers were played when prisoners were killed."). **AK: E465** Case 002/02 TJ, para. 2934, fn. 10038 *citing* **E1/405.1** Chin Kimthong, T. 21 Mar. 2016, 15.19.15-15.21.44, p. 85, lines 9-14 ("there were hundreds of [prisoners] who died, that included those who were smashed as well as those who died in the detention centre from illnesses. As to the estimation of the percentage, I could say that there were a lesser number of prisoners who died from illnesses than those who were smashed."). **1JD: E465** Case 002/02 TJ, fn. 5372 *citing* **E3/7765** Yin Daut WRI, EN 00333352-53 ("The prisoners were smashed when it was dark. Usually the guards dug the pits a half-day before smashing the prisoners. The prisoners were told to sit down on the ground four to five meters from the pits. They hit the prisoners on the head with a bamboo stick or a hoe. Then they dragged the bodies to be buried in the pits."). **KCA: E465** Case 002/02 TJ, para. 1786, fn. 6105. **TK District: E465** Case 002/02 TJ, para. 1080, fn. 4678 *citing* **E3/9010** Chhum Seng DC-Cam Statement, EN 00728623 ("After the killing we simply informed the chief of battalion in the morning that Brother! I smashed that person."). **Cham: E465** Case 002/02 TJ, paras 3219 (Sos Romly's evidence), 3298, fn. 11206 *citing* **E1/346.1** Sen Srun, T. 14 Sept. 2015, 11.13.10-11.15.45, p. 42, line 21-p. 43, line 8 ("The day after [taking Cham people to Wat Au Trakuon], […] I met comrade Moeun and I asked him what happened to the Cham people who had been arrested the previous night. He told me that all of them had been smashed and that the killing lasted until nearly 12 p.m. at night and I asked [...] if any people were spared. He told me that the Cham people, all of them, had been killed and smashed and no one was left."). **Vietnamese: E465** Case 002/02 TJ, paras 3424, 3467, fn. 11696 *citing* **E1/361.1** Prak Doeun, T. 2 Dec. 2015, 15.21.36-15.25.46, p. 86, line 22-p. 87, line 7 ("I was told that these Vietnamese people had been taken away and killed. I learnt the information the next morning. They did not use the term 'kill' at that time. They used the word 'smash'. And I was told that those people had been taken away and smashed. […] the unit chief of mine, told me. He tried to console me the next morning that my wife and child had been killed."). **Ex-KR officials: E465** Case 002/02 TJ, para. 3752 *citing* **E3/832** Execution Order, 4 June 1975, EN 00068915.

3554 **F54** Appeal Brief, paras 1427, 1459 *impugning* **E465** Case 002/02 TJ, para. 3743. Appellant incorrectly contends that the term only meant that the CPK and every Party member should always be "politically, ideologically, and organizationally" pure.

3555 **F54** Appeal Brief, para. 1459 *citing* **E465** Case 002/02 TJ, para. 3765.

a homogenous Khmer society.[3556] The TC's interpretation is borne out by the CPK forcing Cham to forsake their cultural and religious practices to assimilate with the Khmer[3557] by dispersing, targeting, and ultimately destroying the Cham community after small groups of Cham resisted,[3558] as well as by executing the Vietnamese living in Cambodia, particularly to "preserve" the "Kampuchean race" when the armed conflict with Vietnam escalated.[3559]

996. Appellant also fails to show that the TC ignored the impact of the armed conflict with SRV on the DK leadership's "official reactions" in 1977.[3560] The TC expressly mentioned the context of the hostilities in its analysis of these documents.[3561] In any event, his assertion that only findings concerning Son Sen's management could be reasonably drawn from military meeting minutes[3562] ignores ample evidence that the military was fully subordinate to the CPK and that Son Sen implemented Party orders and consistently advocated its political line in these meetings.[3563] Further, the TC took escalation of hostilities into account when assessing two 17 April anniversary speeches,

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3556 *See e.g.* **E1/301.1** Or Ho, T. 19 May 2015, 10.07.16-10.09.56, p. 21, lines 12-13; **E1/302.1** Or Ho, T. 20 May 2015, p. 60, lines 17-20 ("in Kampuchea there would be only one single population that is, Khmer. And there would be no New People, no Base People, no Javanese or no Cham, but one Khmer population.").

3557 *See e.g.* **E465** Case 002/02 TJ, paras 3217-3219, 3228, 3232-3250, 3252-3253.

3558 **E465** Case 002/02 TJ, paras 3219, 3221-3228, 3251-3268, 3272-3304.

3559 *See e.g.* **E465** Case 002/02 TJ, paras 3402, 3406-3407, 3410 (discussing an Aug. 1978 telegram from the West Zone Committee reporting to *Angkar* that as part of its "screening" operations in the preceding month, they had smashed "100 Vietnamese people – small and big young and old"), 3420-3428, 3452-3461, 3466-3471, 3477-3488, 4237-4238. *See also* response to Ground 185 (CPK policy to target the Vietnamese).

3560 **F54** Appeal Brief, para. 1465.

3561 *See e.g.* **E465** Case 002/02 TJ, paras 3397 ("The Chamber notes that, read in context with the ongoing armed conflict, these instruction refer primarily to Vietnamese armed forces."), 3398, 3402 ("The Chamber accepts that Pol Pot's April 1978 speech stating that the CPK's 'One against 30' policy primarily relates to soldiers and served to 'stir up the fighting spirits of cadres and combatants to be ready in battlefields'."), 3411 ("The Chamber notes that this statement was made during an important military offensive of the Vietnamese army. Read in context, the Chamber therefore finds that these instructions refer primarily to Vietnamese armed forces."), 3413. *See also* **E465** Case 002/02 TJ, paras 3835-3836.

3562 **F54** Appeal Brief, para. 1466.

3563 *See e.g.* **E465** Case 002/02 TJ, paras 3738 (CPK as the highest organisation of the army), 3789-3790, 3799, 3804 (support of the Party line); **E3/130** CPK Statute, arts 4 (emphasising the importance of following the Party line), 6 (CPK organised on the principle of democratic centralism, requiring that the lower echelon respect the upper echelon, echelon organisations respect the central organisation, lower echelons report to the upper echelons, and the upper echelons give instructions to the lower echelons which must be carried out), 27 (all three categories of the RAK are "under the absolute leadership monopoly" of the CPK), 28 (the RAK is organised according to democratic centralism); **E3/1733** SC Meeting Minutes, 9 Oct. 1975, EN 00183394 ("national defense is being arranged at the Center"); **E3/222** SC Meeting Minutes, 15 May 1976 (reporting on defence matters to the SC; Appellant (Comrade Hem) present); **E3/12** CC Decision, 30 Mar. 1976, EN 00182809 (authorising the General Staff to "smash" individuals within the "Centre Military"); **E3/739** *Revolutionary Flag*, July 1976, EN 00268945 ("only the Party leads the army; no other organization or individual leads it"); **E3/5724** Kaing Guek Eav alias Duch WRI, EN 00680797-98 ("General Staff was in charge of the execution of Pol Pot's orders, and Son Sen was the one to comply.").

as Appellant says it should have.[3564] Finally, his objection to the assessment of his 30 December 1977 speech[3565] is nothing more than an objection to the way the TC organised its Judgment. The TC repeatedly demonstrated that it was well aware of the state of the conflict at the end of 1977,[3566] and it was not required to articulate every detail of its reasoning for each particular finding it made.[3567] Appellant's blanket objection to the 1978 speeches and documents fails for similar reasons.[3568]

997. Appellant misrepresents the TC's conclusions on Pol Pot's "One against 30" April 1978 speech, falsely arguing that the TC's analysis of the speech was biased.[3569] In fact, the TC accepted the very context Appellant says it rejected, finding that Pol Pot's speech *primarily* related to Vietnamese soldiers and was intended to "stir up the fighting spirits of cadres and combatants to be ready in battlefields".[3570] When the TC looked at the evidence *in toto*,[3571] however, it reasonably concluded that Pol Pot extended "One against 30" policy beyond the SRV military forces to encompass civilians as well.[3572]

The TC took DK-era Marxist ideology into account when assessing the evidence

998. Appellant's attacks on the supposed failure of the TC to properly consider the analysed documents in the context of Marxist lexicon used during the DK regime lack merit.[3573] One incorrect argument hinges on one sentence characterising the meaning of "enemy" used at a specific SC meeting.[3574] Even if, *arguendo*, the TC's characterisation misconstrued the meaning of "enemy" in this particular instance, its extensive evidentiary analysis and findings regarding real or perceived enemies[3575] negate any impact on any

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3564 **E465** Case 002/02 TJ, paras 3392-3394 (discussing the same speeches discussed in impugned paras 3806-3807 and then stating "*In view of the escalating military conflict with Vietnam*" as well as other factors, "the Chamber is satisfied that references to 'all categories of enemies' in the above speech indeed included references to Vietnam as the 'hereditary enemy'") (emphasis added). *Contra* **F54** Appeal Brief, para. 1467.

3565 **F54** Appeal Brief, para. 1468.

3566 *See e.g.* **E465** Case 002/02 TJ, paras 280, 288-290, 2029, 3396.

3567 Standard of Review (Reasoned Decision).

3568 **F54** Appeal Brief, paras 1469-1470 makes the same objection raised in regard to the 30 Dec. 1977 speech and fails for the same reasons stated above.

3569 **F54** Appeal Brief, paras 1470-1471 *impugning* **E465** Case 002/02 TJ, para. 3824.

3570 **E465** Case 002/02 TJ, para. 3402.

3571 *See* **F36** Case 002/01 AJ, paras 418-419; *Lubanga* AJ, para. 22; *Ntagerura* AJ, para. 174. *See also Ngirabatware* AJ, paras 202, 208; *Martić* AJ, para. 233.

3572 **E465** Case 002/02 TJ, paras 3402, 3824. *Note particularly* that the TC considered Pol Pot's references throughout his statement to the total population of both countries, leading it to conclude that the "One against 30" policy applied to the entire Vietnamese population, not just SRV forces. *See also* response to Ground 185.

3573 **F54** Appeal Brief, paras 1473-1479. *Note* that paras 1474 and 1475 do not challenge any specific findings.

3574 **F54** Appeal Brief, para. 1473, fn. 2777 *citing* **E465** Case 002/02 TJ, para. 3768. *Note* that the quote actually belongs to para. 3769 of the Judgment, which references **E3/231** SC Meeting Minutes, 8 Mar. 1976.

3575 *See e.g.* **E465** Case 002/02 TJ, paras 3744-3863.

finding that would either invalidate the Judgment or occasion an actual miscarriage of justice.[3576]

999. Appellant's use of a series of unsubstantiated allegations is also without merit. For example, numerous documents contradict his claim that no document would allow the conclusion that the CPK opposed any who "subscribed to or supported pacifism or revisionism".[3577] He similarly offers no evidence or any particular challenged findings to claim that social class and the theory of class war could only be analysed as a fight against the groups identified by the Chamber, perplexingly relying on one paragraph in the Closing Order discussing types of prisoners at KTC.[3578] His unsupported claims must be rejected.[3579]

1000. Appellant's challenges to the TC's assessment of the word "Yuon" have largely been addressed elsewhere in this Response[3580] but a few issues are worthy of mention here. Contrary to his misleading claim,[3581] the TC specifically acknowledged that the term was, at times, used more generally, and thus applied a case-by-case analysis to determine its use in the context of the documents being assessed.[3582] Also contrary to his unsubstantiated allegation,[3583] the TC explicitly examined the circumstances surrounding the CPK's usage of "Yuon" or any form of Vietnamese "enemy" at least eight times in its assessment of documents before drawing conclusions as to the meaning.[3584] Carefully

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3576 **E465** Case 002/02 TJ, para. 3769 is specifically relied upon eight times in the TJ, each time for facts discussed in that paragraph and its underlying evidence, not for the TC's characterisation of "enemy". *See* **E465** Case 002/02 TJ, fns 1470 (re. radio programs), 12592 (re. Bou Phat alias Hang), 12826 (re. Thailand as an enemy), 12831 (re. Laos as an enemy), 12845 (the acts of fleeing home and desertion could be considered "enemy activity"), 12896 (discussions of the treatment of specific enemies were only held at the higher level), 13483 (Nuon Chea was continuously kept abreast of enemy activity), 13486 (enemy activity was discussed at numerous SC meetings).

3577 *See e.g.* **E465** Case 002/02 TJ, para. 3808 (quoting the June 1977 RF's characterisation of "revolutionary-betraying revisionism"); **E3/5** *Revolutionary Flag*, Aug. 1975, EN 00401483 (from mid-1973 to early 1975: "Government agents, spies, and pacifist agents were eliminated."); **E3/25** *Revolutionary Flag*, Dec. 1976-Jan. 1977, EN 00491424 ("attack the enemy by eradicating their war of espionage, their psychological warfare, and their pacifist agents"); **E3/723** Instructions of 870, undated, EN 00183999; **E3/196** Statement of the CPK to the Communist Workers' Party of Denmark, July 1978, EN 00762399 (Nuon Chea: "the enemy, both the imperialists and the revisionists as well as the Vietnamese, continue to fight us"); **E3/807** Minutes of the Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, Mar. 1977, EN 00933839 ("These incidents prove that the CIA, Yuon and revisionist enemies are powerfully continuing their activities to wreck our revolution"). *Contra* **F54** Appeal Brief, para. 1476.

3578 **F54** Appeal Brief, para. 1476, fn. 2782 *citing* **D427** Closing Order, para. 500.

3579 **F54** Appeal Brief, para. 1477. Appellant summarily states that "Ex-KR were only enemies in the context of the armed hostility with Lon Nol" and "neither NP nor monks were ever considered enemies" without citing any evidentiary support.

3580 *See* response to Ground 185.

3581 **F54** Appeal Brief, paras 1483-1485.

3582 **E465** Case 002/02 TJ, paras 3379-3381. *See also* response to Ground 185.

3583 **F54** Appeal Brief, paras 1480-1481.

3584 **E465** Case 002/02 TJ, paras 3397-3400, 3402, 3411-3413, 3416.

considering all the evidence, the TC noted that even though "Yuon" was sometimes used to refer to Vietnam or Vietnamese in general terms, the CPK frequently used it to derogatorily refer to all ethnic Vietnamese and turned increasingly violent in tone as the armed conflict intensified.[3585]

1001. Finally, Appellant does not demonstrate that the TC deliberately conflated the term "Vietnamese agent" with "Vietnamese" to conclude that there was a criminal policy against all Vietnamese people.[3586] This argument simply attempts to downplay the overwhelming evidence of similar events across the country showing a CPK policy against the Vietnamese, including matrilineal targeting and the drawing up of lists to identify and target people with Vietnamese origins,[3587] the killing of Vietnamese children who by no means could have been considered Vietnamese agents,[3588] and the killing of Vietnamese fishermen and refugees captured at sea.[3589]

The TC correctly assessed the probative value of the evidence before it regarding enemies

1002. Appellant also claims without merit that the TC erred in drawing general conclusions about a policy[3590] from two undated DK notebooks,[3591] the "Combined S-21 Notebook",[3592] and "Ieng Sary's Diary",[3593] allegedly lacking indicia of authenticity. The SCC and international jurisprudence have, however, established that authenticity does not hinge on the presence of one or several factors so long as the evidence, taken holistically, determines that the document is what it is purported to be.[3594] The TC correctly followed this approach, identifying several factors for each document that it

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3585 **E465** Case 002/02 TJ, paras 3379, 3381, 3396-3416.

3586 **F54** Appeal Brief, paras 1486-1487 *impugning* **E465** Case 002/02 TJ, paras 3851-3855. Appellant's specific challenges to the intent to commit genocide of the Vietnamese have been addressed in response to Grounds 159, 185.

3587 *See e.g.* **E465** Case 002/02 TJ, paras 3420-3428, 3503, 3510. *See also* response to Ground 185.

3588 *See e.g.* **E465** Case 002/02 TJ, paras 2478, 2621, 3424-3425, 3483-3485, 3487, fn. 11387.

3589 *See e.g.* **E465** Case 002/02 TJ, paras 3456-3461, 3493.

3590 **F54** Appeal Brief, paras 1440, 1451, 1453-1458, 1463-1464.

3591 **F54** Appeal Brief, paras 1451, 1453 *impugning* **E465** Case 002/02 TJ, paras 3750 (*citing* **E3/1233** DK Notebook on Division of Class Status and Status Struggle in Cambodian Society, undated), 3751 (*citing* **E3/1235** DK Notes entitled Viewpoint on Kampuchea following 17 April 1975, undated).

3592 **F54** Appeal Brief, para. 1464 *impugning* **E465** Case 002/02 TJ, para. 3822 (*citing* **E3/834** Combined S-21 Notebook, Apr. 1978 to Dec. 1978).

3593 **F54** Appeal Brief, paras 1458, 1464 *impugning* **E465** Case 002/02 TJ, paras 3746, 3778, 3803 (*all citing* **E3/522** Ieng Sary's Diary, undated).

3594 *See e.g.* **F36** Case 002/01 AJ, paras 296-297; *Orić* TJ, para. 27 ("gaps in the chain of custody are not fatal, provided that the evidence as a whole demonstrates beyond reasonable doubt that the piece of evidence concerned is what it purports to be") *cited favourably by Taylor* TJ, para. 383; *Đorđević* AJ, para. 395 (observing that the TC carefully assessed the Working Group Notes based on the entirety of the evidence, particularly considering corroborative evidence); *Taylor* TJ, paras 391-392 ("direct, detailed and corroborated" witness testimony contributes to the authenticity of documentary evidence).

deemed to be sufficiently indicative of authenticity.[3595] Appellant's mere mention of factors he wishes had been determinative does not demonstrate that the TC's analysis or findings were illegal or unreasonable. Appellant similarly fails to demonstrate the TC erred in the weight it assigned to (i) a study session summarised in a book by Ben Kiernan,[3596] (ii) two documents copied by Professor Goscha,[3597] and (iii) a draft version of the CPK Statute.[3598] The TC voiced the same concerns Appellant raises about these documents and approached them with caution,[3599] citing them only when other evidence

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3595 **Undated DK Notebooks:** *See* **E185** Case 002/01 Documents Decision, paras 7, 15(v), 21, 23, 25-28 (DC-Cam's methodology provided no reason to fear the documents were tampered with, distorted, or falsified), 36 (relevant documents listed in Annex B, E185.2). *See further* that portions of **E3/1233** that were cited by the TC in the para. 3750 of the Judgment are internally consistent and corroborated by *e.g.* **E3/138** Fundamental Introductory Document for Party Member, undated, EN 00743798 (discussing the worker, peasant, and capitalist classes as well as two categories of feudalists: landowner and aristocrat); **E3/146** *Revolutionary Youth*, Aug.-Sept. 1974, EN 00538946-47 (re. two categories of feudalists; the "ruling" feudalists includes the king and high-ranking officials, EN 00538947-51 (other classes); **E3/5** *Revolutionary Flag*, Aug. 1975, EN 00401486-87 (classes included feudalist, capitalist, petty bourgeoisie, and intellectuals). **Proposed Combined S-21 Notebook:** *See* **E465** Case 002/02 TJ, paras 2091, 2131, 2133, 2170. **Ieng Sary's Diary:** *See* **E465** Case 002/02 TJ, para. 3746. *See also* evidence corroborating the diary in **E465** Case 002/02 TJ, paras 942 (fns 2896, 2897) (*corroborating* **E3/522** Ieng Sary's Diary, undated, EN 00003285), 1881, 3746 (fn. 12497), fns 1290, 1428, 3202-3203, 6320, 12589, 12677.

3596 **F54** Appeal Brief, para. 1458 *impugning* **E465** Case 002/02 TJ, para. 3791, fn. 12642 (*citing* **E3/8** B. Kiernan, "Summary of the Results of the 1976 Study Session" in *Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea*, 1976-1977, Sept. 1976, EN 00104082).

3597 **F54** Appeal Brief, para. 1463 *impugning* **E465** Case 002/02 TJ, paras 3805 (*citing* **E3/10693** Minutes of Meeting Secretaries and Deputy Secretaries of Divisions and Regiments, 3 Apr. 1977), 3814 (*citing* **E3/10686** Minutes of the conference between Kampuchea and China on 29 September 1977, 29 Sept. 1977).

3598 **F54** Appeal Brief, para. 1453 *impugning* **E465** Case 002/02 TJ, para. 3749 (*citing* **E3/8380** 1971 Draft CPK Statute, 3 July 1972).

3599 **Ben Kiernan summary: E465** Case 002/02 TJ, fn. 6329 (TC recalled that absent opportunity to question Ben Kiernan, who did not testify, treats his opinions with due caution), para. 3791 (does not have the Khmer original of the summary of the 1976 study session, so treats this evidence with appropriate caution"). **Goscha documents: E465** Case 002/02 TJ, paras 3805, 3814; *see also* paras 351-354 demonstrating the TC's caution with other documents similarly copied by Professor Goscha. **Draft CPK Statute: E465** Case 002/02 TJ, para. 344 (1976 Statute retained much of the language of the 1971 Statute, author of the 1972 notes containing the 1971 draft statute is unknown so TC treats 1971 Statute with caution, but will rely on the content of these notes if corroborated).

corroborated their content.[3600] It was within the TC's discretion to do so.[3601]

Ground 184: Errors Regarding the "Policy"[3602]

1003. **Ground 184 should be dismissed as Appellant fails to establish that the TC erred in finding that the CPK had a policy to identify, arrest, isolate, and smash the most dangerous enemies at security centres and execution sites throughout the country, and to reeducate "bad elements", and that this policy was implemented by the Party's entire administrative network.**

1004. Based on a holistic assessment of the evidence, the TC found that the CPK had a policy to identify, arrest, isolate, and "smash" the most serious category of enemy at security centres and execution sites, and to reeducate "bad elements".[3603] It also found that this policy was intrinsically linked to the common purpose and involved the commission of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and OIA (attacks against human dignity and enforced disappearances), thereby rendering the policy criminal in character.[3604]

1005. These findings were based on overwhelmingly consistent and detailed evidence from numerous sources, including evidence of lists drawn up to identify specific groups of enemies for arrest, hundreds of prison records, correspondence from local officials seeking and receiving instruction from the upper echelon, reports from subordinates to their superiors regarding the use of torture during interrogations, osteology reports on

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3600 **Ben Kiernan summary: E465** Case 002/02 TJ, fn. 4170. *Note* that **E465** Case 002/02 TJ, fn. 12881 is the only finding supported by impugned TJ para. 3791 (discusses only Kiernan's summary) and is based on extensive evidence in addition to Kiernan's summary. **Goscha documents:** impugned TJ para. 3805 is not cited in any finding and is used solely as part of the TC's chronological overview demonstrating the prominence that the DK regime gave to the topic of enemies (*per* **E465** Case 002/02 TJ, para. 3744). *Note also* the TC cited impugned TJ para. 3814 only when accompanied by other corroborative evidence (*see* **E465** Case 002/02 TJ, fns 1579, 12824, 12830, 12840, 12864, 12866-12868). **E465** Case 002/02 TJ, fn. 12866 cites para. 3814 as its only source, closer scrutiny shows the reference merely gives an example that corroborates the numerous sources cited in fn. 12864. **Draft CPK Statute: E465** Case 002/02 TJ, para. 396 (differences between the two versions of the Statute), fns 536, 949-950, 952, 954-955, 997, 1001, 1003 *read in conjunction with* 1004, 1021 (*see also* **E3/130** CPK Statute, arts 27-28), 1171-1174 (*see also* **E3/130** CPK Statute, art. 6(4)), 1190, 1193-1196, 1218-1219. As for impugned TJ para. 3749 *citing* the Draft CPK Statute, subsequent paragraph 3750 and the evidence cited therein are internally consistent and corroborative in part, discussing foreign imperialism, feudalists, and capitalists; *see also* **E3/522** Ieng Sary's Diary, EN 00003329 (defining bloc of "American Imperialists" to include West German and Japanese imperialists, "they always intend to destroy us" and "They are our real enemies."), 00003331 (noting American imperialists "still persist" and are burrowing from within).

3601 *See e.g.* **F36** Case 002/01 AJ, para. 296; *Haraqija & Morina* AJ, paras 61-62.

3602 Ground 184: **F54** Appeal Brief, *Errors Regarding the "Policy"*, paras 1543-1550, including *Errors Regarding the Security Centres*, paras 1523-1542; **F54.1.1** Appeal Brief Annex A, "*Policy" Applied at Security Centres and Execution Sites,* pp. 63-64 (EN), pp. 58-59 (FR), pp. 90-91 (KH).

3603 **E465** Case 002/02 TJ, paras 3965, 3972, 3987.

3604 **E465** Case 002/02 TJ, paras 3974-3976, 3978-3981, 3982-3983, 3985-3987.

human remains found at Choeung Ek and KTC, and the trial testimony of survivors and former CPK cadres who recounted a litany of horrors.[3605] The evidence established patterns across the country of crimes that were so widespread and so similarly carried out at security centres and execution sites that they could not be attributed to rogue elements acting independently, but only to the implementation of a national policy advocated by the highest levels of the Party.[3606] The evidence also established that Appellant was part of the small group of leaders who set this CPK policy and were well informed about the crimes committed to implement it.[3607]

1006. It is important to note that Appellant has previously conceded that many of the charged crimes either occurred or were likely to have occurred at the Case 002/02 security centres and execution sites.[3608] However, he now claims that (i) the crimes were not part of the common purpose in which he agreed to take part—they were a "deviation" necessary for the secure operation of the regime;[3609] and that the TC: (ii) used the policy to artificially attach him to the crimes because he was not responsible for the security centres;[3610] and (iii) incorrectly weighed probative value and context in its analysis to deduce there was a policy.[3611] These arguments are all without merit for the reasons detailed below.

1007. **The deviation argument fails:** Appellant does not show that the TC erred in finding that the CPK had a policy to arrest and execute enemies at security centres and execution sites or that the TC mischaracterised the crimes at the security centres as CPK policy,[3612] rather than the deviation he alleges.[3613] The evidence proves that the crimes perpetrated at the security centres were a crucial component of the CPK's longstanding policy to defend itself against enemies—real or perceived—so that its socialist revolution could succeed.

3605 *See e.g.* **E465** Case 002/02 TJ, paras 826, 840-872, 902, 1122-1125, 2086-2091, 2115-2119, 2129, 2411-2423, 2532-2540, 2644-2647, 2705, 2777-2785, 2803-2804, 2808, 2860-2862, 3020-3021, 3035-3036, 3287-3290, 3744-3745, 3748.

3606 *See e.g.* **E465** Case 002/02 TJ, paras 294-296, 317-322, 3304, 3974-3976, 3978-3982, 3985-3987, 4045, 4051, 4056, 4058-4061, 4081, 4208.

3607 *See e.g.* **E465** Case 002/02 TJ, paras 321-322, 340, 364, 600-604, 2313, 3769-3770 (SC meetings (attended by Appellant, "Comrade Hem") in which enemies were discussed), 3771 (30 Mar. 1976 CC decision regarding the right to smash), 3775 (SC meeting attended by Appellant), 3955-3965, 3967-3972, 4208, 4219-4235, 4257-4261, 4269-4270, 4272, 4277, 4283-4287.

3608 **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1196, 1214, 1304, 1348, 1411, 1439, 1442.

3609 **F54** Appeal Brief, para. 1547.

3610 **F54** Appeal Brief, paras 1548, 1550.

3611 **F54** Appeal Brief, paras 1523-1542.

3612 **F54** Appeal Brief, para. 1547, claiming that they were unrelated to his defined common purpose of establishing a socialist revolution.

3613 **F54** Appeal Brief, para. 1547, 1594. *See also* fn. 2940 *citing* **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1469-1479, particularly 1479 (attempted overthrows and planned resistance necessitated the identification and purge of enemies; the only common purpose was to establish a socialist revolution to which the crimes were not related). *See also* **E465** Case 002/02 TJ, para. 3932.

The TC detailed the CPK's vigilance to protect itself against "enemy" infiltration well before 1975 through the arrest, interrogation, and execution of suspected spies, and cadres were advised to conduct such activities with utmost secrecy so people would not fear the Party.[3614] The TC also reviewed extensive evidence which demonstrated that this policy continued throughout the regime, including evidence regarding the operation of more than 200 security centres across the country to imprison and "smash" those enemies, and of refashioning "bad elements" at security centres to temper their "counter-revolutionary" tendencies.[3615] As discussed above, the TC's findings were based on overwhelmingly consistent and detailed evidence from numerous sources that established patterns of crimes so widespread and similarly carried out that they could only be explained by the implementation of a national policy advocated by the highest levels of the Party, not by rogue elements acting independently.[3616]

1008. **The "artificial attachment" claim fails:** Appellant does not establish that the TC erred in finding that the policy to arrest and execute enemies was implemented by the Party's entire administrative network, including him.[3617] He erroneously argues that he should not be held responsible for the crimes committed at security centres because the sites were controlled by either the military or district and he had no authority there.[3618] The TC carefully considered this argument[3619] and found that Appellant's role was, in fact, limited with respect to the *oversight* of these security centres.[3620] However, it made an important distinction. The weight of the evidence proved that the military's sole responsibility was to provide support for S-21's operation whereas *instructions regarding security issues* such as interrogations and executions came exclusively from the SC,[3621] with which Appellant had a privileged relationship. Similarly, although AuKg

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3614 **E465** Case 002/02 TJ, paras 244-250, 2135, 3934-3941, 3947.

3615 *See e.g.* **E465** Case 002/02 TJ, paras 1896, 2038, 2128, 2136-2143, 2149, 2161-2180, 2703, 2743, 2771, 2887-2889, 2898-2900, 2907-2908, 2949-2950, 3048-3049, 3059-3065, 3751-3834, 3839-3863, 3942-3943, 3944-3954 (operation of 200+ security centres), 3955-3965 (Party documents and "smashing" of enemies), 3966-3972 (refashioning the "bad elements").

3616 As discussed and cited in the opening paragraphs of this Ground.

3617 *Contra* **F54** Appeal Brief, para. 1548 (Appellant alleges the TC defined the policy against enemies as "polymorphous and changing" to "artificially attach" him to crimes committed at the security centres).

3618 **F54** Appeal Brief, para. 1548, fn. 2944; **E457/6/4/1** KS Case 002/02 Closing Brief, paras 1467, 1480-1486.

3619 **E465** Case 002/02 TJ, para. 2185, 3932. Appellant complains that the TC only partially recalled his arguments (**F54** Appeal Brief, para. 1548), but this was neither required (*see e.g.* **F36** Case 002/01 AJ, paras 203, 207) nor accurate (*see particularly* **E465** Case 002/02 TJ, fn. 13120 noting that paras 1469-1486 of Appellant's Closing Brief submissions were addressed in Section 18.1.2.2 of the Judgment).

3620 **E465** Case 002/02 TJ, para. 4219 (emphasis added).

3621 **E465** Case 002/02 TJ, paras 2186-2187, 2191. This was a reasonable conclusion based on, *inter alia*, the evidence cited in response to Ground 179 discussing this issue, which demonstrates that the SC, not the General Staff, had control over S-21. In addition to the evidence cited therein, *see further* **E465** Case 002/02 TJ, para. 2223 (noting that when Sou Met (a member of the General Staff) wrote to Duch regarding

was under military control, it was clearly utilised for the Party Centre's hunt for enemies,[3622] and although PK operated under the control of Sector 105 authorities, these authorities reported directly to the Party Centre at Office 870,[3623] of which Appellant was a member. Finally, although KTC was a district-level security centre, Sector 13 was heavily involved in deciding the fate of prisoners and regularly relayed information to Zone Secretary/SC member Ta Mok about activities at the site.[3624]

1009. Contrary to his claim, Appellant's responsibility for these crimes was not based on military or district-level authority, but on his membership in the small group of well-informed CPK leaders in the Party Centre, his participation in meetings at which cadres' fates were decided, his contributions to the investigation and purge of others, and his participation in a system that he knew was arresting and executing CPK cadres and DK citizens.[3625] The TC did not need to "artificially attach" Appellant to the security centre crimes—the evidence amply demonstrated that his contribution was "inextricably intertwined" with the crimes that occurred there.[3626]

1010. In a further attempt to attack the TC's finding linking him to the crimes, Appellant incorrectly alleges that the TC erroneously failed to conclude that the secrecy surrounding security centre operations prevented his knowledge of crimes committed there, which would have precluded the finding that the common purpose led to the commission of those crimes.[3627] The TC recognised that secrecy was a feature of security centres' operations[3628] and noted Appellant's claim that he knew, saw and heard nothing because of secrecy.[3629] As discussed in more detail in response to Ground 195, however, the weight of the evidence indicated that CPK senior leaders, including Appellant, were privy to confidential information about the security centre crimes that lower-ranking

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the transfer of four prisoners to S-21, rather than instructing Duch on what to do, Sou Met stated that he would seek *Angkar's* advice regarding further action).

3622 *See e.g.* **E465** Case 002/02 TJ, paras 2872-2884, 2898-2900, 2906, 2935-2936, 2957-2958, 2960.

3623 *See e.g.* **E465** Case 002/02 TJ, paras 487, 489, 3028-3029, 3031, 3034-3049, 3065, 3076-3080, 3162.

3624 **E465** Case 002/02 TJ, paras 2702-2709, 2820, 2838.

3625 *See e.g.* **E465** Case 002/02 TJ, paras 340, 350, 355, 364, 600-604, 2313, 3769-3770 (SC meetings (attended by Appellant, "Comrade Hem") in which enemies were discussed), 3771 (30 Mar. 1976 CC decision regarding the right to smash), 3775 (SC meeting attended by Appellant), 3955-3965, 3967-39772, 4208, 4219-4235, 4258, 4260-4261, 4269-4270, 4272, 4277, 4283-4287. *Contra* **F54** Appeal Brief, para. 1548. *See also* response to Grounds 190-192, 195, 200, 203-205, 216-217, 235.

3626 **E465** Case 002/02 TJ, paras 4219, 4284. *Contra* **F54** Appeal Brief, para. 1548.

3627 **F54** Appeal Brief, para. 1550, fn. 2949 *impugning* **E465** Case 002/02 TJ, paras 3978-3981, 3983, 3985-3987.

3628 *See e.g.* **E465** Case 002/02 TJ, paras 2171, 2183, 2217, 2257-2259, 2404, 3760, 3793, 3862, 3938-3939, 3958.

3629 **E465** Case 002/02 TJ, para. 4202.

cadres were not.[3630] Appellant's other challenges to his knowledge, also discussed elsewhere, fail to demonstrate that the TC applied the law incorrectly or that its findings could not have been reached by any reasonable trier of fact.[3631]

1011. Similarly, Appellant's complaint about being tied to the entire CPK administrative network[3632] also fails as he does not demonstrate any error in the TC's interpretation of messages sent to 870 or *Angkar* that tie him to that network.[3633] Appellant's contention that the TC erred by equating self-criticism with reeducation (sanctioning fault) must also fail for lack of substantiation.[3634] It is further discredited by evidence showing that self-criticism was used to help determine who was "good" and "not good", often resulting in or used alongside threats, disappearances, and work assignments.[3635]

1012. **The probative value and context challenges fail:** Appellant's disagreement with the TC's reliance on Duch's testimony regarding the three categories of enemies disregards the context of the disputed evidence, incorrectly limiting it to the 1976 time period.[3636] In responding to Nuon Chea's counsel's broad question based on an excerpt from the minutes of a 1976 military meeting,[3637] Duch provided a detailed response, tracing the origin of the categories back to 1960.[3638] Considering that Duch took great care to study the Party line after he joined the CPK in 1964,[3639] the TC reasonably considered his testimony to be drawn from his DK-era knowledge of the facts about which he testified.[3640] Appellant's speculative suggestion that Duch drew his knowledge from

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3630 *See e.g.* **E465** Case 002/02 TJ, paras 3760 (at a SC meeting, it was discussed that Chan Chakrei alias Mean and Phan was being investigated and it was to be kept quiet), 3793 (at the meeting of the Secretaries and Deputy Secretaries of Divisions and Regiments, Son Sen summarised recent events surrounding the arrests and confessions of several leading cadres, "stressing that everyone was to maintain secrecy and not disseminate the information to the lower levels"), 3862 ("Details of how to deal with enemy activity and how specific enemies had been dealt with were discussed only within the CPK at the higher level [...]. These discussions were kept secret."), 3958 ("Despite the Party's policy of secrecy, the smashing of enemies was widely reported within Party ranks.").

3631 *See particularly* response to Grounds 192, 195, 216, 217, 235. *Contra* **F54** Appeal Brief, fn. 2948 *cross-referencing* his paras 1849-1878.

3632 **F54** Appeal Brief, para. 1549.

3633 *See* response to Grounds 190, 191, 205, 225, 245 addressing Appellant's arguments in his paras 1616-1639, which he cross-references in **F54** Appeal Brief, fn. 2944.

3634 **F54** Appeal Brief, para. 1549, fn. 2945 *citing* **E465** Case 002/02 TJ, paras 3968, 3972. Appellant merely refers to the impugned paras. *See also* response to Ground 179 (self-criticism).

3635 *See e.g.* **E465** Case 002/02 TJ, paras 1028-1029, 1291, 1295, 1321, 1553, 1555, 1558, 1560, 1677, 1711.

3636 **F54** Appeal Brief, para. 1524 ("But Duch was commenting on the minutes of a military meeting citing three enemy categories held on 9 October 1976.").

3637 **E1/441.1** Kaing Guek Eav alias Duch, T. 21 June 2016, 13.45.00-13.47.13, p. 59, lines 2-18 (Counsel asked if Duch remembered this division into three enemy categories).

3638 **E1/441.1** Kaing Guek Eav alias Duch, T. 21 June 2016, 13.47.13-13.51.14, p. 59, line 22-p. 60, line 13.

3639 **E3/5798** Kaing Guek Eav alias Duch, T. 9 June 2009, 13.50.09-13.54.01, p. 60, lines 16-24.

3640 Case 001-**F28** *Duch* AJ, para. 17 (degree of deference afforded TC findings of fact).

reading the Case File[3641] establishes no error.[3642]

1013. Appellant fails to establish any error in the TC's use of evidence of pre-April 1975 events to demonstrate a policy against enemies during the DK period, particularly in light of the extensive evidence that showed this policy continued throughout the regime, thus establishing a deliberate pattern of conduct.[3643] He also does not demonstrate that the TC erred in concluding that there were at least 200 security centres during the DK regime;[3644] rather, he simply states facts the TC considered before reaching its finding.[3645] Contrary to his representation,[3646] the TC independently reviewed evidence on the Case File regarding the existence of DK-period security centres, cross-checked its findings, and only relied upon credible and, whenever possible, corroborated evidence.[3647] Appellant does not demonstrate that the TC's conclusion based on this careful analysis was unreasonable.

1014. Appellant incorrectly alleges that the TC distorted the meaning of article 10 of the DK Constitution by wrongly interpreting "punishable to the highest degree" to mean death.[3648] As outlined in response to Ground 27, his claim ignores the plain language of the 30 March 1976 CC decision, to which the TC referred, which clearly articulates what was meant: the right to "smash" inside and outside the Party ranks.[3649] The extensive evidence of "traitors" being executed for perceived "serious" transgressions against the DK regime[3650] confirms the correctness of the TC's interpretation. Given the evidence before it, Appellant fails to demonstrate the TC's interpretation was unreasonable. The language of the same 30 March 1976 decision defeats Appellant's claim that the TC distorted the document to make its findings about the power to order executions during

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3641 **F54** Appeal Brief, para. 1524.

3642 **E465** Case 002/02 TJ, paras 2080-2082. *Contra* **F54** Appeal Brief, para. 1524. *See also* **E465** Case 002/02 TJ, paras 2218, 2499, fns 1271, 7425, 7468, 8107 showing the TC's careful approach with Duch's evidence.

3643 **F54** Appeal Brief, para. 1525 *impugning* **E465** Case 002/02 TJ, paras 3934-3941. *See also* response to Ground 180 discussing jurisprudence allowing limited use of temporally out-of-scope evidence.

3644 **F54** Appeal Brief, para. 1525 *impugning* **E465** Case 002/02 TJ, para. 3954.

3645 *See* **F54** Appeal Brief, para. 1525; **E465** Case 002/02 TJ, paras 3949 (re. DC-Cam's methodology and acknowledging Craig Etcheson's prior affiliation with both DC-Cam and OCP), 3951, 3953 (concerns Henri Locard's personally-gathered findings and the TC's reliance on them only when corroborated).

3646 **F54** Appeal Brief, para. 1525 (alleging that the TC relied solely on the work of DC-Cam).

3647 **E465** Case 002/02 TJ, paras 3948, 3953-3954.

3648 **F54** Appeal Brief, paras 1527-1529 *impugning* **E465** Case 002/02 TJ, para. 3955.

3649 **E465** Case 002/02 TJ, para. 3955 *citing* **E3/12** CC Decision, 30 Mar. 1976, EN 00182809.

3650 *See e.g.* **E465** Case 002/02 TJ, paras 1886, 1893-1896, 1899, 1929, 1944-1945, 2013-2014, 2017, 2022-2023, 2030-2031, 2033-2035, 2037-2038, 2041, 2056, 2072, 2128, 2178-2179, 2265, 2267, 2270, 2275-2277, 2281-2283, 2289, 2295-2298, 2302-2304, 2308-2312, 2316-2318, 2320, 2322-2327.

the purges.[3651] Appellant's claim that he had no connection to that document also fails, given he was a full-rights member of the CC at the time of the decision.[3652] His unsubstantiated *tu quoque* argument,[3653] which is not a valid defence under international humanitarian law,[3654] ignores that all people—even suspected traitors—are guaranteed the fundamental rights disregarded by the DK regime.[3655] Finally, the evidence defeats Appellant's claim that the TC applied a double standard in analysing the Constitution.[3656]

1015. Appellant wrongly contends that the TC should not have relied on Duch's evaluation of the June 1978 CC directive pardoning some "enemies" given the mid-1978 context.[3657] The TC did consider that context, but it also considered S-21 prisoner lists confirming that arrests continued throughout the country past June 1978, witness testimony of continued arrests at 1JD, documentary and testimonial evidence of continued inflow of prisoners and executions at KTC, and evidence that the "Yuon" and Cham were excluded from the CPK's so-called pardon.[3658] Given this evidence, Appellant fails to show as unreasonable the TC's reliance on Duch's opinion that the directive was a ruse.

1016. In relation to Appellant's 17 April 1977 speech[3659], the Judgment paragraph he impugns simply recounted that Appellant "echoed the call for the 'suppression' of enemies in a speech during the second anniversary of the 17 April 1975 'liberation'" and quoted a passage from the speech.[3660] Appellant shows no finding characterising this speech as

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3651 **F54** Appeal Brief, para. 1530 *impugning* **E465** Case 002/02 TJ, paras 3955-3956 *citing* **E3/12**. Appellant does not explain how the TC distorted the document, only that it was referenced throughout the Judgment.

3652 **F54** Appeal Brief, para. 1530. *See e.g.* **E465** Case 002/02 TJ, paras 576 (Appellant became a full-rights member of the CPK CC at the Fourth Congress in 1976), 343 (the Fourth Party Congress was held in January 1976); **E1/198.1** Khieu Samphan, T. 29 May 2013, 14.42.41-14.44.52, p. 87, lines 2-4 ("I was a candidate member until late 1975 or early 1976 when I became the full fledge member."); **E3/27** Khieu Samphan WRI, EN 00156751; **E1/223.1** Stephen Heder, 15 July 2013, 11.08.55-11.11.28, p. 43, lines 2-6; **E3/573** Interview with Ieng Sary by Stephen Heder 1999, EN 00427599; **E3/20** Elizabeth Becker, *When the War Was Over*, EN 00237887 (the Fourth Party Congress was in January 1976).

3653 **F54** Appeal Brief, para. 1528 (arguing that severely sanctioning any attack on the Nation is a legal response and it is "enough" to glance at national criminal codes to see this).

3654 *See e.g. D. Milošević* AJ, para. 250 *citing Martić* AJ, para. 111, *Kupreškić* AJ, para. 25.

3655 *See e.g.* ICCPR, arts 6, 9, 14; UDHR, arts 7-11; ECHR, arts 2, 6; ACHR, arts 4, 8. *See also* **E465** Case 002/02 TJ, paras 276, 417-418, 1887, 1931.

3656 **F54** Appeal Brief, para. 1529. *See* response to Grounds 15 and 179.

3657 **F54** Appeal Brief, para. 1531 *impugning* **E465** Case 002/02 TJ, para. 3971.

3658 **E465** Case 002/02 TJ, paras 1468, 2770, 3404, 3828, 3971. *Note* that **E3/764** and **E3/763** are the same document and that this June 1978 CC directive was not applicable to those who opposed the Party from 1975-1978 and intentionally continued in counter-revolutionary activities as "the CPK must eliminate them". (**E465** Case 002/02 TJ, paras 3828, 3971, *citing* **E3/764** (**E3/763**) CC Guidance, 20 June 1978, EN 00275218.

3659 **F54** Appeal Brief, paras 1532-1533.

3660 **E465** Case 002/02 TJ, para. 3960.

"criminal", or that the TC distorted its meaning. [3661]

1017. Appellant fails to demonstrate that the TC wrongly relied on the testimony of CP Preap Chhon regarding a 1977 speech at Chbar Ampov market.[3662] The TC noted Appellant's counsel's extensive questioning of the CP on his failure to mention the speech earlier, and that Preap Chhon credibly and consistently explained the circumstances under which he provided his initial statements, including that he was not asked about Appellant and tried to limit his answers to the questions asked.[3663] The TC was mindful of the circumstances in which CPAs are furnished and, given Preap Chhon's credible testimony under thorough cross-examination, reasonably relied on his evidence.[3664] Acknowledging the untimeliness of the request,[3665] the TC correctly noted that Appellant suffered no prejudice, as he had adequate time to prepare for questioning.[3666] Finally, the TC properly limited its use of the speech to JCE policy evidence regarding the smashing of "enemies", which is within the *saisine* of this case.[3667]

1018. Appellant's assertion that the TC distorted his testimony about the practice of self-criticism to construct intent to discriminate against NP[3668] misrepresents the TC's use of his remarks. The TC merely stated that Appellant acknowledged that self-criticism meetings were ideologically fundamental to the class struggle, including developing "class anger".[3669] Discriminatory intent toward NP was not "extrapolated" from this testimony; it was demonstrated by the testimony of CP Em Oeun[3670] and ample additional evidence.[3671] Likewise, Appellant's complaint that the TC ignored the political rhetoric of his speeches on class struggle[3672] ignores instances where the TC put political rhetoric in context.[3673]

3661 **F36** Case 002/01 AJ, para. 90 (arguments that merely disagree with the TC's conclusions based on unsubstantiated alternative interpretations of the same evidence are insufficient to overturn factual findings).

3662 **F54** Appeal Brief, paras 1534-1535 *impugning* **E465** Case 002/02 TJ, para. 3961.

3663 **E465** Case 002/02 TJ, fn. 13185.

3664 **E465** Case 002/02 TJ, fn. 13185. *See also* Case 001-**F28** *Duch* AJ, para. 17.

3665 **F54** Appeal Brief, para. 1535.

3666 **E436/1** TC Additional CP Decision, para. 5; **E465** Case 002/02 TJ, para. 43 and the authorities cited therein (parties may propose admission of evidence at any stage and if untimely, may be admitted in the interests of justice). TC noted the relevant trial segment had not yet started.

3667 *See* response to Ground 180. *Contra* **F54** Appeal Brief, para. 1534.

3668 **F54** Appeal Brief, paras 1536-1540 *impugning* **E465** Case 002/02 TJ, para. 3967.

3669 **E465** Case 002/02 TJ, para. 3967.

3670 **E465** Case 002/02 TJ, para. 3967. *Contra* **F54** Appeal Brief, para. 1536.

3671 **E465** Case 002/02 TJ, paras 1176-1178, 1348, 1409-1411, 1688-1689, 2839-2843, 3966-3968.

3672 **F54** Appeal Brief, paras 1539-1540 *impugning* **E465** Case 002/02 TJ, para. 3970.

3673 *See e.g.* **E465** Case 002/02 TJ, paras 3397 ("read in context with the ongoing armed conflict, these instruction refer primarily to Vietnamese armed forces"), 3411, 3413, 3836, 3855 ("references to CIA, KGB and Vietnamese agents must be understood to have served predominantly rhetorical purposes"), 3858

1019. In relation to the TC's assessment of *RF* and *RY* magazines, Appellant fails to substantiate his concerns regarding the TC's use of these documents. He provides no examples showing that the TC did not take the magazines' propagandistic nature into consideration as it said it would,[3674] or that the TC allegedly placed articles about ideological combat on a level with articles evoking military combat.[3675] He also misrepresents the nature of the TC's reliance on the *RF*, claiming that the TC said the "magazines preached that enemies should be eliminated through security centres" when in reality, the TC observed that the *RF* "explained that 1976 and 1977 in particular were marked by purges and the systematic 'smashing' of enemies".[3676] This accurately reflected the contents of the *RF* and was also corroborated by extensive evidence.[3677] Similarly, the TC's finding that the smashing of enemies was widely reported within Party ranks was reasonably based on evidence regarding the distribution and use of the magazines, as well as other evidence.[3678]

1020. Appellant's remaining arguments also fail. He claims that the telegram and reports sent to *Angkar* discredit the TC's finding that the CC and SC monitored the implementation of CPK policies because of the "hidden way" enemies were described in the reports, but many of the documents he impugns contain names or other identifying information on the "enemies" and their alleged offences.[3679] Finally, Appellant's claims regarding the

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(context determines the meaning of the expression "to smash", as it could mean either "to kill" or to eliminate a class mindset).

3674 **F54** Appeal Brief, para. 1541; **E465** Case 002/02 TJ, paras 65, 472, 479, 3747. *See also* **F36** Case 002/01 AJ, para. 304; response to Grounds 29, 193.

3675 **F54** Appeal Brief, para. 1541.

3676 **F54** Appeal Brief, para. 1541 *impugning* **E465** Case 002/02 TJ, paras 3958-3959.

3677 *See e.g.* **E465** Case 002/02 TJ, paras 1893, 1896, 1899, 1929-1931, 1941, 1945, 1953, 2013-2014, 2017, 2069, 2072, 2204-2206, 2223-2224, 2233, 2241, 2243, 2264, 2266-2271, 2273-2279, 2281-2284, 2286, 2289-2292, 2295-2300, 2302-2303, 2307, 2318, 2332, 2543-2544, 2546-2551, 2578, 2715, 2885-2886, 2898-2900, 3048-3049, 3054, 3056-3058, 3060-3062.

3678 *See e.g.* **E465** Case 002/02 TJ, paras 466 (radio programs reported on matters such as arrests and perceived enemies), 474-475 (distribution of *RF* and *RY* magazines within the CPK), 477 (*RF* and *RY* were used for educational purposes at CPK political study or training sessions), 1904 (the arrest of Div. 310 Commander Oeun was announced at meetings in Phnom Penh where both his and Koy Thuon's audio-recorded confessions were broadcast), 1918-1919, 1924, 2054 ("Sao Phim's body was paraded around to show that he was dead and that the accusations that he was a traitor were true."), 2235, 3962-3965.

3679 **F54** Appeal Brief, para. 1542 *impugning* **E465** Case 002/02 TJ, para. 3964. *See e.g.* **E3/1179** DK Telegram from M-560, 8 June 1977, EN 00583917-18 (naming A Sok, a former architect in Phnom Penh, who placed wood in concrete; A Chhuon, a base person who "stirred up" 15 people to escape to Thailand; A Pech, who confessed (after being shot and interrogated) to stealing weapons to flee into Thailand; eight people in Au Chreou District attempting to escape to Thailand; four 17 April People living in Sangkat Phkoam who ran away; a "mentally disordered" boy who attempted to steal weapons for his 6-person network and was executed for his crime; 25 escapees in Sector 6; a traitor named A Ruos was smashed); **E3/1144** DK Telegram from Kang Chap alias Se to Committee 870, 6 Sept. 1977, EN 00517923-24 (enemies at the bases, offices, ministries and military offices who were burrowing from within either through spying or anti-revolution activities were purged, including former officials, policemen, and soldiers of the previous regime); **E3/952** DK Telegram from Ke Pauk to "respected Brother Pol", 2 April 1976, EN 00182658

change in strategy between 1966 and the start of hostilities in 1967 merely offer alternative explanations of the facts and concede that the TC's finding was reasonable.[3680]

Ground 180: Existence of the Policy of MOP; The Objective of the Cooperatives [3681]

1021. **Ground 180 should be dismissed as Appellant fails to establish that the TC erroneously used out-of-scope evidence in order to characterise the policy of creating and operating the cooperatives and worksites as criminal.**

1022. The TC concluded, after a holistic review of the evidence, that "control" and "capture the people" was an "important *strategic line*" of the CPK.[3682] This strategy involved moving people *en masse* to the cooperatives (i.e. capturing the people) where the Party could exert maximum control in order to harness manpower most efficiently and thereby rapidly achieve the Party's ambitious construction and production goals.[3683]

1023. The existence of this strategy is based on extensive corroborating evidence. This includes evidence the Party began implementing the strategy in 1973 in areas under CPK control, moving people to cooperatives in order to increase agricultural production both before and during the regime.[3684] It includes evidence showing the CPK's absolute control over every aspect of life in cooperatives and worksites.[3685] It also includes the Party's use of speeches, training sessions, and CPK publications to emphasise the need to work hard, meet quotas, and achieve the Party's plan.[3686] These efforts were intended to indoctrinate

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(former soldiers working with Cham and former cooperative team chairmen made anti-Revolution propaganda and destroyed crops).

3680 **F54** Appeal Brief, para. 1523 (conceding "*another* reasonable finding was possible, *not just* that of the revolutionary movement's intrinsic violence" (emphasis added)); Case 001-**F28** *Duch* AJ, para. 17 (Appellant must show that no reasonable trier of fact could have found as the TC did).

3681 Ground 180: **F54** Appeal Brief, *Existence of the Policy of MOP; The Objective of the Cooperatives*, paras 1489-1493; **F54.1.1** Appeal Brief Annex A, p. 62 (EN), p. 57 (FR), p. 89 (KH).

3682 **E465** Case 002/02 TJ, para. 3877 (emphasis added) *citing, inter alia,* **E3/748** *Revolutionary Flag*, Oct.-Nov. 1975, EN 00495803. *Contra* **F54** Appeal Brief, para. 1491 stating that "the Chamber has invented a new policy that it named 'Control' and 'Capture the people'".

3683 *See e.g.* **E465** Case 002/02 TJ, paras 276, 940, 969, 983 (more than two million people were absorbed into the cooperatives), 1023 (food was used as a means to control the people and cooperatives were structured to exert control), 3877 (Appellant confirmed that the pre-1975 cooperatives allowed the CPK to control the people), 3883 (population centres were emptied), 3885 (methodically organising people into cooperatives would increase productivity), 3887 (the SC noted that the role of cooperatives was "to absorb all the NP coming out of all the cities and towns"), 3889 (the Party's intentions for production, emphasising speed), 3890 (manpower was the Party's only form of capital and required strategic allocation), 3892 (manpower would be organised for consecutive projects; once cooperatives were properly expanded to provide manpower, they could avoid further population movements), 3893, 3900-3903, 3908, 3915-3917.

3684 *See e.g.* **E465** Case 002/02 TJ, paras 236-243. *See particularly* para. 243 regarding the relocation of people to cooperatives, which at that time was done in order to distance the population from Lon Nol forces.

3685 *See* response to Grounds 181, 183.

3686 *See e.g.* **E465** Case 002/02 TJ, paras 466, 979, 1221, 1276, 1289, 1295, 1479, 1485, 1504, 1506-1507, 1517, 1556-1557, 1761, 3739, 3889, 3916, 3926, 4214.

the masses in a revolutionary mindset that was singularly focused on rapid production.

1024. Appellant misstates, ignores, or misrepresents the relevant law and/or the TC's findings to challenge the TC's conclusions on this strategy. First, Appellant wrongly claims that the TC erred in law by citing temporally out-of-scope evidence to establish the motives behind the MOPs and to conclude that there was a plan to "control and capture the people".[3687] Jurisprudence firmly establishes that evidence outside the Indictment period may be used to clarify context, inferentially establish elements of criminal conduct such as intent that occurred during the Indictment period, or demonstrate a deliberate pattern of conduct.[3688] The TC correctly limited its use of the pre-1975 evidence to these permissible purposes.[3689] Second, he wrongly states the TC invented a new policy but fails to point to any finding in which the TC articulated "control and capture" as an actual policy rather than a strategic line.[3690] Third, he accuses the TC of distorting the objective of the cooperatives to conclude they were criminal.[3691] Not only does he misapprehend the basis on which the TC found the policy was criminal,[3692] but a fair reading of the Judgment shows that rather than a distortion, the TC's use of "control" and "capture the people" merely reflected recurring language used by CPK leaders, including Appellant himself.[3693]

1025. Appellant also misapprehends the *saisine* of Case 002/02, wrongly contending that MOPs were excluded in their entirety and therefore the TC erred in law and fact by citing MOP evidence that occurred after the fall of Phnom Penh.[3694] However, the TC properly

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3687 **F54** Appeal Brief, para. 1489.

3688 *See e.g.* **F36** Case 002/01 AJ, para. 236; **E313** Case 002/01 TJ, fn. 195; *Nahimana* AJ, para. 315; *Prlić* Decision on JCE Time Frame, p. 9; *Taylor* TJ, para. 101; *Lubanga* TJ, paras 1022-1024, 1027, 1352. *See also* response to Ground 3.

3689 **E465** Case 002/02 TJ, paras 60, 3877-3883. *See e.g.* that the TC states "In *a pattern of conduct* that continued after the fall of Phnom Penh" when discussing the MOP evidence in para. 3883 (emphasis added).

3690 **F54** Appeal Brief, para. 1491 *impugning* **E465** Case 002/02 TJ, Section 16.4.1. Indeed, the findings in the Section he impugns consistently and correctly identify the policy as a policy to "establish and operate cooperatives and worksites" as defined in **D427** Closing Order, para. 157. *See e.g.* **E465** Case 002/02 TJ, paras 3866-3867, 3918-3919, 3928 *contrasted with* para. 3877 ("an important strategic line of the revolution").

3691 **F54** Appeal Brief, para. 1491.

3692 *See* response to Grounds 181, 183. Similarly, Appellant's allegation disputing discrimination against the Cham is shown elsewhere in this Response to be without merit and is discussed in response to Ground 141 where he particularised his arguments. *Contra* **F54** Appeal Brief, paras 1492-1493.

3693 *See e.g.* **E465** Case 002/02 TJ, paras 3877-3878, 3894, 3898.

3694 **F54** Appeal Brief, paras 1489, 1491 *impugning* **E465** Case 002/02 TJ, paras 3867, 3883, 3916, 3918-3929. The Co-Prosecutors have addressed elsewhere that, contrary to Appellant's view, the *saisine* of Case 002/02 included the Phase Two MOP of the Cham (*see* response to Ground 82).

adhered to the parameters of the Additional Severance Decision,[3695] expressly stating that it was relying on MOP evidence only to analyse ideological policy objectives, while its consideration of factual evidence of MOP *implementation* would be limited to the Cham.[3696] This approach aligned with the SCC's view that the five CPK policies were not mutually exclusive to either case.[3697] It also aligned with the IRs, which provide that where the scope of a trial has been reduced, evidence relating to excluded facts may be relied upon if relevant to the remaining facts.[3698] The TC was squarely within its *saisine* when it relied upon MOP evidence to prove "remaining facts" relevant to the CPK's policy to establish and operate cooperatives and worksites to achieve the common purpose.

Grounds 181, 183: Erroneous findings about CPK policy and Errors concerning the criminal nature of the policy[3699]

1026. **Grounds 181 and 183 should be dismissed as Appellant fails to establish that the TC erred in law or in fact (i) in finding that the policy to establish and operate the cooperatives and worksites involved the commission of crimes which were encompassed by the common purpose, or (ii) in its holistic assessment of the policy.**

1027. The establishment and operation of cooperatives and worksites were key components of the CPK's objective, pursuant to the common purpose, to rapidly implement socialist revolution in Cambodia through a "great leap forward", as the cooperatives and worksites served multiple purposes. First and foremost, they were the driving force behind building the economic infrastructure to provide food for internal consumption and for export to generate capital.[3700] They were also seen as a means to destroy the social class system, forcing former city-dwellers to become worker-peasants and replacing private ownership

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3695 **E301/9/1.1** Case 002/02 TC Additional Severance and Scope Annex, p. 1 (expressly specifying that, *inter alia*, **D427** Closing Order, paras 156-159, 160-163, 165, 167, 168-177 were all within the Scope of Case 002/02).

3696 **E465** Case 002/02 TJ, para. 3867 (emphasis added).

3697 **F36** Case 002/01 AJ, para. 227. *See also* **E301/9/1** TC Additional Severance and Scope Decision, para. 42 (*noting* that JCE policy evidence may not have been fully examined in Case 002/01 due to the limited scope of that trial and may be relevant in the context of Case 002/02).

3698 IR 89*quater*(3).

3699 Ground 181: **F54** Appeal Brief, *Erroneous findings about CPK policy*, paras 1494-1510; **F54.1.1** Appeal Brief Annex A, p. 63 (EN), pp. 57-58 (FR), p. 89 (KH). *Note* Appellant mentions alleged errors associated with his participation in the B-5 meeting of April 1975 (*see* para. 1494) but does not substantiate them in this section. *See* response to Ground 199; Ground 183: **F54** Appeal Brief, *Errors concerning the criminal nature of the policy*, paras 1518-1522; **F54.1.1** Appeal Brief Annex A, p. 63 (EN), p. 58 (FR), p. 90 (KH).

3700 *See e.g.* **E465** Case 002/02 TJ, paras 240, 940, 968-971, 975, 1448-1450, 3737, 3739, 3741, 3743, 3873, 3884-3885, 3889-3890, 3892-3893, 3918.

with collectivisation.[3701] Moreover, the CPK used the controlled structure of the sites to root out "enemies" by requiring people to regularly complete biographies and monitoring them for counter-revolutionary behaviour, which resulted in disappearances and killings.[3702] The KCA worksite was distinctive from the other sites in that it was intended to strengthen the country's military infrastructure while also refashioning and tempering "bad elements" from the RAK through hard labour.[3703]

1028. A wealth of evidence on the Case File established a clear picture of life and work conditions in these locations. Norodom Sihanouk compared them to "concentration camps" after visiting the countryside with Appellant in late 1975-early 1976,[3704] which accurately reflected the CPK's absolute control over every aspect of life for the people in their charge. Singularly focused on rapidly meeting the leadership's production goals no matter the cost, CPK cadres forced the people to work long hours doing arduous labour under abysmal conditions.[3705] Those who failed to meet the Party's ambitious production quotas or did "not work hard enough" were punished.[3706] The people suffered and perished from exhaustion, woefully meagre rations, inadequate medical care, a lack of basic hygiene, and substandard accommodations.[3707] Families were separated and often not allowed to see each other.[3708] The CPK's iron grip extended to every facet of life, even dictating what and where people could eat, where they could go, how they should dress and when spouses could meet.[3709]

1029. After a comprehensive review of the evidence, the TC found that the policy to establish

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3701 *See e.g.* **E465** Case 002/02 TJ, paras 241, 276, 279, 940, 981, 986-987, 3874, 3876, 3894, 3896.

3702 *See e.g.* **E465** Case 002/02 TJ, paras 959-961, 964, 997, 1005, 1028, 1031-1032, 1055, 1070-1080, 1117, 1121-1123, 1150, 1152, 1175, 1198, 1201-1203, 1335-1339, 1345, 1353-1356, 1359-1371, 1407, 1409-1410, 1424-1426, 1538, 1542-1551, 1561-1567, 1572, 1574, 1576, 1580, 1644-1648, 1660-1663, 1682, 1768, 1770, 1771-1778, 3898.

3703 *See e.g.* **E465** Case 002/02 TJ, paras 1723, 1731-1735 ("bad elements" included people perceived to have any affiliation with the former regime, the Vietnamese, or leaders arrested as traitors), 1741, 1756 ("bad elements" included people with bad backgrounds, namely, people from the East Zone), 1761, 1811, 1821-1824 (soldiers sent to KCA were "clearly identified as enemies due to their real or perceived political beliefs or opposition to the CPK").

3704 **E465** Case 002/02 TJ, para. 4265 *citing* **E3/113R** *Jungle War*, EN V00172509, 00:29:32-00:30:26.

3705 *See e.g.* **E465** Case 002/02 TJ, paras 279, 1018-1020, 1145, 1196-1198, 1270-1290, 1296, 1399, 1415-1416, 1504, 1511-1519, 1524-1529, 1535, 1606, 1616, 1618, 1627-1628, 1737, 1739, 1742, 1745, 1755-1757, 1761, 3905-3914.

3706 *See e.g.* **E465** Case 002/02 TJ, paras 1023, 1291-1295, 1332, 1372, 1532-1541, 1552, 1555, 1558, 1562, 1744, 1746.

3707 *See e.g.* **E465** Case 002/02 TJ, paras 1011-1016, 1020, 1037, 1043-1047, 1050, 1142, 1145, 1195-1197, 1231, 1297-1298, 1300-1306, 1308-1310, 1320-1329, 1375-1376, 1384, 1415-1416, 1585-1610, 1624-1626, 1680-1681, 1747-1754, 1758, 3908.

3708 *See e.g.* **E465** Case 002/02 TJ, paras 1033-1039, 1151, 1611, 1614, 1679.

3709 *See e.g.* **E465** Case 002/02 TJ, paras 1006, 1008-1009, 1024, 1033, 1035, 1150-1151, 1302-1306, 1311, 1330-1331, 1333-1334, 1398, 1544, 1593, 1600-1601, 1616-1623, 1679, 1769.

and operate cooperatives and worksites was intrinsically linked to the common purpose and involved the commission of crimes as a means of achieving that purpose, thereby rendering it criminal in character.[3710] These crimes, which were encompassed by the common purpose as the means by which the objective would be achieved, included murder, enslavement, persecution on political grounds, and OIA through attacks against human dignity and enforced disappearances.[3711] The evidence established that these crimes were committed at cooperatives and worksites in such a widespread and systematic manner that it could only be explained by the implementation of a national policy disseminated at the highest levels.[3712] All of these findings were based on extensive evidence that included the testimony and statements of numerous witnesses and former CPK cadres; contemporaneous documents such as meeting minutes and reports discussing production, conditions, and shortages; and speeches and Party propaganda that relentlessly pushed the people to work harder and produce more.[3713]

The TC correctly found that the cooperatives policy involved the commission of crimes which were encompassed by the common purpose (Ground 183)

1030. Appellant erroneously argues that, because the cooperatives policy had motives such as achieving food self-sufficiency (through collectivism), the TC erred in finding it criminal.[3714] To be clear, and as already demonstrated, the TC agreed that the primary objective of the socialist revolution was not criminal in nature.[3715] The common purpose was not one that *amounted to* the commission of the crimes charged, but one that *involved* the commission of numerous crimes, which thereby rendered the common purpose criminal in character.[3716] This finding was supported by extensive evidence.[3717] At the TK Cooperatives, 1JD, and TTD, the population was enslaved to help meet the Party's economic goals,[3718] while at KCA, workers were enslaved to assist the DK's military strategy through the construction of an airfield.[3719] At each location, workers were

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3710 **E465** Case 002/02 TJ, paras 3919, 3928.
3711 *See e.g.* **E465** Case 002/02 TJ, paras 1145, 1155, 1179, 1199, 1204, 1378-1380, 1390, 1402, 1413, 1421, 1429, 1666, 1673, 1684, 1692, 1707, 1712, 1806, 1817, 1828, 1837, 1846, 3919-3928.
3712 *See e.g.* **E465** Case 002/02 TJ, paras 317, 319, 321-322, 3929, 4081.
3713 *See e.g.* **E465** Case 002/02 TJ, paras 817-825, 902, 952, 1012-1013, 1208-1218, 1238-1253, 1256, 1285, 1306-1307, 1438-1444, 1472-1480, 1488, 1495, 1505-1509, 1517, 1530-1531, 1552-1560, 1631-1640, 1717-1720, 3889, 3899-3902, 3904-3907, 3911-3914, 3916.
3714 **F54** Appeal Brief, paras 1520-1522 (arguing the objective did not "imply" crimes).
3715 **E465** Case 002/02 TJ, para. 3743. *See also* response to Ground 178.
3716 **E465** Case 002/02 TJ, para. 3919.
3717 *See* the introduction in response to Grounds 181, 183.
3718 **E465** Case 002/02 TJ, para. 3922.
3719 **E465** Case 002/02 TJ, para. 3923.

subjected to "inadequate food rations" and "hazardous working practices" that were deemed essential to the CPK authorities' exercise of control over the workers and the implementation of revolutionary objectives despite leading to "rampant overexertion, emaciation, malnutrition, disease and death".[3720] Absolute control over these sites further enabled the CPK to isolate, identify, and destroy its enemies.[3721] Indeed, at each location, those who disappeared had been identified as enemies by CPK cadres,[3722] and at TTD and 1JD, enemies were executed.[3723] Considering the scale and duration of the atrocities committed to implement the policy, the TC reasonably found that the professed benign aim to improve living conditions was not substantiated by the evidence.[3724] Appellant's repetition of unsuccessful arguments[3725] and reinterpretation of evidence that the TC considered at length do not demonstrate error.[3726]

The TC's findings on the CPK cooperatives policy are properly based on a holistic assessment of the evidence (Ground 181)

1031. Appellant wrongly alleges that the TC hid the fact that the CPK issued instructions to cooperative leaders to improve the conditions of the people and thereby presented only incriminating evidence in its assessment of the cooperatives policy.[3727] This claim is patently false, as the TC explicitly acknowledged that according to the Party, improving living standards and the people's livelihood was "inextricably linked to the rapid and ongoing fulfilment of economic targets", and it found there was some evidence of the Party Centre's intention "to keep the labour force healthy".[3728] Moreover, the Judgment made numerous references to CPK documents discussing the Party's goal to improve the

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3720 **E465** Case 002/02 TJ, para. 3926.

3721 As discussed in the introduction in response to Grounds 181, 183.

3722 **E465** Case 002/02 TJ, para. 3927.

3723 **E465** Case 002/02 TJ, para. 3920.

3724 **E465** Case 002/02 TJ, para. 3929. Appellant's unsubstantiated argument that the mistreatment of the population was not part of the common purpose but was instead attributable to "slippages" such as incompetence, bad management, and "authoritarian spirals" of authorities at the cooperatives and worksites (*see* **F54** Appeal Brief, paras 1521-1522) would fail for similar reasons as well as for lack of specificity.

3725 **F54** Appeal Brief, para. 1521 ("population mistreatment was not part of the common purpose, […] the aim was rather to improve their conditions, if only to ensure they adhered to the revolutionary project").

3726 Appellant's arguments regarding *saisine* fail as well. The TC was properly seised and the constituent evidence was properly established for all the crimes at the Case 002/02 cooperatives and worksites (*contra* **F54** Appeal Brief, paras 1518-1519). *See* response to Grounds 39, 42-43, 45-47, 59, 63-64, 68, 71-72, 94, 106-107, 114, 118-120. While Appellant references all forms of persecution in this ground of his Brief (*see* para. 1519), the TC only considered persecution on political grounds to be part of the cooperatives policy, whereas the persecution of racial and religious groups fell under the "targeting of specific groups" policy (*see* **E465** Case 002/02 TJ, paras 3924-3925, 3996, 3998, 4005, 4012, 4019-4022).

3727 **F54** Appeal Brief, paras 1501-1504 *impugning* **E465** Case 002/02 TJ, paras 3889-3891, 3893, 3900, 3910-3911, 3998 (should be 3898).

3728 **E465** Case 002/02 TJ, paras 3893, 3913 (*see also* paras 1314, 1316).

people's conditions[3729] and noted Defence submissions in this regard.[3730]

1032. However, the TC's holistic assessment of the evidentiary record showed: that the Party was aware that workers were forced to work irregular hours without rest yet "envisaged work outside of regular hours";[3731] that even in persistent drought and food shortages, all available manpower was pushed to achieve and, where possible, surpass, the Party's economic targets;[3732] and that the Party Centre was kept fully informed of the living conditions and food shortages but repeatedly failed to respond adequately, instead exporting large quantities of rice to generate capital.[3733] From such evidence, the claim that cooperatives and worksites were established to ameliorate living conditions was reasonably found to be unsubstantiated.[3734] Appellant shows no error.

The TC reasonably found that imposed quotas led to inhumane working conditions (Ground 181)

1033. Appellant also wrongly claims the TC erroneously concluded that rice exports and quotas were "set under a policy that did not care for the population", allegedly disregarding evidence that showed agricultural exports were meant to compensate for the lack of products that the population needed.[3735] In fact, the TC considered the economic motivations that drove production in the cooperatives and worksites, finding that "the CPK exported large quantities of rice to generate capital" and noting the materials it received in exchange.[3736] This evidence, however, does not displace the Chamber's evidentially-based findings that the CPK's imposition of production quotas resulted in crimes such as the inhumane working conditions which the Party largely failed to address

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3729 *See e.g.* **E465** Case 002/02 TJ, fns 12470, 12931 (quoting the exact passage from **E3/166** which Appellant claimed in **F54** Appeal Brief, para. 1502, fn. 2833 that the TC *should* have highlighted), 12981 (*see* the evidence cited therein and the TC's note that "Promotion of the revolution as a means of improving living standards and the people's livelihood continued throughout the DK period."), 13039 (quoting a Nuon Chea speech stating that "We must keep up our revolutionary vigilance [...] [to] build our country quickly and improve our people's standards of living."), 13059, 13065 (quoting **E3/2728** and **E3/294** re. solving the people's livelihood and alleviating food shortages), 13067 (quoting **E3/275** as stating that "immediate, actual tasks to fulfil" included producing rice "to the maximum" to help raise the people's living standards as highly and quickly as possible); para. 4265 (referencing a speech by Appellant in which he called on the masses to work collectively in order to increase production and defend the country, guaranteeing that in one or two years, people's livelihood would gradually be improved).

3730 *See e.g.* **E465** Case 002/02 TJ, paras 1148, 1699-1701, 3869-3870, 3929.

3731 **E465** Case 002/02 TJ, paras 3910-3911. *See also* paras 1277, 1284-1287, 1505-1509.

3732 **E465** Case 002/02 TJ, paras 3905-3906 and the evidence cited therein.

3733 **E465** Case 002/02 TJ, paras 3913-3914 and the evidence cited therein.

3734 **E465** Case 002/02 TJ, para. 3929.

3735 **F54** Appeal Brief, para. 1506 *impugning* **E465** Case 002/02 TJ, paras 3901-3908.

3736 **E465** Case 002/02 TJ, para. 3914 (which also notes DK import and export totals; imports included textiles, fuel, medicine, insecticide and machine parts). *See also* **E465** Case 002/02 TJ, paras 619, 968, 1313-1314, 1318, 1454, 1594, 1678, 3901, 3907, 4214, 4266.

because of its emphasis on rapid production.[3737]

1034. Appellant also wrongly alleges that the TC ignored evidence that the CPK only intended to export surplus rice.[3738] While several references in the Judgment show the TC *did* consider such evidence,[3739] the actions the Party took were more important than its words. In light of overwhelming evidence that the CPK sent large quantities of rice to other countries despite widespread starvation at home,[3740] Appellant demonstrates no error.

1035. Appellant seems to blame the Party's inadequate provision of food on false reports from the base concealing the shortages, which supposedly denied CPK leaders an accurate view of the situation.[3741] The TC recognised that false reports occurred,[3742] but they were outweighed by evidence that the senior leaders (i) received direct reports discussing food shortages, (ii) visited the sites themselves and observed conditions,[3743] and (iii) acknowledged food shortages.[3744] CPK propaganda also made references to such.[3745] The

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3737 **E465** Case 002/02 TJ, paras 3909-3914; response to Grounds 176, 183. *See also* **E465** Case 002/02 TJ, paras 975-979, 1010-1016, 1020, 1023, 1045, 1047, 1199, 1284-1287, 1300-1301, 1306-1307, 1312-1319, 1323-1324, 1506-1509, 1511-1519, 1530-1536, 1605, 1609-1610, 1633-1634, 1640, 1671, 1705, 1745-1746, 1754. *See further* response to Grounds 88, 90, 101, 113, 115-117, 123.

3738 **F54** Appeal Brief, para. 1507.

3739 *See e.g.* **E465** Case 002/02 TJ, para. 1452 (referencing a speech in which Nuon Chea announced "we have a surplus of more than 150,000 tons of rice for export"), fns 1952 (referencing Appellant's testimony "referring to the export of excess rice to friendly countries in exchange for agricultural products" and "referring to the exchange of surplus agricultural production in exchange for medicine"), 3209 (referencing Phneou Yav's evidence that rice paddy was stored at the commune and surplus rice was sent to the upper echelon), 4978 (referencing the Sept. 1977 issue of RF, which reported that they had "enough food" for the people and were able to export "tens of thousands of tons of rice" to accumulate capital).

3740 *See e.g.* **E465** Case 002/02 TJ, paras 1010-1013, 1047, 1142, 1195, 1199, 1301, 1448-1454, 1586-1595, 1636-1640, 1678, 1681, 1953, 3900, 3907, 3913-3914, 4276.

3741 **F54** Appeal Brief, paras 1507-1509. Appellant further claims the TC erred in finding that "CPK leaders were informed of everything that happened in the cooperatives" (*see* **F54** Appeal Brief, para. 1508). This misrepresents the finding, which merely stated that construction and production updates were "regularly communicated to the Party Centre by zone authorities" (*see* **E465** Case 002/02 TJ, para. 3899).

3742 *See e.g.* **E465** Case 002/02 TJ, paras 1010 (TK communes misreported rice yields to retain more rice for themselves), 1216-1217, 1251-1252 (deceitful reports), 1260 (only healthy workers were allowed to stand close to TTD visitors), 1496, 1636-1637. Appellant disputes the TC's reliance on Meas Voeun to find Appellant knew of conditions in the cooperatives (*see* **F54** Appeal Brief, para. 1509), but *see* response to Ground 211.

3743 *See e.g.* **E465** Case 002/02 TJ, paras 955, 1238-1259, 1486-1497, 1631, 1633-1635, 1640, 1671, 1705-1706, 3912-3913 and the evidence cited therein; **E3/2041** Report from Commerce Committee to Brother Hem, 1 Nov. 1976, EN 00334994 (noting that Kampuchean people were facing a "food shortage" that year).

3744 **E465** Case 002/02 TJ, para. 3900 and the evidence cited therein. *See also* **E3/232** SC Meeting Minutes, 8 Mar. 1976, EN 00182633 (stating they must be careful about rations in August and September "when there are many shortages" as shortages "will impact their health and labor strength"); **E3/223** SC Meeting Minutes, 17 May 1976, EN 00182710 (reporting Pol Pot's conclusion that the policy still included solving the "food issue"); **E3/294** FBIS, *Conclusion of Pol Pot Speech at 27 Sep Phnom Penh Meeting*, 29 Sept. 1978, EN 00170165 (Pol Pot notes a "food problem" throughout 1975-1977); **E3/781** Governing and carrying out policy and restoring all fields of the country, Sept. 1975, EN 00523590.

3745 *See e.g.* **E465** Case 002/02 TJ, para. 3906, fn. 13023 *citing* **E3/135** *Revolutionary Flag*, June 1977, EN 00446863 (noting food shortages and that the diet of some workers during the rainy season "may in some locations be somewhat poor, leading the people to be a little weak"); **E3/170** *Revolutionary Flag*, Oct.-

TC, therefore, reasonably concluded that CPK senior leaders were apprised of these shortages during the DK regime.[3746]

The TC accurately represented CPK documents concerning the cooperatives (Ground 181)

1036. Appellant fails to show that the TC misrepresented CPK documents concerning the cooperatives to support discrimination against NP, or that it ignored exculpatory evidence that justified the policy and demonstrated the CPK's "constant concern for the population".[3747] Appellant disregards relevant factual findings, focusing on singular pieces of evidence without articulating how any of the passages he cites overcome the entirety of the evidentiary record upon which the TC relied to reach its findings. Appellant's selective review of the evidence merely asserts that the TC failed to interpret the evidence in the manner he prefers. He fails to prove that the TC's findings on the CPK cooperatives policy were ones that no reasonable trier of fact could have reached or that they constituted bias.[3748]

1037. For example, in contrast with the TC's extensive analysis of the cooperatives policy, Appellant selects three passages from documents considered by the TC.[3749] With the first, he contends that the TC showed bias by deliberately ignoring the document's mention of the catastrophic shortages that justified putting everyone to work.[3750] Even if benign motives existed, Appellant seems to confuse motive, which is not an element *of* nor a defence *to* JCE liability, with intent.[3751] As already discussed, it is the crimes committed to implement the policy, such as the enslavement of workers, that underpin Appellant's criminal responsibility in this case. The TC's failure to mention a passage discussing benign motives in one document shows neither bias nor error.[3752] The second document cited by Appellant fails to demonstrate any misunderstanding on the part of the TC regarding the use of the word "enemies", as the TC clearly noted that the impugned

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Nov. 1977, EN 00182553 (acknowledging some 1976 food shortages), 00182558 (stating "it was normal for the people to suffer shortages" in 1975-1977 and "will be normal when they suffer shortages in 1978").

3746 **E465** Case 002/02 TJ, para. 3913.

3747 **F54** Appeal Brief, paras 1494-1495.

3748 *Contra* **F54** Appeal Brief, para. 1510.

3749 **F54** Appeal Brief, fns 2821, 2823, 2829.

3750 **F54** Appeal Brief, para. 1496 *citing* **E465** Case 002/02 TJ, para. 3885 which, in turn, cites **E3/729** *Revolutionary Flag*, Oct. 1975, EN 00357903.

3751 *See e.g.* **E465** Case 002/02 TJ, paras 748-749 (in which Appellant submitted that specific acts were not committed with the requisite intent because the aim was to create families (a benign motive) and the TC noted he appeared to be confusing motive with intent), 3708-3712 (JCE elements, common purpose).

3752 Appellant's claim that "the Chamber completely underestimated CPK objectives in founding [the cooperatives]" fails for the same reason. *See* **F54** Appeal Brief, para. 1499.

document referred to the Party's pre-1975 achievements.[3753] Appellant offers no further explanation as to why the ample evidence upon which the TC based its findings on the treatment of "enemies" in cooperatives during the DK regime[3754] should be disregarded.

1038. The third document also fails to demonstrate any error. Appellant merely asserts that the TC erred in fact by failing to interpret the evidence in a particular manner and cherry-picks a single sentence in a single document, complaining about the order of its placement in the Judgment.[3755] The Judgment paragraph he impugns, however, makes no finding about adverse treatment of the NP: it simply states that the CPK claimed that class distinctions had been dissolved and all economic activities were being carried out by "the worker-peasant class".[3756] Despite this claim of unity, the distinction between BP and NP remained, and the TC's later finding that NP were generally distrusted and at greater risk of being branded enemies was supported by extensive evidence.[3757] Appellant's undeveloped assertion fails to show such a finding was unreasonable.

1039. Finally, Appellant's contentions regarding the TC's use of Ben Kiernan's book and Appellant's thesis, as well as the *saisine* of cooperatives beyond TK district, as already demonstrated elsewhere in this Response, are without merit.[3758] His unsubstantiated complaint about the TC's use of written statements with low probative value does not

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3753 *Contra* **F54** Appeal Brief, para. 1497; **E465** Case 002/02 TJ, fn. 12933. Moreover, the TC was open to consider this evidence in demonstrating a deliberate pattern of conduct, *see* response to Ground 3.

3754 *See e.g.* **E465** Case 002/02 TJ, para. 3848 (NP were generally distrusted and therefore at risk of being branded enemies more quickly than BP, but there were some indications there was not an "outright target" on NP"), 3887 (the SC cautions of the need for vigilance in the cooperatives that had absorbed all the NP, including "contemptibles" and "no-good elements"), 3896, 3898 (enemies continued their activities in the cooperatives), 3908 ("various oppressor classes" had "seized power" in some cooperatives).

3755 **F54** Appeal Brief, para. 1500 *citing* **E3/99** Policy Document No. 6, 22 Sept. 1975, EN 00244274-75.

3756 **E465** Case 002/02 TJ, para. 3894. *Contra* **F54** Appeal Brief, para. 1500 (stating the TC considered that "the distinction between BP and NP meant that NP were designed to be less well treated than BP").

3757 **E465** Case 002/02 TJ, para. 3848. *See e.g.* **TK Cooperatives: E465** Case 002/02 TJ, paras 1007 (the district instructed the communes that NP were the enemy and not as valuable as BP, who were instructed to watch over them), 1016 (NP generally received less food), 1080 (NP were more susceptible to arrests), 1171, 1177; *see further* response to Ground 107 (political persecution of NP in the TK Cooperatives). **TTD worksite: E465** Case 002/02 TJ, paras 1345, 1409 (NP were excluded from occupying any leadership positions which were instead given to the BP, and the BP were to monitor the movements of the NP), 1348 (NP were targeted for arrest and executions); *see further* response to Ground 114 (discriminatory treatment against the NP at TTD worksite). **1JD worksite: E465** Case 002/02 TJ, paras 1649-1653; *see further* response to Grounds 118, 119 (ill-treatment of NP as compared to BP at 1JD worksite). *Note also* that Appellant cites **E3/99** Policy Document No. 6, About governing and carrying out the policy of gathering force of Democratic National Front of party (6th document), 22 Sept. 1975, EN 00244274-75 to demonstrate that the CPK envisaged an alliance between the NP and the BP, but the same document goes on to state that "[The NP's] spiritual and political trends shall be closely monitored" in EN 00244276.

3758 **F54** Appeal Brief, paras 1498-1499. *See* response to Grounds 179 (Ben Kiernan's book), 196, &197 (Appellant's thesis), 3 (use of evidence outside the geographic scope to establish a deliberate pattern of conduct), 39 (*saisine* of TK Cooperatives), 180 (MOP evidence).

meet the appellate standard of review.[3759]

2. SIGNIFICANT CONTRIBUTION

1040. The TC correctly found that Appellant participated in the crimes encompassed by the JCE common purpose, based on the correct articulation of the law and following a holistic assessment of Appellant's roles, functions and conduct, and the compelling underlying evidence.[3760] Appellant's 13 grounds[3761] regarding his contribution to the JCE fail, as they variously advance arguments that lack relevance, repeat those made at trial, are unsubstantiated, or reflect a mere disagreement with the TC's conclusions based on alternative interpretations of the same evidence. In addition, Appellant adopts a flawed piecemeal approach to both the Judgment and the evidence supporting the TC's findings that Appellant significantly contributed to the common purpose.

1041. Moreover, Appellant misrepresents and misapplies much of the relevant law. To prove liability through JCE, Appellant need not have been involved in the design of the common purpose or, contrary to his many assertions, in the commission of specific crimes. As the evidence establishes he did, Appellant need only have contributed to the implementation of the common purpose, which in turn had a direct or indirect effect on the commission of the crimes.[3762] Appellant's contribution may have been in whole or in part by way of omission.[3763] His contribution need not have been a *sine qua non* for the

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3759 **F54** Appeal Brief, para. 1498 *impugning* **E465** Case 002/02 TJ, para. 3915. *See also* Standard of Review (Errors of Fact).

3760 **E465** Case 002/02 TJ, paras 4306 ("As the face of DK, Khieu Samphan supported and promoted the common purpose, end encouraged, incited and legitimised its implementation through criminal policies. He further instructed cadres on their implementation while enabling and controlling the same. Accordingly, the Chamber finds that Khieu Samphan made a significant contribution to the commission of crimes perpetrated by CPK cadres"), 4203 ("The assessment of Khieu Samphan's criminal responsibility will rest on the Chamber's assessment of his roles, functions and conduct [...] In evaluating the extent of his [...] contribution to the commission of crimes [...], the Chamber will consider the totality of Khieu Samphan's statements and conduct including, where appropriate, statements made after the fall of the DK"), 4257-4278 (details how Appellant, in his various roles, functions and conduct, supported and promoted the common purpose and encouraged, incited, legitimised, instructed on, enabled and controlled its implementation through its policies).

3761 Grounds 182, 192, 198, 199, 204, 222, 224, 226-231.

3762 **F36** Case 002/01 AJ, paras 983-985; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 38; *Tadić* AJ, paras 227, 229; *Prlić* AJ, paras 1410, 1880, 1882, 1982, 1988; *Sesay* AJ, para. 611

3763 *Kvočka* AJ, paras 187, 421. Contrary to the TC's holding (**E465** Case 002/02 TJ, paras 3703, 3710), the Co-Prosecutors submit that when establishing an accused's participation in a JCE through his failure to act, the existence of a legal duty to act deriving from a rule of criminal law is *not* required (*see e.g. Prlić* AJ, paras 1394, 1488, 2080; *Stanišić & Župljanin* AJ, para. 110). The question is simply whether, as a matter of evidence, a failure to act made a significant contribution to the commission of crimes. A failure to prevent the recurrence of crimes has been taken into account where the accused had some power and influence or authority over the perpetrators sufficient to prevent or halt the abuses but failed to exercise that power (*Prlić* AJ, paras 1487, 1530).

commission of any crime nor have constituted a *substantial* contribution;[3764] it must, however, have been significant, as it was proven to be.[3765] This significance was rightly determined herein on a case-by-case basis by considering various factors, including: the size, seriousness and scope of the common plan and crimes committed; Appellant's *de jure* or *de facto* position(s); the level and efficiency of his participation; any relevant public comments made by him; and any efforts to prevent crimes.[3766]

Ground 226: Errors with respect to Khieu Samphan's contribution[3767]

1042. **Ground 226 should be dismissed as Appellant fails to show that the TC erred in law or in fact in finding that his significant contribution to the common purpose, as a necessary element of the *actus reus* of the JCE, was established.**

1043. First, Appellant's claim that the TC based its finding regarding his support for the criminal aspects of the policies due to his association with members of the SC[3768] is a gross misrepresentation of the Judgment, which ignores the TC's extensive findings on Appellant's significant contributions to the common purpose.[3769] Certainly, his unique relationship within the CPK, including his associations, gave him the platform, authority and knowledge to significantly contribute; however, it is through his voluntary conduct that he did significantly contribute. As the TC rightly found, Appellant contributed to the common purpose by "personally enabl[ing] and control[ing] its implementation through

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3764 Case-001-E188 *Duch* TJ, para. 508; **E313** Case 002/01 TJ, para. 692; **F36** Case 002/01 AJ, paras 810, 980; *Kvočka* AJ, para. 98; *Sesay* AJ, para. 401; *Brđanin* AJ, para. 430; *Popović* AJ, para. 1378; *Simba* AJ, para. 303.

3765 **F36** Case 002/01 AJ, para. 980; **E313** Case 002/01 TJ, para. 692; Case-001-**E188** *Duch* TJ, para. 508; **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 38; *Brđanin* AJ, paras 427, 430, 432; *Simba* AJ, para. 303; *Sesay* AJ, para. 611.

3766 **E313** Case 002/01 TJ, para. 693; **F36** Case 002/01 AJ, para. 980; *Kvočka* TJ, paras 292, 311; *Kvočka* AJ, paras 101, 192; *Krstić* TJ, para. 642. The SCC has held (**F36** Case 002/01 AJ, para. 982 *citing Krajišnik* AJ, paras 216-217) the following types of conduct to constitute significant contributions to a JCE: "a) Formulating, initiating, promoting, participating in, and/or encouraging the development and implementation of […] governmental policies intended to advance the objective of the [JCE]; (b) Participating in the establishment, support or maintenance of […] government bodies at the [national], regional, municipal, and local levels […] through which [he] could implement the objective of the [JCE]; (c) Supporting, encouraging, facilitating or participating in the dissemination of information to […] win support for and participation in achieving the objective of the [JCE]; (d) Directing, instigating, encouraging and authorizing […] [f]orces to carry out acts in order to further the objective of the [JCE]; […] (f) Engaging in, supporting or facilitating efforts directed at representatives of the international community, non-governmental organizations and the public denying or providing misleading information about crimes.")

3767 Ground 226: **F54** Appeal Brief, *Errors with Respect to Khieu Samphan's Contribution,* paras 2008-2011; *see also* paras 1604-1615, 1942-1945, 1957-1962, 2001-2003; **F54.1.1** Appeal Brief Annex A, p. 76 (EN), p. 70 (FR), p. 109 (KH).

3768 **F54** Appeal Brief, para. 2008.

3769 **E465** Case 002/02 TJ, paras 4257-4278, 4306.

the various policies",[3770] including by "personally enabl[ing] the smooth functioning of the DK administration to the detriment of its population" through his membership of Office 870,[3771] and by contributing to the purges of cadres.[3772]

1044. The TC further found that Appellant contributed to the common purpose by "actively instruct[ing] on",[3773] "encourag[ing] and incit[ing]"[3774] its implementation through CPK policies, while "using his senior position to legitimise the same".[3775] Appellant "actively propagated the CPK's rhetoric calling for the discriminatory treatment of the Vietnamese in Cambodia",[3776] and personally lectured on the removal of all Vietnamese from Cambodia.[3777] He publicly spoke about the need to "eliminate the Lon Nol regime",[3778] while obscuring the crimes being committed against ex-KR.[3779] He encouraged the fulfilment of the Party's construction and harvest work plans,[3780] "regardless of the cost to workers".[3781] He openly promoted the CPK's population policy,[3782] and instructed ministries to arrange marriages.[3783]

1045. The TC also found that Appellant contributed to the common purpose by "publicly support[ing] it"[3784] and, as a senior leader, "actively, vocally and publicly promot[ing], confirm[ing] and endors[ing] it domestically and on the international stage".[3785] Appellant did this through, *inter alia*, his full-rights membership of the CC, his attendance at Party Congresses, his role as President of the State Presidium, his regular attendance and participation in SC meetings, and his membership of Office 870.[3786] As a senior leader, he "personally perpetuated the Party line by leading indoctrination sessions at mass rallies and re-education seminars".[3787] Appellant "publicly laud[ed] the CPK's successes",[3788] while to the outside world, he "obscured the events inside DK and denied

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3770 **E465** Case 002/02 TJ, para. 4278. *See further* **E465** Case 002/02 TJ, paras 4275-4278.
3771 **E465** Case 002/02 TJ, para. 4276.
3772 **E465** Case 002/02 TJ, para. 4277.
3773 **E465** Case 002/02 TJ, para. 4274. *See further* **E465** Case 002/02 TJ, paras 4271-4274.
3774 **E465** Case 002/02 TJ, para. 4270. *See further* **E465** Case 002/02 TJ, paras 4265-4270.
3775 **E465** Case 002/02 TJ, para. 4270. *See further* **E465** Case 002/02 TJ, paras 4265-4270.
3776 **E465** Case 002/02 TJ, para. 4269.
3777 **E465** Case 002/02 TJ, para. 4271.
3778 **E465** Case 002/02 TJ, para. 4272.
3779 **E465** Case 002/02 TJ, para. 4268.
3780 **E465** Case 002/02 TJ, paras 4265-4268, 4273.
3781 **E465** Case 002/02 TJ, para. 4273.
3782 **E465** Case 002/02 TJ, para. 4268.
3783 **E465** Case 002/02 TJ, para. 4273.
3784 **E465** Case 002/02 TJ, para. 4261. *See further* **E465** Case 002/02 TJ, paras 4257-4261.
3785 **E465** Case 002/02 TJ, para. 4264. *See further* **E465** Case 002/02 TJ, paras 4262-4264.
3786 **E465** Case 002/02 TJ, paras 4257-4261.
3787 **E465** Case 002/02 TJ, para. 4262.
3788 **E465** Case 002/02 TJ, para. 4263.

the perpetration of large-scale crimes".[3789] Appellant has not demonstrated that any of these findings were ones that no reasonable trier of fact could have made.[3790] His patently incorrect claim that the TC failed to "determine a specific action [...] characterising his contribution to the criminal aspects of the common purpose" should thus be dismissed.[3791]

1046. Contrary to Appellant's contentions,[3792] as rejected by the SCC in Case 002/01,[3793] all that is required is that he participated in some significant way in the furtherance of the common purpose,[3794] which in turn had a direct or indirect effect on the commission of the crimes.[3795] Therefore, significant contribution need *not* involve the commission of a specific crime, nor be a *sine qua non* for the commission of any crime.[3796] Given the indirect impact of a significant contribution to the criminal purpose on the commission of crimes, there is no violation of the principle of individual culpability,[3797] nor "a break [in] the link"[3798] between an accused and the crimes, as Appellant alleges.

1047. Moreover, the fact that the ultimate objective of the common purpose is non-criminal is irrelevant,[3799] since the TC demonstrated that the purpose *involved* the commission of crimes.[3800] While rapidly implementing a socialist revolution in Cambodia through a "great leap forward" does not have as its primary objective the commission of crimes, as such,[3801] the TC found that its successful implementation was contingent upon the execution of five criminal policies.[3802] Thus, the TC properly connected Appellant's acts to the commission of the crimes by assessing his support and promotion of the common

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3789 **E465** Case 002/02 TJ, para. 4277.
3790 *See* response to Grounds 227-231.
3791 **F54** Appeal Brief, para. 2008.
3792 **F54** Appeal Brief, paras 1604-1615, 1943-1945, 1960-1962, 2002-2003, 2008-2011 (Appellant contends that contributions made solely to the execution of an allegedly non-criminal common purpose lack the necessary causal link to the commission of crimes), *impugning* **E465** Case 002/02 TJ, paras 3710, 4255-4256.
3793 **F36** Case 002/01 AJ, paras 976-985.
3794 **D97/14/15** & **D97/15/9** & **D97/16/10** & **D97/17/6** PTC JCE Decision, para. 38; Case 001-**E188** *Duch* TJ, para. 508; **E313** Case 002/01 TJ, para. 693; *Tadić* AJ, para. 229(iii); *Brđanin* AJ, para. 427; *Popović* AJ, para. 1378; *Krajišnik* AJ, para. 218; *Simba* AJ, para. 250; *Sesay* AJ, paras 611, 1034.
3795 **F36** Case 002/01 AJ, paras 983-984 (As the SCC explained, at para. 984, that "even activities that are on their face unrelated to the commission of crimes may be taken into account when determining whether the accused made a significant contribution", as they may "further and support the commission of crimes, if only indirectly").
3796 **E465** Case 002/02 TJ, para. 3710, fns 12364-12365.
3797 **F54** Appeal Brief, paras 1604-1615, 1942-1945.
3798 **F54** Appeal Brief, para. 1945.
3799 *Contra* **F54** Appeal Brief, paras 1942, 1960, 1962, 2002, 2010-2011.
3800 **E465** Case 002/02 TJ, paras 3928, 3987, 3998, 4012, 4022, 4061, 4067, 4256. *See further* response to Grounds 189, 175, 176, 177 & 224.
3801 **E465** Case 002/02 TJ, para. 3743.
3802 **E465** Case 002/02 TJ, para. 3728. *See also* response to Ground 178.

purpose[3803] and his contribution to its implementation.[3804]

1048. Appellant's arguments contesting the TC finding that a contribution may be made through culpable omission[3805] must likewise fail. Appellant does not identify that the TC relied on any omission in its findings on JCE, and thus, fails to demonstrate how the alleged error had any impact on the verdict.[3806] In any event, Appellant fails to demonstrate that the TC erred in finding that participation in a JCE may be by culpable omission.[3807] In fact, it has been recognised since the post-World War II period that international criminal law recognises liability by omission.[3808] The jurisprudence from the *ad hoc* tribunals later confirmed that an accused could be liable for JCE through "an act *or an omission* which contributes to the common criminal purpose".[3809]

Grounds 227, 228, 229, 230, 231: Supporting and promoting the common purpose and its policies; encouraging, inciting and legitimising the implementation of the common purpose; instructing, enabling and controlling its implementation[3810]

1049. **Grounds 227-231 should be dismissed as Appellant fails to establish that the TC erred in fact by finding that Appellant: (i) publicly supported the common purpose throughout the DK period (Ground 227); (ii) as a senior leader, actively, vocally and publicly promoted, confirmed and endorsed the common purpose, domestically and**

3803 **E465** Case 002/02 TJ, paras 4257-4264.
3804 **E465** Case 002/02 TJ, paras 4265-4278.
3805 **F54** Appeal Brief, paras 1958-1959 *impugning* **E465** Case 002/02 TJ, para. 3703.
3806 *See* Standard of Review (Summary Dismissal, Errors of Law).
3807 **F54** Appeal Brief, paras 1958-1959.
3808 GC III, art. 13 ("Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention"); Commentary to the Third Geneva Convention, p. 626 (Wilful killing "would appear to cover faults of omission"); Commentary to the Fourth Geneva Convention, p. 597 (Wilful killing "would appear to cover cases where death occurs through a fault of omission"; Also, the goal of providing a list of grave breaches was to give notice to potential offenders: "it was also thought advisable to draw up as a warning to possible offenders a clear list of crimes whose authors would be sought for in all countries"); UDHR, art. 11(2) (seems to acknowledge the omission liability: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence [...] when it was committed").
3809 *Kvočka* AJ, paras 95, 187, fn. 403, *Stanišić & Župljanin* AJ, para. 110.
3810 Ground 227: **F54** Appeal Brief, *Alleged support of the common purpose*, paras 2012-17, **F54.1.1** Appeal Brief Annex A, p. 76 (EN), p. 71 (FR), pp. 109-110 (KH); Ground 228: **F54** Appeal Brief, *Alleged promotion of the common purpose*, paras 2018-2020, **F54.1.1** Appeal Brief Annex A, p. 77 (EN), p. 71 (FR), p. 110 (KH); Ground 229: **F54** Appeal Brief, *Alleged encouragement, incitement, and legitimisation of the implementation of the common purpose*, paras 2021-2024; *see also* paras 1686-1690 & 2130 (site visits), **F54.1.1** Appeal Brief Annex A, p. 77 (EN), p. 72 (FR), p. 110 (KH); Ground 230: **F54** Appeal Brief, *Alleged instructions on the implementation of the common purpose*, paras 2025-2028; **F54.1.1** Appeal Brief Annex A, p. 77 (EN), p. 72 (FR), pp. 110-111 (KH); Ground 231: **F54** Appeal Brief, *Alleged facilitation and control of the implementation of the common purpose*, paras 2025-2028; **F54.1.1** Appeal Brief Annex A, p. 77 (EN), p. 72 (FR), p. 111 (KH). (The heading 18.2.1.5 of **E465** Case 002/02 TJ uses the terms "enabling and controlling the implementation").

on the international stage (Ground 228); (iii) encouraged and incited the implementation of the common purpose through the CPK policies while using his senior positions to legitimise it domestically and internationally (Ground 229); (iv) actively gave instructions on the implementation of the common purpose through CPK policies (Ground 230); and (v) personally enabled and controlled the implementation of the common purpose through CPK policies (Ground 231).

1050. Appellant contends that these five alleged errors comprise 16 alleged sub-errors made by the TC. For the most part, Appellant does not present any new arguments regarding those alleged errors and sub-errors but merely refers to other large sections of his brief. For reasons set forth in detail in other sections of this Response, these alleged errors are not demonstrated concerning the following TC findings that Appellant:

(a) supported the CPK and its policies since at least 1967 and continued to do so until 1979[3811] (Ground 227). The argument fails as the TC provided detailed reasoning for this finding based on abundant evidence and Appellant fails to establish any error of fact that would have been unreasonable and would have occasioned a miscarriage of justice.[3812]

(b) supported the common purpose, which involved the commission of crimes although the CPK revolutionary goals were not criminal in themselves[3813] (Ground 227). The argument fails, however, as Appellant does not establish any error regarding the criminal nature of the common purpose's various policies.[3814]

(c) supported the common purpose by attending or participating in leadership meetings concerning the overall CPK political line, the identification and purge of enemies and

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3811 **F54** Appeal Brief, para. 2012, *referring to* paras 1660-1664 (CPK Member), 1704-1753 (CC/SC Member); **E465** Case 002/02 TJ, para. 4257.

3812 *See e.g.* response to Grounds 198 (1970-1975), 180 (MOPs), 199 (CC meetings in 1974-1975), 204 (training sessions), 182 (role in cooperatives), 222 (marriage policy), 203 ("member" of CC and SC), 200 (work places and proximity with leaders), 190 (Party Centre), 191 (*Angkar*), 205 (Office 870), 206 (Commerce Committee), 196 & 197 (CPK member), 202 (President of State Presidium).

3813 **F54** Appeal Brief, para. 2013, *referring to* para. 4257 (Appellant claims that his continued occupation of CPK/DK positions could not lead to the finding that he supported an overarching common purpose involving the commission of crimes), para. 2015, fn. 3886, *referring to* paras 1489-1522 (Cooperatives and Worksites "Policies") (Appellant argues that agreeing with the target of producing three tonnes of rice per hectare, publicly endorsing the DK Constitution and willing to transform the entire population into a society of worker-peasants could not establish his support for any criminal aspect of the common purpose); **E465** Case 002/02 TJ, paras 4257-4259.

3814 *See e.g.* response to Grounds 189, 175, 176, 177 & 224 (common purpose); 180, 182 (cooperatives and worksites policies); 184 (security centres' policy), 188 (policy on Buddhists), 187 (policy against ex-KR).

the conditions at cooperatives and worksites, including the KCA[3815] (Ground 227). The argument fails as Appellant does not demonstrate any error in the assessment of the overwhelming evidence in support of his attendance and active participation in CPK leadership meetings where policies were adopted, and purges decided.[3816]

(d) as CC member, approved the delegation of the "right to smash" down the CPK ranks, contributed to the publication of a 1978 memorandum discriminating against the Vietnamese and attended the Fifth Party Congress at which Vorn Vet was arrested then sent to S-21[3817] (Ground 227). The argument fails as Appellant does not establish any error in the TC's assessment of the evidence supporting his membership of the CC, the decisions, instructions and *memoranda* issued by the CC, and his participation in the Fifth Party Congress.[3818]

(e) was named as the chairman of an April 1975 Special National Congress in reports detailing CPK revolutionary goals[3819] (Ground 228). The argument fails as Appellant does not demonstrate any error committed by the TC in finding that, despite doubts regarding the holding of that special national congress, the regime's attribution of that event to Appellant in official radio broadcasts and his acceptance of such attribution legitimised the CPK's political line internationally.[3820]

(f) participated in meetings held at the Silver Pagoda in Phnom Penh in May 1975, laying the groundwork for the socialist revolution through policies, including population movements or the establishment of cooperatives and worksites[3821] (Ground 228). The argument fails as Appellant does not establish that the TC erred in its assessment of the evidence supporting the finding that achieving the non-criminal objective of

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3815 **F54** Appeal Brief, para. 2014, *referring to* paras 1867-1868 (Chou Chet), 1816-1848 (Cooperatives and Worksites), 1749-1753 (Democratic Centralism), 1690-1803 (Errors Regarding Roles During the DK); **E465** Case 002/02 TJ, paras 4258-4259.

3816 *See e.g.* response to Grounds 203 ("member" of CC and SC), 194 (military structures and communication), 198 (1970-1975), 182 (role in cooperatives), 201 (meetings in 1974-1975), 196 & 197 (CPK member), 216, 217, 235 (knowledge of purges), 211 (knowledge of cooperatives and worksites).

3817 **F54** Appeal Brief, para. 2016, fns 3887, 3889, 3891-3892, *referring to* paras 1704-1753 (CC/SC Member), 828-835 (Persecution on racial grounds), 1851-1853 (Lack of awareness of S-21 crimes), 1869-1871; **E465** Case 002/02 TJ, para. 4260.

3818 *See e.g.* response to Grounds 203 ("member" of CC and SC), 184 (security centres' policy), 216, 217 & 235 (knowledge of purges).

3819 **F54** Appeal Brief, para. 2018 (fn. 3896), *referring to* paras 1690-1691; **E465** Case 002/02 TJ, paras 4262, 3735.

3820 *See e.g.* response to Grounds 201 (meetings in 1974-1975), 176 (substance of the 'socialist revolution').

3821 **F54** Appeal Brief, para. 2019 (fn. 3898), *referring to* paras 1754-1803 (Residual functions, a section which does not appear to have any relevance to the Silver Pagoda meetings), 1490-1522 (Cooperatives and Worksites "Policies"); **E465** Case 002/02 TJ, para. 4262.

"socialist revolution" involved the commission of crimes that were encompassed by the common purpose.[3822]

(g) as President of the State Presidium, endorsed and promoted the goal of achieving a "great and magnificent leap" while building and defending the country[3823] (Ground 228). Appellant's argument that the TC erroneously attributed a speech made at the PRA between 11 and 13 April 1976 to Appellant does not warrant SCC intervention as it has no impact on the verdict or critical factual findings. The TC rightly found Appellant endorsed and promoted the CPK political line, not only as President of the State Presidium delivering or endorsing speeches but also as a participant in CC and SC meetings, Party congresses, as lecturer and attendant at training sessions, and that the alleged error would lead to a miscarriage of justice.[3824]

(h) in speeches, publicly lauded the CPK's successes and encouraged popular support of *Angkar's* programme for building and defending DK[3825] (Ground 228). The argument fails as Appellant does not establish that the content of his speeches about the CPK criminal policies was distorted or exaggerated by the TC.[3826]

(i) supported the abolition of Buddhism while showing a public "deceptive" attitude aimed at maintaining an image of normalcy[3827] (Ground 229). The argument fails as the TC provided detailed reasons based on a large set of evidence for the reasonable finding that he supported the abolition of Buddhism, even though he denied it.[3828]

3822 *See e.g.* response to Grounds 181, 183 & 180 (cooperatives and worksites policies), 246 (*actus reus* of A&A for *dolus eventualis* murders in cooperatives and worksites), 220 & 242 (Buddhists), 221 (ex-KR, knowledge), 243 (ex-KR, intent).

3823 **F54** Appeal Brief, para. 2020 (fn. 3900), *referring to* paras 1408-1437, 1754-1803, 1490-1522; **E465** Case 002/02 TJ, paras 4262, 3739).

3824 *See e.g.* response to Grounds 202 (President of State Presidium), 203 ("member" of CC and SC); *see also* 234 (cooperatives & worksites, intent), 17 (burden of proof), 176 (substance of the 'socialist revolution').

3825 **F54** Appeal Brief, para. 2020 (fn. 3901), *referring to* paras 1754-1803 (Residual functions); **E465** Case 002/02 TJ, para. 4263, *referring to* paras 3742, 598, 4271-4274.

3826 *See e.g.* response to Grounds 202 (President of State Presidium), 204 (training sessions), 182 (cooperatives and worksites policies), 243 (ex-KR, intent), 219 (Vietnamese, knowledge), 234 (cooperatives and worksites, intent), 216, 217 & 235 (security centres, intent), 185 (Vietnamese policy), 166 (marriage's evidence). Further, Appellant leaves unchallenged the TC's important finding that he "personally perpetuated the Party line by leading indoctrination sessions at mass rallies and reeducation seminars" aiming among others at "engendering support for CPK policies" (**E465** Case 002/02 TJ, para. 4262).

3827 **F54** Appeal Brief, para. 2023, *referring to* paras 1910-920, 2094; **E465** Case 002/02 TJ, para. 4268 (Appellant incited the population to transfer their sentiments for their parents to *Angkar*, encouraged the arrangement of marriages against Buddhist traditions in order to rapidly increase DK's population and supported the abolition of Buddhism), *referring to* paras 4240-4242, 4248.

3828 *See e.g.* response to Grounds 220 & 242 (Buddhists, knowledge), 188 (policy on Buddhists), 109 (Buddhists' persecution: *actus reus*).

(j) publicly denied and sought to obscure the DK crimes against the ex-KR officials[3829] (Ground 229). The argument fails as Appellant does not establish that the TC erred in assessing the evidence of the existence of crimes against the ex-KR officials and of his knowledge and intent regarding those crimes.[3830]

(k) incited hatred of the Vietnamese in speeches[3831] (Ground 229). The argument fails as Appellant does not prove that the TC erred in finding that Appellant actively incited the population to hate the Vietnamese, encouraged their "discriminatory treatment", and pledged and called to destroy them and their agents as their "elimination was necessary to 'preserve the nation and the Cambodian race forever'".[3832]

1051. For reasons set forth in detail in other sections of this Response, Appellant also fails to demonstrate the existence of other errors allegedly committed by the TC in assessing the evidence, in particular:

(a) in understanding the policy on cooperatives and worksites and interpreting its evidence, including Appellant's site visits and post-DK statements[3833] (Ground 229). The argument fails as Appellant did not demonstrate any error concerning the common purpose and its policies, including the policy on cooperatives and worksites, or the interpretation of its evidence by the TC.[3834]

(b) in relying on Sihanouk's statements[3835] (Ground 229). The argument fails as no error has been established regarding the TC's limited use of Sihanouk's statements as

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3829 **F54** Appeal Brief, para. 2023, *referring to* paras 1921-1927, 2099-2113; **E465** Case 002/02 TJ, para. 4268 ("Appellant publicly denied and sought to obscure the crimes committed against ex-KR officials"), *referring to* paras 4252-4253.

3830 *See e.g.* response to Grounds 187 (policy on ex-KR), 106 (political persecution of ex-KR), 221 (ex-KR, knowledge), 243& 221 (ex-KR, intent).

3831 **F54** Appeal Brief, para. 2023, *referring to e.g.* paras 1058-1097, 1551-1560, 1886-1909, 2075-2090; **E465** Case 002/02 TJ, para. 4269, *referring to* paras 3394, 3399, 3401, 3404, 3406, 3408.

3832 *See e.g.* response to Grounds 185 (policy on Vietnamese), 219 (Vietnamese, knowledge), 240 (intent of genocide against Vietnamese).

3833 **F54** Appeal Brief, paras 2021-2022 (fns 3905, 3910), *referring to* paras 1399-1603, 2130, 1816-1848. *See also* paras 1686-1689; **E465** Case 002/02 TJ, paras 4265-4266 (Appellant encouraged the collective work in the fields, factories, and construction sites "at a pace never before attained" and continued to do so until the end of the regime despite his knowledge of "appalling conditions, gruelling work regimes and inadequate food", hygiene, and health care on the ground), *referring to* Section 16 *Common Purpose*, including paras 3897, 3909, 3916, 3919-3927 (Section 16.4.1.2 *Criminality of Policy*), 4214-4217, 1508; **E465** Case 002/02 TJ, para. 4267 (Appellant issued statements impelling the population to "'fulfil or overfulfil' *Angkar's* Four-Year Economic Plan and 'maintain under all circumstances' the targets set by the Party, including to export rice), *referring to* para. 3742.

3834 *See e.g.* response to Grounds 189, 175, 176, 177 & 224 (common purpose); 181 & 183, 211 (policy on cooperatives and worksites and role of Appellant); 200 (site visits); 27, 217 (use of post-DK statements);

3835 **F54** Appeal Brief, para. 2021, *referring to* paras 293-305; **E465** Case 002/02 TJ, paras 3401, 3571, 3586, 4248, 4265, 4269, 606.

corroborating evidence on some specific topics.[3836]

(c) in evaluating Appellant's DK statements regarding the family, plan to increase the population and marriages[3837] (Ground 229). The argument fails as Appellant has not established any error on part of the TC in using and assessing Appellant's DK statements on those topics as part of its holistic approach of the evidence.[3838]

(d) with regard to Appellant's instructions on the implementation of the common purpose's implementation[3839] (Ground 230), in relying on testimonial evidence allegedly obtained outside the legal framework,[3840] allegedly unreliable,[3841] allegedly distorted,[3842] or evidence consisting exclusively of FBIS and SWB reports.[3843] The argument fails as Appellant does not undermine the probative value of the testimonies of Neou Sarun, Ek Hen, Em Oeun, Preap Chhon, Bit Na and Chea Deap and of the FBIS and SWB reports cited by the TC in support of its finding regarding Appellant's instructions on the implementation of the common purpose through CPK policies.[3844]

(e) with regard to Appellant enabling the smooth functioning of the DK administration to the detriment of its population and cadres[3845] (Ground 231), in relying incorrectly

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3836 *See e.g.* response to Grounds 210, 222, 170 (regulation of marriage); 185 (Vietnamese); 200 (conditions in cooperatives and worksites).

3837 **F54** Appeal Brief, paras 2022-2023, *referring to* paras 1098-398; **E465** Case 002/02 TJ, paras 3522-701, 4062-4067.

3838 *See* response to Grounds 166 (plan to increase the population); 170 (threat and coercion); 210 & 222 (knowledge of crimes).

3839 Contrary to Appellant's contentions, the TC correctly concluded that through many public speeches and statements during the DK period, Appellant instructed the CPK cadres and population to implement the common purpose through CPK's various policies, including the deportation and elimination of the Vietnamese (**E465** Case 002/02 TJ, para. 4271), the search for "enemies", in particular ex-KR officers, traitors, infiltrated people, those too lazy to work and NP (paras 4272-4273), the necessity to meet production targets at all cost (para. 4273), and organise marriages within ministries (para. 4273).

3840 **F54** Appeal Brief, para. 2025, *referring to* para. 1894 (Neou Sarem).

3841 **F54** Appeal Brief, paras 2025, *referring to* paras 1080-1082, 1898-1902 (reliability of the documents disseminated by "*le Comité des Patriotes du Kampuchéa Démocratique*"), 2026, *referring to* paras 1075, 1759, 1892-1894 (Ek Hen), 2027 (fn. 3932), *referring to* paras 1757-1758, 1864 (Em Oeun), 2027 (fn. 3933), *referring to* paras 1534-1535 (Preap Chhon), 2028 (fn. 3940), *referring to* paras 1233-1242, 1815, 1929, 1936, 2028, 2117 (Chea Deap).

3842 **F54** Appeal Brief, para. 2027 (fn. 3936), *referring to* paras 1794-1797 (Bit Na).

3843 **F54** Appeal Brief, para. 2028 (fns 3937-3938), *referring to* paras 1898-1902.

3844 *See e.g.* response to Grounds 219, 237 (Neou Sarem's credibility); 20, 23, 34, 159, 204, 204 & 219, 237 (Ek Hen's credibility); 22, 34, 184, 163, 204, 217 (Em Oeun's credibility); 184, 27, 243 (Preap Chhon's credibility); 206 (Beit Boeum *alias* Bit Na's credibility); 166, 25, 34, 173, 174, 210, 166 (Chea Deap's credibility) (*see also* **F51/1** Co-Prosecutors' Response to Khieu Samphan's Request to Admit Additional Evidence, 24 Oct. 2019, paras 23-28); As regard to FBIS and BBC/SWB evidence, *see* response to Grounds 159, 202, 230, 220, 221 and 189, 175, 176, 177 & 224 (common purpose).

3845 Contrary to Appellant's contentions, the TC correctly concluded that Appellant ensured that Doeun's responsibilities remained fulfilled after his removal and that cooperatives handed over rice to the Party Centre for exporting the maximum quantity (**E465** Case 002/02 TJ, para. 4276, *referring to* paras 4225, 619, Sections 10.1.7.3, 11.2.17.1, paras 1450-1451, 3908, 3912-3913, 3926); that Appellant personally

on: Appellant's functions in relation to Office 870 and Commerce;[3846] Appellant's role in exporting rice despite food shortages;[3847] Appellant's participation in meetings during which decisions about purges were made, including that of Kang Chap;[3848] and Appellant's knowledge of large-scale crimes despite his denials.[3849] The claims fail, as Appellant does not demonstrate the TC made any errors in finding that he enabled and controlled the implementation of the common purpose to the detriment of the population through CPK policies.[3850]

1052. For each of those 16 alleged errors addressed elsewhere in this Response, Appellant fails to demonstrate that the TC's findings could not have been reached by any reasonable trier of fact upon a holistic assessment of the evidence.

1053. Appellant's three new assertions of factual errors in Grounds 230-231 similarly fail.

1054. First, in Ground 230, Appellant contends that the TC erred by referring to his April 1978 speech reproduced by "*Le Comité des Patriotes du Kampuchéa Démocratique en France*", claiming it to be unreliable and stating that the cited extract does not mention any deportation or destruction of Vietnamese.[3851] Although the TC was slightly confused about its date,[3852] the evidence establishes that the speech in question was effectively delivered by Appellant at a mass rally on 15 April 1978 in celebration of the 17th April

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inspected products destined for export and supervised import and export of goods (para. 4276, *referring to* paras 619-621, 3907, 3909, 3914, Section 8.3.4.2); contributed to the investigation and purge of CPK cadres and participated in meetings decisive for the fate of others (para. 4277, *referring to* paras 4219, 4221-4230, 4234); and hid and denied large-scale crimes within DK (paras 4277, 4253).

3846 **F54** Appeal Brief, para. 2029 (fns 3944-3946), *referring to* paras 1763-1798.

3847 **F54** Appeal Brief, para. 2029 (fn. 3948), *referring to* paras 1506-10, 1490-1522, 1770-1798.

3848 **F54** Appeal Brief, para. 2030 (fn. 3951), *referring to* paras 1851-1853, 1857-1878.

3849 **F54** Appeal Brief, para. 2030 (fn. 3955), *referring to* the entire Title III (paras 1804-1937).

3850 Regarding Appellant's functions at 870 and Commerce, *see e.g.* response to Grounds 192, 205, 190 (role in 870; *see also* response to Grounds 221, 216-217); 206, 217 (supervision of Commerce); Concerning Appellant's role in exporting rice, *see* response to Grounds 181-182, 206, 211, 234; As regard to Appellant's participation in meetings where purges were decided, *see e.g.* response to Grounds 203, 217, 215, 247, 235, 192; As regard to Appellant's knowledge of large-scale crimes, *see e.g.* response to Grounds 208 (general knowledge), 193 (*RF/RY* magazines), 223 (knowledge that crimes had been committed), 195 (secrecy), 218-221 (Cham, Vietnamese, Buddhists, ex-KR), 217 (purges), 211-216 (cooperatives and worksites, including Tram Kak, TTD, 1JD, KCA, PK), 210 (marriages).

3851 **F54** Appeal Brief, para. 2025 (mentioning **E465** Case 002/02 TJ, para. 4271, *referring to* para. 3400, which in turn cites **E3/169** *Khieu Samphan Speech at Anniversary meeting*, 17 Apr. 1978, EN 00280396).

3852 **E465** Case 002/02 TJ, paras 3399-400 (The TJ erroneously distinguished two speeches successively pronounced by Khieu Samphan on 15 and 17 April 1978 in paragraphs 3399 and 3400 while these constitute a unique speech delivered in advance on 15 April 1978, followed by resolutions adopted by the participants in the meeting including Appellant, at the occasion of the third anniversary of the 17 April 1975, hence the confusion.). *See also* **E295/6/1.4** Annex 4 to OCP Final Brief, *Khieu Samphan Chronology*, 15 Apr. 1978, EN 00948530-31.

1975 victory, and was reproduced in full in two different sources (FBIS[3853] and the *Comité des Patriotes*),[3854] in large excerpts by the BBC/SWB,[3855] while other excerpts were also used or summarised in a French telegram[3856] and by Stephen Heder.[3857] As the sources reproducing the speech include the very same substance as the speech itself and the radio broadcast, these various sources corroborate each other and are, thus reliable; only the translations into French and English differ slightly. The speech's relevance is obvious: Appellant explicitly calls for eliminating all Vietnamese (and their spies) from Cambodian soil.[3858] This stance is repeated in the resolutions immediately following his speech, affirming unambiguously the CPK leadership's will to "expel resolutely from Cambodian territory" the Vietnamese and their agents and to "destroy" them in order to preserve "the Cambodian race forever".[3859] The TC reasonably interpreted this CPK document to target all Vietnamese indiscriminately.[3860]

1055. Second, in Ground 230, Appellant rightfully points out that the TC omitted to properly source the factual finding[3861] that Appellant in 1977 "was personally advising the masses that the object of the revolution was to 'eliminate the Lon Nol regime [...] eliminate the capitalist, the feudalist [and] the intellectuals'".[3862] A key word search of the Judgment quickly indicates that the source was CP Preap Chhon, who was quoted in Judgment paragraph 3961 as the source of the statement,[3863] as well as described by Appellant in

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3853 **E3/1361** FBIS, *Third Anniversary Celebrated at 15 April Mass Rally: Khieu Samphan Statement Resolution adopted*, 17 Apr. 1978, EN 00168813-22 (mass rally held on 15 April 1978; radio broadcast issued on 16 April 1978; FBIS document dated 17 April 1978).

3854 **E3/169** *Khieu Samphan Speech at Anniversary meeting*, 15 Apr. 1978, EN 00280389-99.

3855 **E3/562** BBC/SWB, *Phnom Penh Rally Marks 17th April Anniversary*, 15 Apr. 1978, EN S 00010558-63 (Speech delivered by Appellant on 15 April 1978 but report published on 18 April 1978).

3856 **E3/2671** French International Telegram, *Chronique Cambodgienne 15 février-1 mai 1978*, 19 June 1978, EN 007432300-02.

3857 **E3/3169** Stephen Heder, *Pol Pot and Khieu Samphan,* EN 00002762-64.

3858 **E3/1361** FBIS, *Third Anniversary Celebrated at 15 April Mass Rally: Khieu Samphan Statement – Resolution adopted*, 17 Apr. 1978, EN 00168815 ("All of us are determined to [...] wholeheartedly strive to [...] completely and forever eliminate aggressive enemies of all stripes, particularly the expansionist, annexationist Vietnamese aggressors, from our Cambodian soil"), 00168819 ("successfully defend the 'Cambodian race'"). *See also* **E3/169** *Khieu Samphan Speech at Anniversary meeting*, EN 00280392 ("radically eliminate forever from the territory of Kampuchea, all enemy aggressors, especially Vietnam"), 00280398; **E3/562** BBC/SWB, *Phnom Penh Rally Marks 17th April Anniversary*, 15 Apr. 1978, EN S 00010560, 63.

3859 **E465** Case 002/02 TJ, para. 3399 *citing* **E3/1361** FBIS, *Third Anniversary Celebrated at 15 April Mass Rally: Resolution adopted*, 17 Apr. 1978, EN 00168820 (national defence, resolutions 4, 5, 9, 10, 17); **E3/562** BBC/SWB, *Phnom Penh Rally Marks 17th April Anniversary*, 15 Apr. 1978, EN S 00010563.

3860 **E465** Case 002/02 TJ, paras 3399-3400.

3861 **F54** Appeal Brief, para. 2026 (pointing out the fact that in **E465** Case 002/02 TJ, para. 4272, fn. 13941 erroneously refers back to para. 4272 in a circular movement).

3862 **E465** Case 002/02 TJ, para. 4272.

3863 **E465** Case 002/02 TJ, para. 3961 (Preap Chhon testified that "in delivering a speech to a group of East Zone evacuees at Chbar Ampov market in 1977, Khieu Samphan stated that: [W]e made a revolution in

the very next lines as lacking credibility.[3864]

1056. Third, Appellant erroneously contends in Ground 231 that the TC committed an error based on an incongruous use of the concept of "silent assent" to the mistreatment of civilians.[3865] Appellant mistakenly cross-refers to a section of his Brief that does not deal at all with the mistreatment inflicted to civilians "*in cooperatives and worksites*", as the TC specified, but with the internal purges, and more particularly the treatment of enemies at security centres.[3866] The unique new argument invoked by Appellant is that he did not give, as a cadre of "unique standing within the CPK" and regular attendant to SC meetings,[3867] "silent assent" to the said mistreatment, as one could not prove assent by silence.[3868] However, as detailed in response to Ground 182, the TC underlined that Appellant publicly admitted his contemporaneous knowledge of the arrest, imprisonment and ill-treatment of civilians and that this was confirmed by Witness Meas Voeun.[3869] Further, in a system applying the principle of democratic centralism, the TC found that each participant to CC and SC meetings, including Appellant, had the right to express ideas and opinions before their consolidation by the CC or SC secretary.[3870] As pointed out by the TC, Nuon Chea explained at a hearing that if members were still not satisfied at that stage, they could express further objections and present proposals and the discussion would then go on until reaching a consensus.[3871] As Appellant stated in respect of the SC's decision to evacuate Phnom Penh, "if there had been a single voice against the evacuations, there would have been no evacuations".[3872] *A contrario*, remaining silent at such CC or SC meeting where criminal policies and decisions, including about arrests, were discussed meant implicitly accepting and endorsing them,[3873] thereby contributing

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order to eliminate the Lon Nol regime. And another point was to eliminate the capitalist, the feudalist, the intellectuals. He [Appellant] didn't want them to exist"). *See* response to Ground 20.

3864 **F54** Appeal Brief, para. 2027.

3865 **F54** Appeal Brief, para. 2030.

3866 **F54** Appeal Brief, para. 2030 (erroneously referring to paras 1849-1878) (emphasis added).

3867 **E465** Case 002/02 TJ, para. 4277.

3868 **F54** Appeal Brief, para. 2030.

3869 **E465** Case 002/02 TJ, paras 4231-35. *See also* paras 3885, 3896, 3900, 3908, 3913, 3920-3927, 3967, 4208, 4210-4218, 4253, 4265, 4272-4273. *See also* response to Grounds 182, 211.

3870 **E465** Case 002/02 TJ, paras 391-392, 397.

3871 **E465** Case 002/02 TJ, para. 392 *citing* **E1/23.1** Nuon Chea, T. 15 Dec. 2011, pp. 33-36.

3872 **E465** Case 002/02 TJ, para. 393, fn. 1179 *citing* **E3/4051** Khieu Samphan Transcript, undated, EN 00788872.

3873 *See e.g.* **E465** Case 002/02 TJ, paras 4223 *citing* **E3/18** Khieu Samphan, *Cambodia s Recent History and the Reasons Behind the Decisions I Made*, EN 00103754-55 ("because everyone had great confidence in Pol Pot, *they accepted most of the ideas and analyses without much discussion*. Once when a member of the Central Committee – and later a member of the Permanent Committee – was arrested, the committee leadership's confidence in Pol Pot did not waver. The committee considered each disappearance as a separate case and *probably*, in the eyes of the insiders, *justified*") (emphasis added), 4259 (By his CC

significantly to the crimes committed as a result.[3874] Regarding the mistreatment of civilians in cooperatives and worksites of which he was fully aware,[3875] remaining silent instead of exercising his authority to prevent or stop the commission of crimes (as he selectively did to save family-in-law members in the new North Zone),[3876] demonstrated his assent.

Ground 192: 870[3877]

1057. **Ground 192 should be dismissed as Appellant fails to establish that the TC erred in fact by finding that, as a member of Office 870, Appellant contributed to the crimes by participating in the implementation of CPK policies, and knew of Doeun's arrest and execution.**

1058. The ground fails, as, contrary to Appellant's assertions,[3878] the principle of secrecy did

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membership and participation in Party Congresses, Appellant assented to the policies and directives adopted), 4286 ("By defending Pol Pot's methods as warranted in the circumstances, he implicitly but necessarily endorsed the arbitrary and secret arrest, detention, torture and extrajudicial execution of his fellow CPK leaders").

3874 The ICTY Chambers have consistently held that an accused may participate in a JCE by passive conduct (*Milutinović* TJ, para. 103 *citing Kvočka* TJ, para. 309) and that an accused's irreplaceable leadership status and silent approval of measures advancing the common plan militate in favour of a finding that his participation was significant, particularly in the absence of any attempt to impede the efficient functioning of the JCE (*Milutinović* TJ, para. 105; *Kvočka* TJ, paras 309, 311. *See also Prlić* AJ, paras 1487, 1530). This position is fully supported by the post-WWII jurisprudence which established the principle that an accused may be held criminally responsible for their failure to object to the criminal operation in such a way as to contribute to its success. *See e.g. Einsatzgruppen* Judgment, pp. 572 (Convicting Fendler on the basis that he knew that executions were taking place and failed to do anything about it, although as the second highest ranking officer in the Kommando his views could have been heard), 580-581 (Acquitting Rühl because he did not take part in any "executive operation nor did his low rank place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation." The tribunal also found (p. 580) that "it was not established beyond reasonable doubt that he was in a position to control, prevent, or modify the severity of [the program of his Sonderkommando]"); *Pohl Case*, pp. 1002-1004 ("[t]here is "an element of positive conduct implicit in the word 'consent'". The tribunal added that "[i]n the case of a person who had power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent.").

3875 *See e.g.* **E465** Case 002/02 TJ, paras 3885 (Appellant acknowledges the absence of freedom in cooperatives), 3896-3897 ("bad elements" amongst NP), 3900 (Pol Pot mentions food shortage, disease, inadequate shelters), 3908-3909 (insufficient food, disease, and death from malnutrition), 3912 (reports of food shortage by zone secretaries), 3913 (Appellant was aware of the living conditions on the ground, including food shortages, health issues, and lack of medicine), 3916, 3920-3927, 4208, 4210-4218, 4232-4234. This is also clear from the content of his speeches about work conditions in cooperatives and worksites and the necessity to identify CPK enemies among workers, especially among NP (*See e.g.* **E465** Case 002/02 TJ, paras 4253, 4265 (a labour force "working day and night [...] without rest"; acknowledging irregular work hours; Sihanouk describing Appellant's knowledge of appalling conditions), 4272-4273, 3967). *See* response to Grounds 182, 211.

3876 *See e.g.* **E465** Case 002/02 TJ, paras 4232-34 (Appellant admitting in an open letter his contemporaneous knowledge of the imprisonment and ill-treatment of civilians, in particular in Preah Vihear; Meas Voeun's intervention to release Appellant's sister-in-law), 4216, 4286.

3877 Ground 192: **F54** Appeal Brief, *870*, paras 1763-1769; **F54.1.1** Appeal Brief Annex A, pp. 66-67 (EN), pp. 61-62 (FR), pp. 99-100 (KH).

3878 **F54** Appeal Brief, paras 1650-1651, 1859.

not apply to Appellant and he knew and adhered to the CPK policy of eliminating those considered as enemies.[3879] The treatment of enemies was shrouded in the utmost secrecy only for the lower-ranking cadres, ordinary people, or foreigners. Moreover, the TC reasonably found that, during the DK period, Appellant knew of the arrest and death of high-ranking CPK cadres through meetings or DK documents he had access to,[3880] contrary to what he contends.[3881] Appellant's current claims to not have "witnessed" arrests but merely "observed" the disappearance of CC and SC members during the DK[3882] are disingenuous. Appellant unambiguously acknowledged before the CIJs that the term "disappearance" of such high-ranked cadres in the DK context was equivalent to "arrest" and that "everyone [that is, other members of the CC and SC Committees][3883] seemed to approve" those arrests at the time and considered them as "probably justified".[3884]

1059. The ground also fails as Appellant has not established that the TC erred in fact by finding that he specifically knew of Doeun's arrest and execution.[3885] First, Appellant

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3879 *See* response to Ground 195 (principle of secrecy).

3880 **E465** Case 002/02 TJ, paras 4220-4224 (knowledge of the arrest and execution of high-ranking cadres in general), 4225-4230 (knowledge of the fate of several high-level cadres: Sua Vasi *alias* Doeun, Chan Chakrei, Suos Neou, Koy Thuon, Keo Meas, Hu Nim, Chou Chet *alias* Sy, Vorn Vet, Sao Phim, and Veung Chhaem), 4231-4235 (knowledge of lower-level purges and imprisonment and ill-treatment of civilians), 3858 ("Despite the Party's policy of secrecy, the smashing of enemies was widely reported within Party ranks"), 4253 ("Khieu Samphan attended and lectured at study sessions and mass rallies at which criminal conduct toward CPK enemies was discussed, encouraged, and incited"), 4277, 4284-4285. It does not matter that Appellant's statements about the disappearances, arrests, and purges of enemies were made after January 1979 as long as it is clear he had that knowledge at the time.

3881 **F54** Appeal Brief, paras 1858-1859. *See also* **E465** Case 002/02 TJ, para. 4220 (Khieu Samphan "deposed that he did not learn of any arrests before 1979").

3882 **F54** Appeal Brief, para. 1858, *referring to* **E465** Case 002/02 TJ, para. 4220.

3883 **E465** Case 002/02 TJ, paras 4220, fn. 13769 *citing* **E3/210** Khieu Samphan WRI, 14 Dec. 2007, EN 00156948-49 ("I observed that some members of the Central Committee *disappeared* one after another [...] Nonetheless I did not know the extent of the *arrests* at that time [...] [I]n relation to the *disappearance* of the members of the Central Committee and the Standing Committee, everyone seemed to approve, but I did not know the extent or the scope of such *arrests*") (emphasis added), 4221, fn. 13770 *citing* **E3/203** Khieu Samphan interview by Stephen Heder, 4 Aug. 1980, EN 00424013 (using "we" to describe the fight against Yuon agents, their complete 'management' and defeat); 4222, fn.13774 *citing* **E3/4023** Khieu Samphan Interview, undated, EN 00792450 (the upper echelon "only considered the arrests of cadres who had committed misconduct"); **E3/630** Khieu Samphan VOA Interview, 13 Nov. 2007, EN 00524534 (According to Khieu Samphan, "hundreds" of "important cadres" had been arrested, not "thousands").

3884 **E465** Case 002/02 TJ, para. 4223 *citing* **E3/18** Khieu Samphan, *Cambodia's Recent History*, pp. 63-64, EN 00103755 ("when a member of the Central Committee – and later a member of the Permanent Committee – was arrested, the committee leadership's confidence in Pol Pot did not waver. The committee considered each disappearance as a separate case and probably, in the eyes of the insiders, justified").

3885 **F54** Appeal Brief, paras 1862-1863. The TC used the terms "knew of Doeun's arrest and subsequent execution" and "knew that Doeun had been purged" (**E465** Case 002/02 TJ, para. 4225), while Appellant uses the terms "had to be aware of the arrest and execution of Doeun" (**F54.1.1** Appeal Brief Annex A, pp. 66-67 (EN), pp. 61-62 (FR). *Contra* **F54** Appeal Brief, para. 1862 ("knew that Doeun had been the victim of a purge").

acknowledged that Doeun was a member of the CC,[3886] Minister of Commerce and chairman of Office 870[3887] and that, as demonstrated above, when such a prominent CPK cadre "disappeared", it meant he had been "arrested". Second, as one of two or a few members remaining in Office 870,[3888] and as a full-rights CC member and overseer of Commerce matters,[3889] Appellant necessarily noticed Doeun's nearly two-year "disappearance",[3890] not only because he worked so closely with him[3891] but because he also regularly dined with him at K-3.[3892] The TC reasonably found that Appellant personally ensured Doeun's commerce responsibilities remained fulfilled after his purge.[3893] Third, the TC underlined that Doeun and other purged senior CPK cadres (including Chan Chakrei, Suos Neou, Koy Thuon, Chou Chet, and Keos Meas) were listed in a 1978 *RF*, and qualified as traitors associated with the CIA and/or "Yuon".[3894] This establishes that Doeun's arrest and execution was well known within the CPK ranks, a fact that was even clearer for Appellant, who was privileged to participate in SC meetings and had a close relationship with Pol Pot and Nuon Chea.[3895] Appellant has not demonstrated that the TC's factual finding regarding Doeun's arrest and execution was

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3886 **E3/27** Khieu Samphan WRI, 13 Dec. 2007, EN 00539266; **E3/203** Interview with Khieu Samphan by Stephen Heder, 4 Aug. 1980, EN 00424016. *See also* **E3/356** Duch WRI, 25 Nov. 2008, EN 00242903-04; **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, EN 00396426; **E465** Case 002/02 TJ, para. 355, fn. 997.

3887 *See e.g.* **F54** Appeal Brief, paras 1764-1769, 1862-1863. *See also* **E465** Case 002/02 TJ, para. 2292.

3888 **E465** Case 002/02 TJ, paras 364, 4225.

3889 **E465** Case 002/02 TJ, para. 4225 (Appellant assumed Doeun's oversight responsibilities in the Commerce Committee by late October 1976), 4276. Appellant must have noticed that by October 1976, Ministry of Commerce's reports were addressed to him and no longer to Doeun: **E465** Case 002/02 TJ, para. 618, fn. 1951.

3890 **E465** Case 002/02 TJ, para. 364 (Office 870 continued to operate after Doeun's arrest in around February 1977).

3891 **E465** Case 002/02 TJ, paras 4225, 610. *See also* **E465** Case 002/02 TJ, paras 364 (*citing* two official Appellant's ECCC statements and one of his books stating that Doeun was frequently absent on travels), 4225 (Appellant claimed discovering after January 1979 that Doeun had been arrested in 1977, which does not make sense).

3892 **E465** Case 002/02 TJ, para. 4225, fn. 13781 (*citing* Appellant's wife, So Socheat: **E1/206.1** So Socheat, T. 12 June 2013, pp. 12-16, who said in substance that Appellant had dinners on many occasions with Doeun at K-3 until suddenly he did not appear anymore and she decided to stop preparing food for Doeun). *See also* **E3/16** Khieu Samphan, *Considerations on the History of Cambodia*, EN 00498280, fn. 193.

3893 **E465** Case 002/02 TJ, para. 4225.

3894 **E465** Case 002/02 TJ, para. 2292, fn. 7755 (*citing* **E3/727** *Revolutionary Flag*, May-June 1978, EN 00185333: "The heads we must attack are CIA, Yuon, and [KGB]. Since 1975 the forces that have attacked us have all nothing other than CIA and Yuon. The despicable Chakrei, the despicable Chhouk, the despicable Thuch, the despicable Deuan, the despicable Pheum, the despicable Sy, the despicable Kaev Meah, and the despicable Chey were all CIA. The only difference among them was that some of these CIAs were more on the American side while others were more on the Yuon side.") *See also* **E1/437.1** Duch, T. 14 June 2016, pp. 15-16. Khieu Samphan had access to *RF* magazine: **E465** Case 002/02 TJ, para. 4253.

3895 **E465** Case 002/02 TJ, para. 4225; *see also* para. 4284.

speculative or was one no reasonable trier of fact could have reached.

Ground 198: From 1970 to 17 April 1975[3896]

1060. **Ground 198 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that through his functions and activities, Appellant played an important role in rallying support for the revolution between 1970 and April 1975, thereby reinforcing the legitimacy of the CPK.**

1061. The ground fails as Appellant does not demonstrate any error in the TC's assessment of the evidence by relying on his role of reassuring the public about the CPK's plan and his calls for violent struggle against the Lon Nol regime to conclude that he legitimised the CPK movement.[3897]

1062. Appellant's contention that the TC erred in finding that he had a role within the FUNK/GRUNK to reassure the public about the CPK's project is unsubstantiated.[3898] Appellant merely asserts that the TC overrepresented his role within the FUNK/GRUNK,[3899] and ignored the context of his appointment as Deputy Prime Minister, without elaborating further as to where the error lies.

1063. Appellant baselessly asserts that the TC erred in relying on his statements as Deputy Prime Minister to find that he legitimised the CPK's movement.[3900] Appellant does not contest that he denounced the "seven traitors" of the Khmer Republic government, impelling their overthrow and calling for their "annihilation" or "execution",[3901] but merely claims that the TC could not rely on these statements as they were made in a time of war.[3902] The fact that these speeches were made in a time of conflict does not render unreasonable the TC's finding that he called for a violent struggle against the Lon Nol regime and the execution of its leaders. With his remaining arguments, Appellant alleges that the TC ignored pieces of evidence concerning the nature of his speeches in general and his role in the communication of FUNK/GRUNK,[3903] but fails to establish how it contradicts in any way the TC's finding. Indeed, the fact that Sihanouk also had a role in the communication of FUNK/GRUNK does not minimise Appellant's own efforts.

3896 Ground 198: **F54** Appeal Brief, *From 1970 to 17 April 1975,* paras 1665-68; **F54.1.1** Appeal Brief Annex A, p. 71 (EN), p. 63 (FR), pp. 96-97 (KH).
3897 **F54** Appeal Brief, para. 1668 *citing* **EE465** Case 002/02 TJ, para. 582.
3898 **F54** Appeal Brief, 1666 *citing* **E465** Case 002/02 TJ, para. 582.
3899 **F54** Appeal Brief, para. 1666.
3900 *Contra* **F54** Appeal Brief, para. 1666.
3901 **E465** Case 002/02 TJ, para. 581, fn. 1818.
3902 **F54** Appeal Brief, para. 1667.
3903 **F54** Appeal Brief, para. 1667, fns 3210-3211.

Similarly, the fact that witnesses stated that some of his speeches were pacific does not change the fact that the speeches he made about the Lon Nol regime were violent.

1064. Finally, Appellant's contention that the TC erred in finding that he legitimised the CPK movement between 1970 and April 1975[3904] overlooks the totality of evidence the TC relied upon, such as his role of preparing and disseminating propaganda material, his performance of diplomatic duties and his role in liaising with Norodom Sihanouk.[3905]

Ground 199: Participation in the June 1974 and the April 1975 CC meetings [3906]

1065. **Ground 199 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that he gave his agreement to the evacuation of the population on 17 April 1975 and to the subsequent forced movements of population.**

1066. The ground fails as Appellant does not establish that the TC's assessment of the evidence concerning the meetings of June 1974 and April 1975 about the evacuation of Phnom Penh was biased or unreasonable.[3907]

1067. Regarding the meeting of June 1974, Appellant erroneously contends that the TC's review of its finding in Case 002/01 on his participation in the meeting demonstrates that the TC was biased,[3908] but fails to rebut the presumption of judicial impartiality.[3909] In fact, the TC's reasoning regarding this meeting does not demonstrate any bias, as it merely rectified its previous factual finding in light of the Case 002/01 Appeal Judgment.[3910] Contrary to Appellant's assertion,[3911] the SCC did not find that the TC was biased, but rather that it erroneously relied on the part of Phy Phuon's testimony concerning the meeting of April 1975 to find that Appellant agreed with the plan to evacuate Phnom Penh in the June 1974 meeting.[3912] The TC acknowledged that error in Case 002/02,[3913] examined Phy Phuon's testimony in light of the evidence *in toto*,[3914] and subsequently found that Appellant participated only in the April 1975 meeting and not in the June 1974 meeting.[3915]

3904 **F54** Appeal Brief, para. 1668.
3905 **E465** Case 002/02 TJ, para. 582.
3906 Ground 199: **F54** Appeal Brief, *Participation in the June 1974 and the April 1975 CC meetings,* paras 1669-1682; **F54.1.1** Appeal Brief Annex A, p. 68 (EN), p. 63 (FR), p. 97 (KH).
3907 **F54.1.1** Appeal Brief Annex A, p. 68 (EN), p. 63 (FR), p. 97 (KH).
3908 **F54** Appeal Brief, para. 1670.
3909 *See* response to Ground 4 (bias allegations); **F36** Case 002/01 AJ, para. 112.
3910 **E465** Case 002/02 TJ, para. 589, fn. 1839 *citing* **F36** Case 002/01 AJ, para. 1009, fn. 2674.
3911 **F54** Appeal Brief, para. 1670.
3912 **F36** Case 002/01 AJ, para. 1009, fn. 2675.
3913 **E465** Case 002/02 TJ, para. 588.
3914 **E465** Case 002/02 TJ, paras 584-587.
3915 **E465** Case 002/02 TJ, para. 588.

1068. Regarding the April 1975 meeting, Appellant merely disagrees with the TC's evidentiary analysis, based on three erroneous claims, each of which fails to demonstrate any error.

1069. First, Appellant baselessly contends that the TC erred in its assessment of Phy Phuon's credibility. Appellant reiterates a claim rejected by the SCC[3916] that the TC ignored evidence contradicting Phy Phuon's testimony, and thus erred in finding him credible. Appellant merely asks the SCC to reassess the evidence, thereby ignoring both the high degree of deference given to the TC in assessing the reliability and credibility of the evidence,[3917] and the extensive reasons the TC provided.[3918] Indeed, the TC found that Phy Phuon's testimony was consistent and clear that CPK leaders held a meeting in April 1975 about the evacuation of Phnom Penh, which Appellant attended and where he agreed to the decision to evacuate.[3919]

1070. Appellant's arguments that the TC failed to address Saloth Ban's and Oeun Tan's testimonies regarding Phy Phuon's time spent in B-5,[3920] and the latter's incapacity to overhear conversations during meetings,[3921] are not sufficient to establish that the TC's assessment of Phy Phuon's credibility was unreasonable. In fact, a close reading of the latter's testimony demonstrates that there is no such contradiction between Saloth Ban and Phy Phuon as to his time spent in B-5.[3922] Appellant fails to acknowledge that both witnesses indicated that Phy Phuon worked as a messenger and was in charge of the food at B-5.[3923] Appellant claims that guards could not hear the conversations in meetings due to the distance they would normally stand from the CPK leaders. This claim overlooks Phy Phuon's testimony, in which he explained that his knowledge of the content of conversations did not rest exclusively on the fact that he guarded the meeting, but also because he was in charge of feeding the participants of the meeting.[3924] Phy Phuon further specified that he could see the diagrams they drew on the board during the April 1975 meeting.[3925]

3916 **F36** Case 002/01 AJ, para. 1011.
3917 **F36** Case 002/01 AJ, para. 89.
3918 **E465** Case 002/02 TJ, paras 583-588.
3919 **E465** Case 002/02 TJ, paras 586, 588. *See also* **E1/97.1** Rochoem Ton *alias* Phy Phuon, T. 26 July 2012, 09.38.15- 09.56.01, pp. 12-18, 10.09.04-10.22.08, pp. 21-25; **E3/24** Phy Phuon WRI, EN 00223584; **E1/98.1** Phy Phuon, T. 30 July 2012, 13.37.44-13.42.02, p. 57, lines 6-13, 15.20.31-15.24.06, pp. 83-84.
3920 **F54** Appeal Brief, para. 1677.
3921 **F54** Appeal Brief, para. 1678.
3922 *Contra* **F54** Appeal Brief, para. 1678.
3923 **E1/68.1** Saloth Ban *alias* So Hong, T. 25 Apr. 2012, 11.28.03-11.30.40, p. 46, lines 20-24; **E1/97.1** Rochoem Ton *alias* Phy Phuon, T. 26 July 2012, 09.33.36-09.35.59, p. 11, lines 10-19, 10.26.50-10.29.38, p. 27, lines 15-23.
3924 **E1/97.1** Rochoem Ton *alias* Phy Phuon, T. 26 July 2012, 09.33.36-09.35.59, p. 11, lines 10-19.
3925 **E1/97.1** Rochoem Ton *alias* Phy Phuon, T. 26 July 2012, 09.33.36-09.35.59, p. 11, lines 10-19.

1071. Second, Appellant contends that the TC erred in finding that Nuon Chea and Appellant's testimonies, as well as Ieng Sary's statements, corroborate the accounts of Phy Phuon regarding the April 1975 meeting at B-5, but fails to present any argument demonstrating that the finding was unreasonable.[3926] Appellant merely disagrees with the finding and erroneously suggests that the TC failed to provide reasons for accepting Phy Phuon's testimony in light of conflicting evidence.[3927] A proper reading of the TC's reasons demonstrates that it acknowledged some conflicting evidence on Appellant's participation in the April 1975 meeting,[3928] but still accepted Phy Phuon's evidence because it found his testimony both reliable in light of "his clear and consistent descriptions of the April 1975" meeting,[3929] and corroborated by numerous witnesses. These witnesses confirmed that (i) there was a meeting in April 1975;[3930] (ii) Pol Pot opened an office at B-5 to prepare the liberation of Phnom Penh;[3931] (iii) Appellant was at B-5 to follow the last offensives along with Pol Pot, Nuon Chea, and the Zone Secretaries;[3932] and (iv) there was a meeting at the beginning of April 1975 where the evacuation of Phnom Penh was discussed.[3933]

1072. Third, Appellant claims without merit that the TC ignored exculpatory evidence as to his absence of involvement in the decision on the evacuation of Phnom Penh.[3934] The evidence Appellant cites does not support his claims. For example, Appellant erroneously claims that he could not vote as a member of the Party,[3935] citing the CPK Statute of 1976 that was not in force in April 1975[3936] because as the TC found,[3937] it was adopted in the 4th Party Congress in January 1976. The CPK Statute of 1971, on the other hand, provided that "the rights of other Party candidates are the same as those of [a] full-rights Party [member]".[3938] Similarly, Appellant cites Saloth Ban's testimony to support his claim that he was not involved in military matters, ignoring the fact that Saloth Ban saw him participating in a meeting at B-5 where he provided assistance on the listing of

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3926 **F54** Appeal Brief, para. 1679.
3927 **F54** Appeal Brief, para. 1679.
3928 **E465** Case 002/02 TJ, para. 583.
3929 **E465** Case 002/02 TJ, para. 588.
3930 **E465** Case 002/02 TJ, para. 585.
3931 **E465** Case 002/02 TJ, para. 585, fn. 1831.
3932 **E465** Case 002/02 TJ, para. 585, fn. 1832. *See also* **E1/68.1** Saloth Ban *alias* So Hong, T. 25 Apr. 2012, 11.23.53-11.28.03, p. 45, lines 14-22.
3933 **E465** Case 002/02 TJ, paras 233, 585 (fns 561, 1833).
3934 **F54** Appeal Brief, paras 1681-1682.
3935 *See* response to Ground 203 (democratic centralism).
3936 **F54** Appeal Brief, para. 1681, fn. 3239.
3937 **E465** Case 002/02 TJ, para. 3738.
3938 **E3/8380** CPK Statute, 1971, art. 3.

ammunition.[3939] Contrary to Appellant's assertion,[3940] Ieng Sary did not mention in December 1996 that Appellant was not involved in the decision to evacuate Phnom Penh.[3941]

Ground 204: Training sessions [3942]

1073. **Ground 204 should be dismissed as Appellant fails to establish that the TC erred in law and fact in finding that he attended and lectured at political training sessions focused on, *inter alia*, the identification of "enemies" and "traitors".**

1074. The ground fails as Appellant does not demonstrate any error in fact and law in the TC's findings on (i) his statements about the enemies and traitors; or (ii) his role during the political trainings and their content.

The TC properly assessed Appellant's statements about the enemies and traitors

1075. Appellant contends that the TC erroneously attributed to him statements about identifying "enemies" and ferreting out "traitors"[3943] by relying on two witnesses who were allegedly unreliable and not credible. Appellant does not show any error in the TC's assessment of credibility and reliability of Em Oeun and Ek Hen, considering the deference given to the TC in assessing the evidence before it.[3944]

1076. Regarding Em Oeun's testimony, Appellant erroneously avers that the TC erred in ignoring contradictions affecting his credibility.[3945] As established in response to Ground 22, the TC correctly considered Em Oeun's testimony to be credible.[3946] The contradictions raised by Appellant[3947] were peripheral to Em Oeun's main statement that Appellant provided training at Borei Keila, inciting the attendants to identify the traitors and enemies.[3948] Contrary to Appellant's claim,[3949] the TC's assessment of Em Oeun's testimony was reasonable since the witness gave consistent and detailed testimony on the location and the topics discussed by Appellant during the political training session he

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3939 **E1/68.1** Saloth Ban *alias* So Hong, T. 25 Apr. 2012, 11.23.53-11.28.03, p. 45, lines 14-22.
3940 **F54** Appeal Brief, para. 1682.
3941 **E3/89** Interview with Ieng Sary by Stephen Heder, 17 Dec. 1996, EN 00417627.
3942 Ground 204: **F54** Appeal Brief, *Training sessions,* paras 1754-1762, 1928-1931; **F54.1.1** Appeal Brief Annex A, p. 70 (EN), p. 65 (FR), p. 99 (KH).
3943 **F54** Appeal Brief, para. 1755.
3944 *See* Standard of Review (Errors of Fact).
3945 *Contra* **F54** Appeal Brief, para. 1758.
3946 *See* response to Ground 22.
3947 The contradictions raised concerned the circumstances of Em Oeun's mother's death (**E465** Case 002/02 TJ, para. 1758) and the exact period the training sessions was held (**F54** Appeal Brief, paras 1757-1758).
3948 **F54** Appeal Brief, para. 1758.
3949 **F54** Appeal Brief, para. 1757.

attended[3950] and was corroborated by other witnesses.[3951]

1077. Regarding Ek Hen's testimony, Appellant contends that she gave confusing versions regarding the time of the Borei Keila's meetings and identity of the speakers denouncing enemies.[3952] As established in Response to Ground 20, the TC correctly considered Ek Hen's testimony to be credible. Ek Hen was consistent on the nature of Appellant's statements during the political trainings he gave at Borei Keila. About the timing, she stated that Appellant and Nuon Chea gave two separate trainings in 1976 and 1978, one in which (i) Nuon Chea talked about traitors in the North Zone, and talked about Koy Thuon's treason;[3953] and another in which (ii) Appellant talked about work quotas[3954] and Vietnamese spies and justified Pang's arrest "because he was a traitor collaborating with the 'Yuon'".[3955] When assessing her testimony in the context of the evidence, it was obvious for the TC that the trainings given by Nuon Chea and by Appellant were respectively held in 1976 and 1978, because Koy Thuon was arrested in 1976[3956] and Pang in 1978.[3957] Appellant fails to demonstrate that her confusion about the year she attended Appellant's training would make the TC's reliance on her testimony unreasonable.[3958]

The TC correctly assessed Appellant's role during the political trainings and their content

1078. Appellant claims that the TC erred in relying on his participation in political trainings to find that he contributed to the common purpose.[3959]

1079. First, Appellant erroneously contends that his remarks during these meetings were not about any CPK policies but general economic projects.[3960] Appellant's piecemeal approach[3961] fails to consider the totality of the evidence. Indeed, Appellant ignores the weight of the evidence the TC relied on to conclude that his lectures pertained to

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3950 **E1/115.1** Em Oeun, T. 27 Aug. 2012, 10.10.31-10.31.05, pp. 25-33, 11.18.00-11.23.53; T. 23; **E1/113.1** Em Oeun, T. 23 Aug. 2012, 14.22.12-15.07.54, pp. 80-87, 15.35.36-15.43.37, pp. 97-99.

3951 **E465** Case 002/02 TJ, para. 3739, fn. 12473 *citing* **E1/73.1** Pean Khean, T. 17 May 2012, 10.14.52 - 10.24.01, pp. 22-25; **E1/217.1** Ek Hen, T. 3 July 2013, pp. 40-48, 63, 78-82, 87-88, 90-98.

3952 **F54** Appeal Brief, para. 1759.

3953 **E1/217.1** Ek Hen, T. 3 July 2013, 11.37.13-11.43.46, pp. 50-51; **E3/474** Ek Hen WRI, EN 00205049-50.

3954 **E1/217.1** Ek Hen, T. 3 July 2013, 11.18.47-11.21.13, p. 43, lines 1-21; **E3/474** Ek Hen WRI, EN 00205049; **E3/4635** Ek Hen DC-Cam Statement, EN 00662014.

3955 **E1/217.1** Ek Hen, T. 3 July 2013, 11.26.06-11.28.02, p. 45, lines 17-20, 11.29.00-11.33.02, pp. 47-48.

3956 **E465** Case 002/02 TJ, para. 4069.

3957 **E465** Case 002/02 TJ, para. 4139.

3958 **F54** Appeal Brief, para. 1759.

3959 **F54** Appeal Brief, paras 1760-1762.

3960 **F54** Appeal Brief, para. 1760.

3961 **F54** Appeal Brief, paras 1760-1762.

identifying "enemies" and uncovering "traitors".[3962] Both Em Oeun and Ek Hen testified that he urged the participants to identify infiltrated enemies based on a particular method and not to follow the example of traitors who collaborated with Vietnamese.[3963] Appellant also ignores the testimony of Phy Phuon who stated that Appellant gave a training session at K-15 where the internal and external political situation and "common enemy" were discussed.[3964] Appellant also misrepresents the evidence. For example, he claims that the TC erroneously relied on Pean Khean's testimony, arguing that he stated that the political session was only about presenting a development policy for "a prosperous country",[3965] where, in fact, he also stated that Appellant and other leaders' presentation at Borei Keila comprised instructions to identify infiltrated enemies, including CIA and KGB agents, and Vietnamese, in order to defend the country against a Vietnamese invasion or the return of American Imperialists.[3966]

1080. Second, Appellant erroneously avers that the TC erred in its assessment of his role during these meetings, arguing that he did not speak much.[3967] Appellant fails to demonstrate any error and merely proposes an alternative interpretation of the evidence on which the TC relied.[3968] The TC reasonably found that Appellant lectured at, and also attended training sessions where other CPK leaders spoke about enemies inside the country and who infiltrated the Party,[3969] labelling as enemies the Vietnamese, Vietnamese "agents",[3970] and ex-KR soldiers,[3971] and the need to "find", "screen" and "sort" soldiers affiliated to the previous regime.[3972] Appellant did not dissociate himself from the comments made by the other CPK leaders.

3962 **E465** Case 002/02 TJ, para. 607, fn. 1904.
3963 Em Oeun: **E465** Case 002/02 TJ, paras 3942-3943, 3967; Ek Hen: **E465** Case 002/02 TJ, para. 3390, *see also* para. 3216 (fn. 10825).
3964 **E1/96.1** Phy Phuon, T. 25 July 2012, 14.25.02-14.34.24, pp. 77-79; **E1/100.1** Phy Phuon, T. 1 Aug. 2012, 15.26.35-15.35.43, pp. 94-96. Appellant also ignored Bit Na's testimony stating he participated actively with Pol Pot and Nuon Chea in the political sessions instructing to search for internal enemies (**E1/502.1**, Beit Boeum *alias* Bit Na, T. 28 Nov. 2016, 10.08.26-10.45.14, pp. 22-23, 25, 28).
3965 **F54** Appeal Brief, para. 1762, fn. 3406.
3966 **E1/73.1** Pean Khean, T. 17 May 2012, 10.08.24-10.24.01, pp. 20-24.
3967 **F54** Appeal Brief, para. 1761.
3968 **F54** Appeal Brief, paras 1761-1762.
3969 **E465** Case 002/02 TJ, para. 4038.
3970 **E465** Case 002/02 TJ, para. 3517.
3971 **E465** Case 002/02 TJ, para. 4038, fn. 13373.
3972 **E465** Case 002/02 TJ, paras 4038, 4054.

Ground 182: Errors about Khieu Samphan's role regarding the cooperatives [3973]

1081. **Ground 182 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that he promoted, supported, and/or endorsed the objective of fulfilling economic and ideological goals, and that he knew of the mistreatment of the population and of the crimes, thereby establishing that he had the requisite *mens rea* for the crimes committed in cooperatives and worksites.**

1082. The ground fails as Appellant's arguments ignore the TC's holistic approach to the evidence and do not show that the TC's assessment was unreasonable regarding (i) his speeches/statements, and (ii) his contribution to the criminal policy.

1083. Regarding his own speeches/statements, Appellant erroneously assesses some of them in isolation, in an attempt to demonstrate that none was sufficient in itself to demonstrate his knowledge that crimes were committed in the cooperatives.[3974] Appellant erroneously asserts that the TC's finding on his knowledge of the crimes committed in cooperatives was solely based on his *post facto* statements[3975] as he ignores the totality of the evidence upon which the TC relied.[3976]

1084. Contrary to Appellant's claim,[3977] many of his speeches show that he promoted, supported, and/or endorsed the criminal policy regarding the cooperatives.[3978] For example, on 21 April 1975, he referred to the people "increasing production", cultivating two rice harvests annually, "working day and night [...] without rest, and by making countless outstanding sacrifices".[3979] In his April 1978 speech, he announced that because food crop production objectives of three tonnes per hectare per harvest had been met, the Party increasingly exported rice and decided to increase the production target and exports even more.[3980] In a January 1979 statement, Appellant underlined that the people were "vigorously struggling to maximize production in order to maintain *under all circumstances* mastery in food supplies *at the rate set by the party*".[3981]

3973 Ground 182: **F54** Appeal Brief, *Errors about Khieu Samphan's role regarding the cooperatives,* paras 1511-17; **F54.1.1** Appeal Brief Annex A, p. 63 (EN), p. 58 (FR), pp. 89-90 (KH).

3974 **F54** Appeal Brief, paras 1511-1513.

3975 **F54** Appeal Brief, para. 1511.

3976 *See* response to Ground 211 (knowledge of crimes in cooperatives and worksites).

3977 **F54** Appeal Brief, para. 1513.

3978 **E465** Case 002/02 TJ, para. 3916, fn. 13067 (all sources cited), *see also* fn. 13072.

3979 **E465** Case 002/02 TJ, para. 3916, fn. 13067 *citing* **E3/118** FBIS, *Khieu Samphan 21 April Victory Message on Phnom Penh Radio*, 21 Apr. 1975, EN 00166994-95.

3980 **E465** Case 002/02 TJ, para. 3909, fn. 13041 *citing* **E3/169** *Khieu Samphan Speech at Anniversary meeting*, 17 Apr. 1978, EN 00280393, 400. **E3/1361** FBIS, *Khieu Samphan Statement*, 15 Apr. 1978, EN 00168816.

3981 **E465** Case 002/02 TJ, para. 3916, fn. 13067 *citing* **E3/296** FBIS, *Government Statement Appeals for Aid to Combat SRV Aggression*, 1 Jan. 1979, EN 00169295 (statement read by Appellant) (emphasis added).

1085. Regarding his contribution to the policy to establish and operate cooperatives, Appellant alleges without merit a series of factual errors in the TC's findings.[3982] Most of his claims repeat erroneous claims made in Grounds 200, 201, 202, and 203, which have been addressed in detail in other sections of this Response.

1086. First, Appellant contends that the TC erred in finding that he was a DK leader.[3983] He repeats his erroneous claims that his functions as President of the State Presidium were ceremonial[3984] and minimises the significance of his participation in SC meetings.[3985]

1087. Second, Appellant erroneously asserts that the TC erred in finding he was aware of the report on the SC's visit to the Northwest Zone[3986] that concluded that the cooperatives' role was to absorb all the NP, including the "contemptibles" and "no-good elements".[3987] It was reasonable for the TC to make this finding[3988] not only because of his seniority within the Party, but also because he personally participated in the development of plans and policies reflected in the report.[3989] As the TC found, Pol Pot, Nuon Chea, Appellant, Ieng Sary, and Son Sen met regularly after April 1975 with Zone and Sector Secretaries to discuss policies and plans to develop the country, including building cooperatives,[3990] and Appellant attended numerous SC meetings, including one held in September 1975 at which agriculture, drought and industry were discussed.[3991]

1088. Third, Appellant contends that the TC erred in finding that he would have known of living conditions on the ground due to the systematic reporting regime,[3992] and repeats the claim that cooperatives and worksites were established with the overarching purpose of improving living conditions.[3993] This assertion is incorrect[3994] and ignores the totality of the evidence, which supports the TC's finding.[3995]

1089. Fourth, contrary to Appellant's assertions[3996] and as detailed in the response to Ground

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3982 **F54** Appeal Brief, para. 1514.
3983 **F54** Appeal Brief, para. 1514, *criticising* **E465** Case 002/02 TJ, para. 3884.
3984 See response to Ground 202 (President of State Presidium).
3985 *See* response to Ground 203 (participation in SC's meetings).
3986 **F54** Appeal Brief, para. 1515, *criticising* **E465** Case 002/02 TJ, para. 3888.
3987 **E465** Case 002/02 TJ, para. 3887.
3988 As well as the finding regarding his knowledge of the Sept. 1975 policy document: **E465** Case 002/02 TJ, para. 3891.
3989 **E465** Case 002/02 TJ, paras 3888, 4224.
3990 **E465** Case 002/02 TJ, paras 3884 (fns 12960, 12962-12963), 3885.
3991 **E465** Case 002/02 TJ, para. 3891, fn. 12977.
3992 **F54** Appeal Brief, para. 1516, *criticising* **E465** Case 002/02 TJ, para. 3913. *See* response to Grounds 211-15.
3993 **F54** Appeal Brief, para. 1516.
3994 This argument made during the trial was rejected by the TC in**E465** Case 002/02 TJ, para. 3929.
3995 *See* response to Ground 211 (knowledge that crimes were committed).
3996 **F54** Appeal Brief, para. 1517.

201,[3997] the TC reasonably found that Appellant contributed to the criminal cooperatives policy as he was reported in radio broadcasts to have presented the new Constitution during a December 1975 national congress,[3998] to have then explained that people did work collectively in the fields and appealed to people to "jointly strive to increase production to build and protect the country".[3999]

Ground 222: Errors on knowledge of crimes in relation to marriages.[4000]

1090. **Ground 222 should be dismissed as Appellant fails to establish that the TC erred in fact in finding that he gave instructions regarding marriages as part of a policy to increase the population at a meeting in Wat Ounalom and that he personally promoted this policy in his speeches, thereby establishing that he was responsible for these crimes as a member of the JCE.**

1091. The ground fails as Appellant does not demonstrate that the TC erred in finding that (i) he "lectured cadres on the necessity of remaining detached from one's parents and instructed that all ministries had to arrange marriages" for all youths so that the couples could produce children in order to augment "the forces to defend the country";[4001] and (ii) he promoted the policy to rapidly increase DK's population.[4002]

1092. Regarding the instructions on marriage that he gave at a meeting in Wat Ounalom in late 1975, Appellant fails to establish that the TC's reliance on Chea Deap's testimony, considered by it to be "reliable and consistent throughout",[4003] was unreasonable.[4004] He merely refers to Ground 166 of his Appeal Brief[4005] and repeats previous arguments that were unsuccessful before the TC.[4006]

1093. Contrary to Appellant's contention,[4007] Chea Deap's credible testimony is not the only evidence that demonstrates his involvement in the policy of forced marriage. Appellant

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3997 *See* response to Ground 201 (participation in 1975 national congresses).

3998 **E465** Case 002/02 TJ, para. 3897, fns 12991-12992.

3999 **E465** Case 002/02 TJ, para. 3897, fn. 12991 *citing* **E3/273** FBIS, *Khieu Samphan Report*, 6 Jan. 1976, EN 00167810-17 (at 00167815: "Everybody works in the fields because our workers practice the collective system of labour"); **E3/1356** FBIS, *National Congress Held; New Constitution Adopted*, 15 Dec. 1975, EN 00167574-75.

4000 Ground 222: **F54** Appeal Brief, *Errors on knowledge of crimes in relation to marriages,* paras 1928-1931; **F54.1.1** Appeal Brief Annex A, p. 75 (EN), p. 70 (FR), p. 107 (KH).

4001 **E465** Case 002/02 TJ, para. 4247, fn. 13860, *referring to* para. 3569.

4002 **E465** Case 002/02 TJ, para. 4248, fns 13863-13864, *referring to* paras 3551, 3586.

4003 **E465** Case 002/02 TJ, para. 3569.

4004 **F54** Appeal Brief, para. 1929.

4005 **F54** Appeal Brief, para. 1929, *referring to* paras 1233-1242. *See* response to Ground 166 (Chea Deap).

4006 **E465** Case 002/02 TJ, para. 3569, fn. 11979.

4007 **F54** Appeal Brief, para. 1929.

fails to acknowledge his mid-April 1978 speech, which echoes his lecture at Wat Ounalom, by encouraging the people to "resolutely [put] the interests of the nation, the class, the people and the revolution over the personal and family interests".[4008]

1094. Appellant erroneously avers that the TC erred in finding that he promoted the policy to increase the population. Appellant's unsubstantiated claim fails to demonstrate that the TC distorted his April 1978 speech during which he stated that Party members should aim to strive to "implement well the plan to increase the size of the population to its maximum, so as to have 15-20,000,000 people in the next 15-20 years".[4009]

1095. The ground also fails as Appellant erroneously contends that the TC was biased in its evidence assessment because it previously heard Case 002/01 evidence on the regulation of marriage. Contrary to Appellant's claim,[4010] in Case 002/01, the TC never determined Appellant's criminal responsibility for forced marriage. In addition, Appellant failed to overcome the strong presumption of impartiality of the judges. The TC properly directed itself by stating that "[n]o importation of criminal responsibility is made between cases and factual findings are not transposed from Case 002/01 to Case 002/02",[4011] adding that "although there is partial commonality between the oral and documentary evidence in each case, [it] evaluates all the material now before it".[4012]

3. INTENT

1096. As required by the *mens rea* requirement of JCE I,[4013] the TC correctly found that Appellant shared with the other JCE participants both the intent to commit the crimes within the common purpose and the intent to participate in the common purpose involving their commission.[4014] Appellant's 31 grounds[4015] regarding his intent fail, as they adopt a flawed piecemeal approach to both the evidence and the Judgment, and are based on a misunderstanding of relevant law.

1097. In particular, Appellant's claims contravene settled jurisprudence that there is no

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4008 **E465** Case 002/02 TJ, para. 3570 *citing* **E3/202** *Khieu Samphan's Speech*, undated, EN 00002960.
4009 **E465** Case 002/02 TJ, para. 3551, fn. 11931.
4010 **F54** Appeal Brief, para. 1928.
4011 **E465** Case 002/02 TJ, para. 36.
4012 **E465** Case 002/02 TJ, para. 36, fn. 83. *See* response to Ground 4.
4013 **F36** Case 002/01 AJ, paras 1053-1054; **D97/15/9** PTC JCE Decision, paras 37, 39; Case 001-**E188** *Duch* TJ, para. 509; **E313** Case 002/01 TJ, paras 690, 694; *Tadić* AJ, paras 196, 220, 228; *Brđanin* AJ, para. 365; *Šainović* AJ, para. 1470; *Popović* AJ, para. 1369; *Munyakazi* AJ, para. 160; *Sesay* AJ, paras 474-475. *See also Prlić* AJ, paras 1771-1772, 2372, 2422.
4014 **E465** Case 002/02 TJ, paras 4279-4305.
4015 Grounds 193, 195-197, 208, 210-221, 223, 225, 232-243.

requirement that Appellant intended specific crimes or incidents,[4016] nor is knowledge of crimes a separate material element additional to intent.[4017] The TC properly *inferred* Appellant's intent from, *inter alia*, his knowledge of crimes and continuing participation in the common plan.[4018] In drawing this inference, the TC was not required to find that Appellant knew about *specific* criminal incidents.[4019] That intent may be demonstrated through an accused's wilful blindness is also well established.[4020] It is not required that the Appellant have enthusiasm for or gain personal satisfaction from the crimes nor is it required that they were personally initiated by him.[4021]

i. Mens Rea for JCE

Ground 225: Mens rea: the intention to commit a deliberate crime at the core of the common purpose[4022]

1098. **Ground 225 should be dismissed as Appellant fails to establish that the TC committed any error in articulating the law on the *mens rea* for JCE.**

1099. Contrary to Appellant's repeated submissions,[4023] the TC articulated the correct

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4016 *Prlić* AJ, para. 2074 (fn. 7106); *Stanišić & Župljanin* AJ, para. 917; *Sesay* AJ, para. 906.

4017 *Šainović* AJ, para. 1491; *Prlić* AJ, para. 2074 (fn. 7106); *Sesay* AJ, para. 823.

4018 *See e.g. Tolimir* AJ, para. 474 ("[To demonstrate that an individual shared the common purpose] it suffices that [s/he] knows that crimes are being committed according to a common plan and knowingly participates in that plan in a way that facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently"); *Prlić* AJ, paras 1800 ("The Appeal Chamber recalls [...] that the requisite *mens rea* for a conviction under JCE I can be inferred from a person's knowledge of the common plan, combined with his continued participation in the JCE, if this is the only reasonable inference available on the evidence"), 1802; *Popović* AJ, para. 1652.

4019 *Prlić* AJ, para. 1802 ("the Appeals Chamber is not convinced by Stojićs submission that knowledge of crimes typically obtained from reports after the fact cannot support an inference that he possessed the requisite intent to commit the crimes in question. [...] The Trial Chamber [found] that Stojić [...] knew of the crimes [...] In this regard, the Appeals Chamber recalls that it is not necessary for a participant in a JCE to know of each specific crime committed in order to be liable for it."); *Tolimir* AJ, para. 474 ("a participant in a JCE need not know of each crime committed in order to be criminally liable").

4020 *See e.g.* IMT Judgment, pp. 305-307 ("Funk has protested that he did not know that the Reichsbank was receiving articles of this kind [personal belongings taken from victims who were exterminated in concentration camps]. The Tribunal is of the opinion that he either knew what was being received *or was deliberately closing his eyes to what was being done*" (emphasis added). On this basis, the IMT found Funk guilty of, *inter alia*, CAH); *Eichmann* Case, paras 115, 244 (Finding Eichmann guilty of crimes against the Jewish people (genocide) and CAH, in part on the basis that he willingly ignored warnings about the criminal nature of the deportation of thousands of Jews from Hungary and ordered his assistant to do the same); *R v. Finta* [1994] 1 S.C.R. 701, p. 706 ("Alternatively, the *mens rea* requirement of both [CAH] and war crimes would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.").

4021 *Popović* AJ, fn. 2971; *Krnojelac* AJ, para. 100.

4022 Ground 225: **F54** Appeal Brief, *Mens rea: the intention to commit a deliberate crime at the core of the common purpose*, paras 1963-1965; **F54.1.1** Appeal Brief Annex A, p. 76 (EN), pp. 70-71 (FR), p. 109 (KH).

4023 **F54** Appeal Brief, paras 1963-1965. Appellant simply repeats an argument which was previously rejected by the SCC in Case 002/01: **F36** Case 002/01 AJ, para. 1053 ("To the extent that Khieu Samphan argues that the [TC] incorrectly stated that the accused must have the intention to participate in the common

definition of the *mens rea* for JCE, which has been consistently applied at the ECCC.[4024] Appellant merely notes different phrasing used by other tribunals without showing that it amounts to any difference in meaning.[4025] When analysing Appellant's *mens rea*, the TC did not "deduce the intention to commit the crimes from mere participation in the purpose"[4026], but rather specifically addressed whether he had acted with the intent to commit the crimes encompassed by the common purpose.[4027]

Ground 232: Reminder of the errors regarding the intent to share support for a criminal common purpose [4028]

1100. **Ground 232 should be dismissed as Appellant fails to demonstrate that the TC erred in finding that he intended to support a common purpose that was criminal in nature.**

1101. Appellant alleges multiple errors relating to his intent to support the common purpose of the JCE, however, these allegations are ill-defined and unfounded.[4029] He does not indicate whether he is alleging errors of law or fact, ignores the requisite standards of review, and utterly fails to establish how the arguments he raises could invalidate the Judgment or occasion an actual miscarriage of justice.

1102. Contrary to Appellant's claims,[4030] the TC did not err in defining the common purpose,[4031] or by finding that the common purpose involved criminal policies.[4032] Further, though it is necessary to demonstrate that an accused made a significant

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purpose, as opposed to effect the common purpose and perpetrate crimes, the [SCC] considered that this statement does not disclose an error of law.").

4024 **E465** Case 002/02 TJ, para. 3712 ("an accused must intend to participate in the common purpose and this intent must be shared with the other JCE participants. JCE participants must also be shown to share with the other JCE participants the required intent regarding the underlying crime"), *affirmed* in **F36** Case 002/01 AJ, para. 1053. *See also* **E313** Case 002/01 TJ, para. 694.

4025 **F54** Appeal Brief, paras 1963-1964, fn. 3814. Each judgment cited by Appellant states that an accused must intend to commit the crimes falling within the common purpose and "intend to participate in a common plan aimed at their commission." *See e.g. Popović* AJ, para. 1369. Appellant does not demonstrate how the analyses in these judgments differ from that undertaken by the TC, nor does he explain how they support his erroneous claim that the law requires an accused to have the intent of participating in the "**execution** of the criminal aspect of the common purpose" (emphasis added) (**F54** Appeal Brief, para. 1963).

4026 **F54** Appeal Brief, para. 1965.

4027 **E465** Case 002/02 TJ, para. 4279. *See also* paras 4282, 4287, 4289, 4293-4295, 4298, 4300, 4302, 4305. In its measured analysis, the TC found that Appellant did not have the requisite intent to impute JCE liability for the crime of genocide against the Cham, *see* para. 4290.

4028 Ground 232: **F54** Appeal Brief, *Reminder of the errors regarding the intent to share support for a criminal common purpose*, paras 2031-2032; **F54.1.1** Appeal Brief Annex A, p. 78 (EN), p. 72 (FR), p. 111 (KH).

4029 **F54** Appeal Brief, paras 2031-2032.

4030 **F54** Appeal Brief, para. 2031 *citing* paras 1438-1603.

4031 *See* response to Grounds 189, 175, 176, 177 & 224. *See* **E465** Case 002/02 TJ, paras 3743, 4068.

4032 *See* response to Grounds 178-180, 181 & 183, 182, 184-188.

contribution to the common purpose, it is not necessary to demonstrate that the particular contribution was itself criminal in nature.[4033] Thus, contrary to Appellant's claim,[4034] the TC was not required to establish his intent to participate in the "criminal aspect" of the common purpose,[4035] and rightly found that he made a significant contribution to the common purpose.[4036]

Ground 233: Incorrect reasoning to deduce criminal intent[4037]

1103. **Ground 233 should be dismissed as Appellant fails to establish that the TC's conclusion that Appellant possessed the requisite *mens rea* to commit the crimes in the JCE was one no reasonable fact finder could have reached.**

1104. In disputing the TC's reasoning regarding his intent to commit the crimes through the JCE, Appellant fails to advance substantive argumentation, merely repeating erroneous claims made elsewhere in his brief,[4038] without providing citations to evidence or legal authorities.[4039]

1105. It is clear that the common purpose "intrinsically" relied on the implementation of five policies, each of which involved the commission of crimes.[4040] Appellant's endless repetition of an invalid claim disputing this finding does not make the finding any less true.[4041] It is also clear, based on a correct application of the law,[4042] that, "by designing, implementing, controlling and contributing to the policies",[4043] Appellant shared the intent to bring about the common purpose,[4044] and, crucially, intended the commission of crimes the five policies intrinsically linked to the common purpose involved, as discussed in more detail in response to Appellant's grounds regarding intent below.[4045] Appellant consistently displayed his intent to commit crimes underlying the common

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4033 *See* response to Ground 225.
4034 **F54** Appeal Brief, para. 2032 *citing* paras 1593-1603, 2001-2030, 1963-1965.
4035 *See* response to Grounds 226 and 189, 175, 176, 177 & 224.
4036 *See* Section VIII.C.2. Significant Contribution.
4037 Ground 233: **F54** Appeal Brief, *Incorrect reasoning to deduce criminal intent*, paras 2033-2038; **F54.1.1** Appeal Brief Annex A, p. 78 (EN), pp. 72-73 (FR), p. 112 (KH).
4038 **F54** Appeal Brief, para. 2034, fn. 3962 *citing* paras 1981-2000.
4039 **F54** Appeal Brief, paras 2033, 2035-2038.
4040 **E465** Case 002/02 TJ, para. 4068. *See* response to Grounds 178, 189, 175, 176, 177 & 224 (common purpose).
4041 **F54** Appeal Brief, para. 2034 *citing* paras 1981-2000.
4042 *See* response to Ground 225.
4043 **E465** Case 002/02 TJ, para. 4073.
4044 *See* response to Ground 232.
4045 *See in particular* Section VIII.D.3. Intent (intent to commit crimes against targeted groups; intent to commit crimes during internal purges and at security centres and execution sites; intent to commit crimes at cooperatives and worksites; intent to commit forced marriage including rape.)

purpose in a variety of fashions, be it through his "enthusiasm" for the CPK's plans, his "defen[ce] [of] Pol Pot's methods", or his "steadfast" and "staunch" support of the Party's discriminatory policies.[4046]

ii. Knowledge Indicative of Appellant's Intent

Ground 208: The requisite level of knowledge varies at different times[4047]

1106. **Ground 208 should be dismissed as Appellant fails to demonstrate that, in stating that the requisite level of knowledge varied depending on when the criminal liability materialised, the TC committed an error of law that invalidates the Judgment.**

1107. The phrasing used by the TC may be somewhat ambiguous.[4048] However, as Appellant himself acknowledges,[4049] it is clear from the context and the Chamber's own citation[4050] that the TC is merely stating that different modes of criminal liability require different types of knowledge to support the requisite *mens rea*, and that such knowledge may occur before, concurrent with, or after the commission of crimes. Thus, the TC's statement is not erroneous.

1108. Throughout the Judgment, the TC correctly stated[4051] and applied[4052] the *mens rea* for JCE and A&A liability. Indeed, though Appellant inaccurately paraphrases the Judgment, he seemingly acknowledges that the TC stated that JCE liability requires direct intent while A&A requires knowledge that a crime is likely to be committed and that his conduct assists or facilitates the commission of a crime.[4053] Appellant has not demonstrated that this statement had any effect on the TC's ultimate verdict or that the TC failed to show that he held the requisite *mens rea* for any of the crimes for which he was convicted.

4046 **E465** Case 002/02 TJ, paras 4281, 4286, 4298, 4300. *See* response to Grounds 193, 223.

4047 Ground 208: **F54** Appeal Brief, *The requisite level of knowledge varies at different times*, paras 1804-1807; **F54.1.1** Appeal Brief Annex A, p. 71 (EN), p. 66 (FR), p. 101 (KH).

4048 **E465** Case 002/02 TJ, para. 4204. Note that the English translation of this sentence in **F54** Appeal Brief, para. 1804 erroneously reads that "the requisite level of knowledge varies depending on whether *the criminal offences* with which the Accused is charged materialised before, concurrent with or after the commission of the crimes" (emphasis added).

4049 **F54** Appeal Brief, para. 1807 ("It would thus appear that what the [TC] meant to say was that the requisite level of knowledge varies according to the alleged mode of liability").

4050 **E465** Case 002/02 TJ, para. 4204, fn. 13726 *cross referring* to paras 3715, 3717, 3719-3720, 3722, 3725.

4051 **E465** Case 002/02 TJ, paras 3712 (JCE), 3722 (A&A) *See* response to Grounds 225 (JCE), 245 (A&A).

4052 *See* Section VIII.C.3. Intent, Section VIII.D.2 *Mens Rea.*

4053 **F54** Appeal Brief, paras 1805-1806 citing **E465** Case 002/02 TJ, paras 3715, 3722.

Ground 195: Principle of secrecy[4054]

1109. **Ground 195 should be dismissed as Appellant fails to establish that the TC erred in fact by finding that the "principle of secrecy" only occasionally applied to Appellant.**

1110. This ground should be dismissed as Appellant merely disagrees with the TC on the impact of the CPK's principle of secrecy on Appellant's knowledge of crimes. Appellant merely asserts an alternative interpretation of the evidence without demonstrating how the TC erred, a flawed approach which was rejected by the SCC in Case 002/01.[4055]

1111. Further, Appellant takes the TC's findings on the principle of secrecy out of context. As in Case 002/01,[4056] Appellant is silent on extensive findings contained in different sections of the Judgment relevant to this issue.[4057] Consequently, Appellant's assessment as to the impact of the principle of secrecy is substantially incomplete, and Appellant fails to demonstrate that the TC's findings regarding the principle of secrecy could not have been reached by any reasonable trier of fact upon a holistic assessment of the evidence.[4058]

1112. The TC reasonably considered that from 1975-1979 the precise operational structure, goals and activities of the CPK were indeed shrouded in secrecy by the CPK leadership in order to protect the Party from enemy infiltration, keep ordinary people and lower-ranking cadres ignorant, and make them obey the leadership's decisions without question.[4059] The TC also reasonably found that the CPK leaders, including Appellant, were not subject to, but supported, the principle of secrecy,[4060] and participated in SC meetings during which discussions were held about what should be kept secret.[4061] The need to maintain absolute secrecy about the identification of CPK enemies and the modalities of their arrest and execution in furtherance of the common purpose was also

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4054 Ground 195: **F54** Appeal Brief, *Principle of secrecy*, paras 1650-51; **F54.1.1** Appeal Brief Annex A, pp. 67-68 (EN), p. 62 (FR), pp. 95-96 (KH).

4055 **F36** Case 002/01 AJ, 1071 rejecting Appellant's claims regarding the "principle of secrecy" raised in **F17** Case 002/01 Appeal Brief, paras 145-149. *See also* **F36** Case 002/01 AJ, para. 90.

4056 *See* **F36** Case 002/01 AJ, para. 1071.

4057 **E465** Case 002/02 TJ, paras 4202-54 (on Appellant's knowledge), 42-454, 3927, 3958, 3968, 3986, 4208, 4281.

4058 *See e.g.* **E465** Case 002/02 TJ, paras 4202-03.

4059 **E465** Case 002/02 TJ, paras 342, 362, 3793, 3927, 3938-39, 3986, 4134.

4060 **E465** Case 002/02 TJ, paras 398, 4281, 4285.

4061 **E465** Case 002/02 TJ, paras 4129, 4134. Although these paragraphs relate mainly to Nuon Chea, they equally apply to Appellant as he attended and participated in most SC meetings.

agreed upon.[4062]

1113. The testimonies Appellant cites[4063] do not support his contention that the TC speculated in considering that the principle of secrecy did not apply to all Party members, including the highest-level cadres. This evidence was from CPK cadres who were much lower than Appellant in the hierarchy and therefore subject to, in larger part, that secrecy. These witnesses did not take part in the SC and CC meetings where crucial decisions were made, they were not trusted to live and work in close proximity to Pol Pot and Nuon Chea at K-1 and K-3 throughout the regime, and they had no membership or leading role in Office 870. The TC reasonably relied on these and other factors[4064] in finding that the principle of secrecy did not apply to Appellant and that, enjoying the confidence of the other CPK senior leaders, he had "ongoing knowledge of the development of plans, their implementation and the substantial likelihood that crimes within the scope of Case 002/02 would occur".[4065]

1114. Similarly, the excerpts of testimonies selectively chosen by Appellant fail to demonstrate he had only limited access to the most secret information at K-1 and K-3.[4066] In fact, as Appellant acknowledged, Pol Pot, Nuon Chea and himself "did nothing separately".[4067]

Grounds 196 and 197: Childhood, youth and careers[4068]

1115. **Both grounds should be dismissed, as Appellant fails to establish that the TC erred in fact in its findings relating to (i) his doctoral thesis, (ii) his personal relationships with individuals who would later occupy prominent positions in the CPK, (iii) his**

4062 **E465** Case 002/02 TJ, paras 4281, 3937, 3938, 4134, 3986. *See also* **E3/1733** SC Minutes, 9 Oct. 1975, *cited in* **E465** Case 002/02 TJ, para. 3760, fn. 12536; **E3/229** SC Minutes regarding national defence matters, 22 Feb. 1976, EN 00182626, *cited in* **E465** Case 002/02 TJ, para. 4134, fn. 13585.

4063 **F54** Appeal Brief, para. 1650, fn. 3172 citing Duch, Sao Sarun, Saloth Ban, Ieng Phan and Chhouk Rin.

4064 **E465** Case 002/02 TJ, paras 4208 (noting Appellant's power to issue statements on key issues, be privy to statements made by members of the Party Centre, attend and lecture at training and indoctrination sessions where the implementation of the criminal policies was discussed, receive CPK circulars, supervise the Commerce Committee, and travel in the country), 3968, 4285, 589-624.

4065 **E465** Case 002/02 TJ, para. 4208.

4066 **F54** Appeal Brief, para. 1651, fn. 3175: the excerpts of testimonies of Oeun Tan, Sa Vi and Norng Sophang cited merely show that telegrams were delivered at K-1 to Pol Pot and Nuon Chea. However, *see* **E465** Case 002/02 TJ, paras 589 ("while living at K-3, Khieu Samphan maintained his habit of staying close to Pol Pot and Nuon Chea (which he had done since 1970), frequently visiting K-1, where Pol Pot continued to reside"). *See also* **E465** Case 002/02 TJ, para. 484, fn. 1527 (*citing* Noem Sem stating that Pol Pot, Nuon Chea and Appellant dined together at K-3; Sa Vi indicating that Appellant visited K-1 more frequently than any other senior leader; Saloth Ban stating that Ieng Sary, Nuon Chea and Appellant met with each other at K-1).

4067 **E3/3198** Transcript of video statement of Khieu Samphan, EN 00815884; **E3/3197R** Video statement of Khieu Samphan, at 00.38.48-00.42.42.

4068 Ground 196: **F54** Appeal Brief, *Childhood, youth and careers*, paras 1652-1659, **F54.1.1** Appeal Brief Annex A, p. 68 (EN), p. 63 (FR), p. 96 (KH); Ground 197: **F54** Appeal Brief, *CPK Member*, paras 1660-64, **F54.1.1** Appeal Brief Annex A, p. 68 (EN), p. 63 (FR), p. 96 (KH).

support for the common purpose dating back to 1967, and (iv) his awareness regarding the likelihood of crimes as far back as 1969.

1116. Both grounds fail as the TC made no finding based exclusively on Appellant's activities or thesis before 1970 regarding Appellant's support of the common purpose, seniority among the CPK leadership or knowledge of the likelihood of the crimes after 17 April 1975.[4069] Contrary to Appellant's assertions,[4070] it is inconsequential whether the TC might have been inconsistent regarding the year Appellant acquired knowledge of some CPK policies.[4071]

1117. Appellant does not contest that he joined the *maquis* in 1967 and became a CPK member in 1969.[4072] Appellant has not established that the TC erred by finding that the content of his doctoral thesis reflected a "positive disposition toward the CPK's policies of collectivism, including through the population's subjugation to state production initiatives".[4073] Appellant merely disagrees with the TC's conclusions regarding his thesis and repeats arguments that were rejected by the SCC in Case 002/01.[4074] The TC, however, made reasonable findings based on a nuanced approach to Appellant's thesis, acknowledging that while it was not a blueprint for CPK policies,[4075] there were some points of convergence with the policies that were ultimately enacted by the CPK.[4076]

1118. Appellant has not demonstrated that the TC erred by finding that Appellant knew some future CPK leaders while studying in France in the 1950s and/or after his return to

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4069 **E465** Case 002/02 TJ, paras 4207-4208, 4257, 574-578, 582, 219-221, 226-227, 231-232 (concerning policies, the common purpose and some crimes between 1970 and 1975 but *not* focusing on the period *prior* to 1970), 211, 572-573 (detailing Appellant joining Ta Mok in 1967 in the *maquis* and his induction as CPK member in 1969, but not drawing any conclusion regarding the DK crimes and common purpose), 567-568, 3884, 4206 (discussing the thesis but noting that it did not advocate the abolition of money or private property and was not a blueprint for CPK policies). Appellant has replicated an argument presented in **F17** Case 002/01 Appeal Brief, paras 237-246 against **E313** Case 002/01 TJ, para. 965 ("by 1969 when he joined the CPK, Khieu Samphan was well aware of the common purpose [...], as well as its development [...], and that he assented to it"). However, in **E465** Case 002/02 TJ, the TC never phrased any finding in the way presented by Appellant in **F54.1.1** Appeal Brief Annex A, p. 68.

4070 **F54** Appeal Brief, para. 1660.

4071 **E465** Case 002/02 TJ, paras 211, 220, 572-73, 4207, 4257. *See also* **E465** Case 002/02 TJ, paras 212, 3934.

4072 **F54** Appeal Brief, paras 1661-1663, 2012; *See also* **E465** Case 002/02 TJ, paras 486, 572-573, 4207, 4257.

4073 **E465** Case 002/02 TJ, para. 4206.

4074 *See* **F36** Case 002/01 AJ, para. 1002, fn. 2624 (*citing* **F17** Case 002/01 Appeal Brief, paras 246-248 which discuss his thesis' content), 1005. *See also* **F17** Case 002/01 Appeal Brief, paras 247-248.

4075 **E465** Case 002/02 TJ, paras 568, 4206.

4076 **E465** Case 002/02 TJ, paras 567-568 (Appellant's proposals of state monopoly on foreign trade, self-sufficiency, transfer of capital from commercial sector to agriculture and industry, organisation of peasants into mutual aid teams and cooperatives), 3884 (The TC compares Appellant's positions in April 1975 regarding the need to coerce people to join cooperatives in order to build the country with the content of his thesis about mutual aid teams and cooperatives), 4206 (Appellant's proposal of deterring the capitalist classes from their unproductive activities and encourage them to participate in production and organisation of cooperatives through a package of very strict measures).

Cambodia in 1959.[4077] Appellant once again repeats arguments dismissed by the SCC in Case 002/01 on this issue.[4078] The TC further did not err in concluding from these findings that Appellant showed "*support for a common criminal purpose*".[4079] The TC merely mentioned that Appellant's "*support* of the CPK and its policies traces back to at least 1967"[4080] and referred to policies which were planned, tested and implemented in "liberated" areas between 1969 and April 1975 and "implemented during the DK period in pursuit of the common purpose and involved the commission of crimes".[4081] The TC never concluded that Appellant supported any "common criminal purpose" based solely on his relations with CPK leaders developed in the 1950s in France or between his return to Cambodia and 1970. In any event, Appellant does not establish that the TC erred in finding that Appellant met Ieng Sary, Ieng Thirith, Son Sen, Ok Sakun and Hou Youn in Paris in the Marxist-Leninist Circle (1953-1959),[4082] the French Communist Party (1955-1957)[4083] or the "UEK".[4084] Nor does he establish that the TC erred in finding that the newspaper "L'Observateur", which he erroneously alleges the TC labelled "communist",[4085] was partially financed by people aligned with the Communist movement in Cambodia.[4086]

1119. Finally, and in any event, grounds 196 and 197 fail as Appellant has not demonstrated how the alleged factual errors concerning pre-1970 events could have any impact on the TC's findings regarding his criminal responsibility and constitute an actual miscarriage

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4077 **F54** Appeal Brief, paras 1652-1659, 1662.

4078 *See* **F36** Case 002/01 AJ, paras 1002, 1005. *See also* **F17** Case 002/01 Appeal Brief, paras 237-245.

4079 **F54** Appeal Brief, para. 1658 (emphasis added).

4080 **E465** Case 002/02 TJ, para. 4257 (emphasis added).

4081 **E465** Case 002/02 TJ, paras 4207-4208.

4082 **E465** Case 002/02 TJ, paras 565-566, 573. *See also* **E295/6/1.4** OCP Annex 4 to Case 002/01 Final Brief ("OCP Khieu Samphan's Chronology"), EN 00948464-66.

4083 **E465** Case 002/02 TJ, para. 565 *citing* **E3/18** Khieu Samphan, *Cambodia s Recent History and the Reasons Behind the Decisions I Made,* EN 00103740 (admitting that he joined the French Communist Party, but stating that he did not renew his membership card after 1957 due to the fact that the party's activities were primarily geared toward France's interior problems, not because it was communist); **E1/21.1** Khieu Samphan, T. 13 Dec. 2011, 14.31.37-14.34.42, p. 75, line 8–p. 76, line 8 (explaining he adhered to the French Communist Party in 1955 but later chose not to renew his membership as the meetings were only about French politics).

4084 **E465** Case 002/02 TJ, para. 566.

4085 TC did not refer to it as a communist publication but "a French language newspaper" that "contained a critique of the political landscape under Norodom Sihanouk while unequivocally supporting his policy of neutrality": **E465** Case 002/02 TJ, para. 569.

4086 **E465** Case 002/02 TJ, para. 569 (Regarding the funding by Ieng Thirith but also Thiounn Prasith, Bou Phat, Hou Youn and Hu Nim); Appellant himself has admitted that some of his sources were communists: **E1/21.1** Khieu Samphan, T. 13 Dec. 2011, 14.40.37-14.42.18, p. 78, lines 5-18. *See also* **E295/6/1.4** OCP Khieu Samphan's Chronology, EN 00948466 and sources cited within.

of justice.[4087] As in Case 002/01,[4088] the references made to Appellant's doctoral thesis and pre-1970 activities do not provide a basis for his criminal liability and are only used by the TC to contextualise his mindset and involvement in the CPK and to show how Appellant progressively gained the trust of the Party's leadership and became a leader himself who later promoted CPK policies and crimes.

Ground 193: Revolutionary Flag/Revolutionary Youth magazines[4089]

1120. **Ground 193 should be dismissed as Appellant fails to establish that the TC erred in fact and law by finding that Appellant had access to *RF/RY* magazines, and through them, became aware of the charged crimes.**

1121. This ground is essentially the same as Appellant's arguments regarding *RF/RY* magazines in Case 002/01,[4090] which were rightfully rejected by the SCC.[4091] As in Case 002/01, Appellant's arguments should be dismissed, as the TC did not find that Appellant's knowledge was based solely or even primarily on *RF/RY* magazines. In any case, Appellant fails to substantiate his specific claims regarding his access to and knowledge of *RF/RY* magazines.

1122. First, Appellant fails to substantiate his claim that the TC erred in finding that all Party members had actual access to *RF/RY* magazines, including at the district and commune levels.[4092] The TC reasonably found that the CPK ensured by a variety of means that its members knew of the content of *RF/RY* magazines and were aware of the CPK policies therein, as these magazines were frequently used for educational purposes at CPK political study or training sessions, at both the local or national level.[4093] Further, contrary to Appellant's assertions, the TC did in fact consider that, despite its wide dissemination,[4094] not every member was given their own copy of *RF/RY* magazines.[4095]

1123. Second, Appellant fails to demonstrate that the TC erred in finding that he had effective access to all of these *RF/RY* magazines or would have read specific articles to conclude

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4087 *See* Standard of Review (Errors of law).
4088 *See* **F36** Case 002/01 AJ, para. 1005.
4089 Ground 193: **F54** Appeal Brief, *Revolutionary Flag/Revolutionary Youth Magazines*, paras 1641-1643; **F54.1.1** Appeal Brief Annex A, p. 67 (EN), p. 62 (FR), pp. 94-95 (KH).
4090 **F17** Case 002/01 Appeal Brief, paras 492-494, 496.
4091 **F36** Case 002/01 AJ, para. 1072.
4092 **F54** Appeal Brief, para. 1642.
4093 **E465** Case 002/02 TJ, paras 477, 1026, 3747; *See also* **E1/502.1** Beit Boeurn alias Bit Na, T. 28 Nov. 2016, 10.06.40-10.14.06, p. 21, line 19-p. 23, line 15 (Beit Boeurn alias Bit Na testified that she twice attended study sessions at which Pol Pot, Nuon Chea and Appellant spoke and "taught the contents of the *Revolutionary Flag* magazines").
4094 **E465** Case 002/02 TJ, para. 479.
4095 **E465** Case 002/02 TJ, para. 475.

he had knowledge of the crimes,[4096] including in particular the fate of the enemies.[4097] Contrary to Appellant's assertions,[4098] the TC did not speculate in finding that Appellant was aware of the arrests of high-ranking CPK cadres Chan Chakrei, Suos Neou *alias* Chhouk, Keo Meas and Koy Thuon through *RF* magazines. The TC detailed numerous sources of information, in addition to *RF/RY* magazines, through which Appellant would have known of these arrests.[4099] In contrast to Appellant's piecemeal approach of the evidence, the TC correctly assessed the totality of the evidence to make reasonable findings.[4100]

1124. Third, Appellant's claim that the TC erred in finding that Appellant's statements echoed *RF/RY* articles concerning the discriminatory treatment of the Vietnamese enemies and their agents, is entirely unsubstantiated.[4101] His claims regarding the context of his speeches is addressed in response to Ground 185.[4102]

1125. Appellant's remaining claims regarding the admissibility and evidentiary value of *RF/RY* magazines are addressed in response to Grounds 29 and 177.[4103]

Ground 223: Knowledge that crimes have been committed[4104]

1126. **Ground 223 should be dismissed as Appellant fails to establish that the TC erred in fact by finding that, through his participation in study sessions and gatherings where criminal behaviour was discussed, adopted and implemented, and his access to CPK documents, Appellant knew that crimes had been committed.**

1127. This ground fails as Appellant does not demonstrate that the TC's finding that Appellant knew of crimes after they were committed occasioned an actual miscarriage of justice in that it was critical to the verdict reached.[4105] Appellant does not identify a single conviction that the TC could not have established without this finding. Indeed, the TC

4096 **F54** Appeal Brief, para. 1643. The TC did not find Appellant had read specific articles, but merely mentioned that the *RF/RY* magazines were available to Appellant by virtue of his positions of responsibility: **E465** Case 002/02 TJ, paras 4226, 4253.

4097 **F54** Appeal Brief, paras 1641, 1643; *see* **E465** Case 002/02 TJ, paras 4253, 4226.

4098 **F54** Appeal Brief, paras 1643, 1865, 1086 (where Appellant admits that Chakrey, Sao Phim, Doeun and Chey were considered in the *RF* magazines of May-June and July 1978 as Vietnamese "agents").

4099 **E465** Case 002/02 TJ, para. 4226.

4100 *See* Standard of Review (Errors of Fact).

4101 **F54** Appeal Brief, para. 1641. *See* **E465** Case 002/02 TJ, para. 4269. *See also* paras 3406-3407, 3513, 3819-3820, 3824, 3829, 3833.

4102 *See* response to Ground 185.

4103 *See* response to Grounds 29 and 177.

4104 Ground 223: **F54** Appeal Brief, *Knowledge that crimes have been committed*, paras 1936-1937; **F54.1.1** Appeal Brief Annex A, p. 75 (EN), p. 70 (FR), p. 107 (KH).

4105 *See* Standard of Review (Errors of law, Errors of fact).

did not actually rely on its finding that Appellant knew of the crimes after they were committed to establish his liability for any of the crimes for which he was convicted. It did not need to, as it had already established that Appellant knew of each of the crimes at the time of their commission.[4106]

1128. Appellant's various claims that the TC erred by failing to identify his knowledge *vis-à-vis* crimes fail for the same reason.[4107] The TC did not need to do this as it had already established that he had contemporaneous knowledge of each specific crime,[4108] and it was not relying on his knowledge of crimes subsequent to their commission to establish his liability.

1129. Appellant's arguments regarding the crimes relating to the regulation of marriage, on which Appellant places particular emphasis,[4109] fail for these same reasons. Contrary to Appellant's claim that "with regard to the regulation of marriage, the [TC] found that [Appellant] *became aware* of the crimes after they were committed",[4110] the TC had already established that Appellant had contemporaneous knowledge of these crimes.[4111] The TC did not refer to or rely on its finding of his knowledge of these crimes subsequent to their commission when establishing his liability for these crimes.[4112] The finding was in no way critical to the verdict.

1130. Appellant's remaining allegations made in this ground are without merit and have either already been addressed in response to other grounds or are unsubstantiated and should be dismissed as such. His claim that the TC erred in its findings regarding letters sent to him by Amnesty International[4113] is addressed in response to Ground 207.[4114] His dispute with the TC's findings on his contemporaneous knowledge of crimes[4115] are addressed

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4106 *See* **E465** Case 002/02 TJ, paras 4209-4249.

4107 *See e.g.* **F54** Appeal Brief, paras 1933 ("the Chamber did not demonstrate his knowledge after the fact of the specific crimes for which he was prosecuted in Case 002/02"), 1934 ("It did not specify what policies were involved, much less which crimes he became aware of through these speeches"), 1935 ("the Chamber has not established beyond reasonable doubt that he was aware that specific crimes were committed"), 1937 ("The alleged access to revolutionary publications did not permit the Chamber to find that the Appellant had knowledge of specific crimes").

4108 **E465** Case 002/02 TJ, paras 4209-4249.

4109 Ground 223 as framed in Annex A appears to be concerned solely with the TC's findings as they relate to the regulation of marriage: **F54.1.1** Appeal Brief Annex A, p. 75.

4110 **F54** Appeal Brief, para. 1936 (emphasis added).

4111 **E465** Case 002/02 TJ, paras 4247-4249.

4112 **E465** Case 002/02 TJ, paras 4303-4305.

4113 **F54** Appeal Brief, para. 1932.

4114 *See* response to Ground 207.

4115 **F54** Appeal Brief, paras 1932 (regarding Appellant's knowledge that crimes had been committed "as part of the establishment and operation of cooperatives and worksites and internal purges"), 1936 (regarding Appellant's knowledge of crimes relating to the regulation of marriage).

elsewhere.[4116] His claim regarding his access to *RF* and *RY*[4117] magazines are addressed in response to Ground 193.[4118] Finally, the relevance of his claim that "the speeches on the increase in the population were in connection with the objective of improving the living conditions of the population" is unclear.[4119] Appellant's motive is irrelevant to his knowledge of the crimes and, if anything, can only demonstrate that knew of them.[4120]

iii. Intent to Commit Crimes against Targeted Groups

Grounds 220 and 242: Buddhists[4121]

1131. **Grounds 220 and 242 should be dismissed as Appellant fails to demonstrate that the TC erred in law and in fact in finding that he had the requisite *mens rea* for JCE liability for the CAH of persecution on religious grounds against Buddhists.**

1132. The ground fails as Appellant (i) misunderstands the *mens rea* required for the CAH of persecution on religious grounds and JCE liability; and (ii) does not establish that the TC erred in its findings regarding his knowledge and intent.

1133. First, Appellant's claims misunderstand the law.[4122] Contrary to his assertions,[4123] JCE liability does not require knowledge of specific criminal acts.[4124] Further, the *mens rea* for the CAH of persecution does not require an intent to isolate or exclude a group from society.[4125]

1134. Second, Appellant erroneously avers that the TC failed to substantiate its findings regarding his *mens rea*.[4126] His claims must be dismissed since Appellant adopts a flawed piecemeal approach to the evidence, and fails to read the TC's conclusions together with the underlying factual findings.[4127] Contrary to Appellant's contention, the TC provided a sufficient basis for its conclusion that "[h]is steadfast support of the CPK policies and concurrent concealment of their implementation demonstrates his intent to eliminate

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4116 *See* response to Grounds 210-215. *See also generally* Section VIII.C.3. Intent.
4117 **F54** Appeal Brief, para. 1934.
4118 *See* response to Ground 193.
4119 **F54** Appeal Brief, para. 1937.
4120 *See* response to Grounds 210 and 166.
4121 Ground 220: **F54** Appeal Brief, *Buddhists*, paras 1910-1920; **F54.1.1** Appeal Brief Annex A, p. 74 (EN), p. 69 (FR), p. 106 (KH). Ground 242: **F54** Appeal Brief, *Buddhists*, paras 2091-2098; **F54.1.1** Appeal Brief Annex A, p. 80 (EN), p. 75 (FR), p. 115 (KH).
4122 **F54** Appeal Brief, paras 2097-2098.
4123 *See e.g.* **F54** Appeal Brief, paras 1912-1917.
4124 *See* Section VIII.C.3. Intent.
4125 *See* response to Ground 94.
4126 **F54** Appeal Brief, paras 1910-1920, 2092-2096.
4127 *See* Section VIII.C.3. Intent.

Buddhism in Cambodia."[4128]

1135. Appellant's claims that the TC failed to substantiate its findings that he knew about and supported the CPK's policies ignore the TC's findings on Appellant's acts after the CPK victory in April 1975.[4129] The TC found that in May 1975 Appellant participated in the Silver Pagoda meetings where the Party policies were decided, including the plan to close all pagodas and disrobe all monks.[4130] Between 20 and 25 May 1975, these policies were conveyed during mass meetings of cadres[4131] attended by Appellant.[4132] Pol Pot publicly admitted that the Party was trying to "eliminate" Buddhism, and the way to do this was to make monks build dams and work,[4133] a sentiment Appellant publicly confirmed.[4134] In January 1976, Appellant presented the new Constitution prohibiting the "reactionary religions" (which Buddhism was considered to be),[4135] and explained the Party's motivation for this prohibition stemmed from the need to oppose "at all costs" those using religion to subvert the regime.[4136] International delegates were informed that Buddhism was no longer respected and was "considered to be incompatible with the revolution".[4137]

1136. The TC also reasonably found that Appellant instructed the arrangement of marriages in absence of monks and "in a fashion fundamentally inconsistent with Buddhist traditions".[4138] Contrary to Appellant's claims,[4139] the TC did not rely on "baseless speculation" and explicitly addressed the reliability of Chea Deap's testimony that Appellant lectured cadres on the necessity of arranged marriages,[4140] evidence which was

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4128 **E465** Case 002/02 TJ, para. 4298.
4129 **F54** Appeal Brief, paras 1910-1920, 2093.
4130 **E465** Case 002/02 TJ, para. 3736.
4131 **E465** Case 002/02 TJ, para. 3736, fn. 12461. *See also* **E1/82.1** Sao Sarun, T. 6 June 2012, 11.32.33-11.35.46, p. 45, line 17-p. 46, line 10 *confirming* **E3/367** Sao Sarun WRI, EN 00278694 ("In that meeting, the presenters at the opening sessions were Nuon Chea and Pol Pot [...] Both of them talked about [...] monastery closings"); **E3/1593** Ben Kiernan, *The Pol Pot Regime*, EN 01150024 (policies discussed at meeting includes: "(4) Defrock all Buddhist monks and put them to work growing rice"); **E3/1568** Chea Sim Statement, 3 Dec. 1991, EN 00651867, and original interview notes **E3/5593** at EN 00419371-72 (confirming that one of the eight points discussed by Pol Pot and Nuon Chea was to "Defrock all monks"); **E1/291.1** Pech Chim, T. 23 Apr. 2015, 14.31.36-14.34.47, p. 70, lines 17-23 (TK District Secretary Khom attended the May 1975 meeting and convened district cadres on her return to communicate the plan: "Q: Do you recall whether she said anything about disrobing or defrocking of the monks? A: Yes [...] She talked about that and she led the communes to implement").
4132 **E465** Case 002/02 TJ, para. 3736, fn. 12460.
4133 **E465** Case 002/02 TJ, para. 1092.
4134 **E465** Case 002/02 TJ, para. 4241, fn. 13844.
4135 **E465** Case 002/02 TJ, para. 1108.
4136 **E465** Case 002/02 TJ, para. 4020 *referring to* para. 1090.
4137 **E465** Case 002/02 TJ, para. 1108.
4138 **E465** Case 002/02 TJ, paras 4297, 4242 *referring to* paras 3569-3570.
4139 **F54** Appeal Brief, para. 1918.
4140 **E465** Case 002/02 TJ, para. 3569. *See also* response to Ground 166.

corroborated by witness Ruos Suy and Norodom Sihanouk.[4141] The TC found the witness testimony consistent with the "CPK ideological discourse, including the speeches made by [Appellant]".[4142]

1137. Appellant similarly does not establish that the TC erred in finding his statements supporting Buddhism were "subterfuge" providing a "charade of normalcy".[4143] Appellant fails to consider the TC's underlying findings of his role as Deputy Prime Minister of GRUNK, in which capacity he was found to have fortified the FUNK and GRUNK façade that obscured the CPK's operations,[4144] including those against the Buddhists. Regarding the treatment of Buddhists more specifically,[4145] the TC found Appellant participated in the FUNK façade by endorsing the FUNK official political program which proclaimed that "Buddhism is and will remain to be the state religion".[4146] Appellant maintained the impression of normalcy until April 1975 by praising *Sangha* for its contribution to the revolution[4147] and by paying homage to Buddhist monks.[4148]

1138. Contrary to Appellant's claim, it was not unreasonable for the TC to rely upon FBIS reports since the evidence was corroborated by independent sources,[4149] and by other reports of his statements.[4150] It is clear through the TC's reasoning that the TC considered the reliability and probative value of the evidence before it.[4151] The TC also explicitly considered Appellant's evidence that "he was unaware of anything to do with the practice of religion during the DK period" and rightfully rejected it based on substantial evidence to the contrary.[4152]

1139. Further, with respect to TK specifically, Appellant claims without merit that the TC failed to substantiate its findings, and erroneously relied on speeches and documents which pre-

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4141 **E465** Case 002/02 TJ, paras 3570-3571, 3586.
4142 **E465** Case 002/02 TJ, para. 3590.
4143 **F54** Appeal Brief, paras 1914-1920, 2094 *referring to* **E465** Case 002/02 TJ, paras 4241, 4297.
4144 **E465** Case 002/02 TJ, paras 4208, 4297.
4145 **E465** Case 002/02 TJ, paras 1084-1086.
4146 **E465** Case 002/02 TJ, para. 4240. *See also* **E465** Case 002/02 TJ, paras 263, 1084.
4147 *See e.g.* **E465** Case 002/02 TJ, para. 4297 *referring to* para. 4240.
4148 **E465** Case 002/02 TJ, paras, 1086, 4240, fn. 13836.
4149 FBIS records about Appellant's communiqué claiming that members of the Buddhist clergy had attended the Special National Congress in representation of the Sangha is corroborated by independent sources such as: **E3/2290** New York Times, *Cambodia Bars Foreign Bases: Move Believed aimed at Hanoi*, 29 Apr. 1975, EN 00165953-54; **E3/3722** The Guardian, *Cambodia Holds Special Congress,* 21 May 1975, EN S 00003467.
4150 *See e.g.* **E3/116** Statement by Khieu Samphan, Hu Nim and Hou Youn, 9 Sept. 1972, EN 00485282-83 (calling the "Respected monks" to unite themselves with the Khmer People's National Liberation Armed Force in order to eliminate the traitors).
4151 **E465** Case 002/02 TJ, para. 4241, fn. 13843.
4152 **E465** Case 002/02 TJ, para. 4240.

dated DK and did not mention TK.[4153] As discussed elsewhere,[4154] the TC sufficiently reasoned its finding that acts of persecution were committed in TK in the context of a larger persecutory campaign against Buddhists, of which Appellant was aware.[4155] Appellant was also aware of the crimes committed at TK.[4156] Appellant further ignores that the TC may rely on evidence outside the geographic or temporal scope of the case in specific circumstances, for example to evaluate any deliberate pattern of conduct.[4157]

Grounds 243 and 221: Former Khmer Republic soldiers and officials[4158]

1140. **Grounds 243 and 221 should be dismissed as Appellant fails to establish that the TC erred by finding he held the requisite *mens rea* for JCE liability in relation to the CAH of persecution and murder committed against ex-KR officials.[4159]**

1141. Grounds 243 and 221 fail as Appellant (i) does not demonstrate the TC erred in finding Appellant held the requisite *mens rea* for JCE liability based on the totality of evidence before it; (ii) makes erroneous claims regarding isolated pieces of evidence; and (iii) repeats legally incorrect claims raised elsewhere in his brief.

1142. First, Appellant takes issue with specific findings,[4160] but fails to demonstrate that the TC did not reasonably establish that Appellant held the requisite *mens rea* for JCE liability regarding the CAH of the murder and persecution of ex-KR.[4161]

1143. The TC considered substantial evidence that demonstrated that Appellant must not only have known of the crimes committed against ex-KR, he must have intended for them to be committed. The TC determined that the "decision to kill" ex-KR was made by CPK leadership on or about 20 April 1975 in Phnom Penh.[4162] Appellant was present as a senior leader at training sessions and mass rallies where cadres were instructed to

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4153 **F54** Appeal Brief, paras 1916-1917.
4154 *See* response to Grounds 95, 108, 109.
4155 *See* response to Ground 188.
4156 *See* response to Ground 212.
4157 **E465** Case 002/02 TJ, paras 60, 815.
4158 Ground 243: **F54** Appeal Brief, *Former Khmer Republic Soldiers and Officials*, paras 2099-2113; **F54.1.1** Annex A, p. 80 (EN), p. 75 (FR), pp. 115-116 (KH). Ground 221: **F54** Appeal Brief, *Ex-KR*, paras 1921-1927; **F54.1.1** Appeal Brief Annex A, pp. 74-75 (EN), p. 69 (FR), pp. 106-107 (KH).
4159 **F54.1.1** Appeal Brief Annex A, p. 80.
4160 *See e.g.* **F54** Appeal Brief, paras 1927, 2104-2107 (Appellant contents the TC erred in finding he was a "staunch supporter of the Party's discriminatory policies", specifically intended that ex-KR "be subjected to adverse treatment", and knew of the crimes being committed against ex-KR).
4161 Appellant contends that he "must be acquitted of the CAH of persecution *on religious grounds* and of murder against the former Khmer Republic soldiers": **F54.1.1** Appeal Brief Annex A, p. 75 (emphasis added). The TC did not find Appellant guilty of the CAH of persecution on religious grounds in relation to the ex-KR).
4162 **E465** Case 002/02 TJ, para. 4053.

discriminate against ex-KR.[4163] Appellant publicly praised the destruction of the Khmer Republic celebrating that "the enemy [had] died in agony".[4164] Telegrams before the TC confirmed that the arrest of ex-KR was routinely reported to Office 870 through 1976 and 1977 while Appellant was a member of that office.[4165] Appellant publicly advised the masses as late as 1977 to "eliminate the Lon Nol regime".[4166]

1144. The TC also considered that ex-KR were "discussed at length" in CPK magazines,[4167] the contents of which Appellant would have been aware.[4168] Several editions of *RF* magazines instructed cadres that ex-KR must be identified and killed.[4169] *RF* magazines referred to Lon Nol officials as "contemptible traitors"[4170] and reproduced Pol Pot's speeches in which he spoke of the "enemies" of CPK and referred to the Lon Nol "traitor clique".[4171] An October 1976 issue of *RF* described "'life-and-death' contradictions with "government officials, policemen, soldiers and students who could not be reformed by education".[4172] Further, in 1978, Pol Pot publicly referred to ex-KR officials as "chieftains" who were connected to the American enemy.[4173] Letters of concern were forwarded to Appellant from Amnesty International, with support from the UN Commission on Human Rights, noting concerns over the treatment of ex-KR, requesting that enquiries be made.[4174]

1145. Appellant's claim that the TC created an "artificial link" between his "calls" to incite crimes against ex-KR in 1972 to the crimes that occurred at S-21 and KTC is entirely without merit.[4175] Appellant ignores the evidence that the TC relied on, establishing that Appellant continued to incite the persecution of ex-KR and specifically called for their elimination after 1972, throughout the entire DK period. The TC correctly found that Appellant consistently displayed his intent to persecute against and murder ex-KR throughout cooperatives, worksites[4176] and security centres,[4177] by his "staunch" support

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4163 **E465** Case 002/02 TJ, paras 4038-4041, 4054.
4164 **E465** Case 002/02 TJ, para. 4037.
4165 **E465** Case 002/02 TJ, para. 4048.
4166 **E465** Case 002/02 TJ, para. 4272.
4167 **E465** Case 002/02 TJ, para. 3847.
4168 *See* response to Ground 193.
4169 **E465** Case 002/02 TJ, paras 4042-4043, 4047.
4170 **E465** Case 002/02 TJ, paras 3755 *citing* **E3/5** *Revolutionary Flag*, Aug. 1975, EN 00401493, 00401495, para. 3829 *citing* **E3/746** *Revolutionary Flag*, July 1978, EN 00428293.
4171 **E465** Case 002/02 TJ, para. 3813.
4172 **E465** Case 002/02 TJ, para. 1062 *citing* **E3/10** *Revolutionary Flag*, Sept.-Oct. 1976, EN 00450529.
4173 **E465** Case 002/02 TJ, para. 3818.
4174 **E465** Case 002/02 TJ, para. 4048. *See also* response to Ground 207.
4175 **F54** Appeal Brief, para. 2111.
4176 **E465** Case 002/02 TJ, para. 4284.
4177 **E465** Case 002/02 TJ, para. 4287.

of the Party's discriminatory policies[4178] and inciting the widespread arrest, disappearance, discrimination and execution of ex-KR before 17 April 1975, and throughout the DK period.[4179]

1146. Second, Appellant makes several erroneous claims regarding isolated pieces of evidence, failing to consider the evidence supporting the TC's findings in its totality. Appellant takes issue with FBIS evidence but ignores that the TC established that evidence contained in the FBIS file was "important" and could be relied upon when sufficiently corroborated.[4180] His statements regarding the elimination of high-ranking ex-KR members were corroborated.[4181] Appellant also highlights a minor typographical citation error[4182] and misleadingly claims that the TC failed to properly cite a statement made by Appellant that "the object of the revolution was 'eliminate the Lon Nol regime' [...] and that those who betrayed the Party or the revolution would be killed". The impugned paragraph refers to paragraph 4272 of the Judgment, which in turn refers to paragraph 3961, where the evidence is first presented. Appellant himself cites paragraph 3961 of the Judgment where it is made clear that the evidence came from the testimony of Preap Chhon.[4183] Appellant merely disagrees with the TC's assessment of Preap Chhon's evidence.

1147. Further, Appellant erroneously asserts that the TC erred by considering evidence of Appellant's conduct prior to April 1975.[4184] As explained by the SCC in Case 002/01, it is not erroneous to consider Appellant's pre-DK conduct where his contributions "were part of a cluster of transactions of a [JCE] that continued over a period of time" and "brought to fruition" crimes committed within the temporal jurisdiction of the Court.[4185] The TC found that Appellant had been "publicly calling for the elimination of high-ranking members of the Khmer Republic administration and their subordinates" since 1972 and that this pattern of behaviour continued throughout DK,[4186] highlighting

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4178 **E465** Case 002/02 TJ, para. 4300.
4179 **E465** Case 002/02 TJ, para. 4059.
4180 **E465** Case 002/02 TJ, paras 469-472.
4181 **E3/3169** Working Paper on "Pol Pot and Khieu Samphan" by Stephen Heder, p. 7. (stating "during the first four months of 1975 Khieu Samphan twice signalled those who had been fighting against it that only the seven top leaders among them would be executed upon defeat.")
4182 **F54** Appeal Brief, para. 1923. Appellant notes that in para. 4244 of the TJ, the TC referenced a speech by Appellant made in 1972 which is incorrectly cited, referring to para. 4037 when it should read para. 4026 *citing* **E3/116** Khieu Samphan, Hou Youn, Hu Nim Statement, 9 Sept. 1972, EN 00485283.
4183 **F54** Appeal Brief, para. 2110, fn. 4064 ("See Reasons for Judgement, §3961, fn 13185 referring to the testimony of Preap Chhon evoking a supposed speech by Khieu Samphan in 1977").
4184 **F54** Appeal Brief, paras 1921, 2101-2102, 2109.
4185 **F36** Case 002/01 AJ, para. 217.
4186 **E465** Case 002/02 TJ, paras 60, 4244-4245.

Appellant's consistent contribution to the criminal common purpose.[4187]

1148. Third, Appellant's claims refer to incorrect arguments that the TC violated the principle of *non bis in idem*,[4188] that persecution requires an intent to exclude individuals from society,[4189] and that he only participated in a "non-criminal common purpose".[4190] These arguments are legally incorrect, as discussed elsewhere.[4191] Notably, Appellant defeats his own claim regarding *non bis in idem* by highlighting that the SCC "considered that 'the killing of high-ranking [ex-KR] was part of the common purpose *in relation to the evacuation of Phnom Penh*'".[4192] These facts have not been considered in relation to the events thereafter, thus the TC did not retry Appellant for those crimes.

Grounds 236 and 218: Cham [4193]

1149. **Grounds 236 and 218 should be dismissed as Appellant fails to establish that the TC erred in fact and law by finding that Appellant had the requisite *mens rea* for JCE liability with respect to the crimes committed against the Cham.**

1150. Grounds 236 and 218 fail as Appellant (i) misunderstands the *mens rea* required for JCE liability; (ii) misrepresents the Judgment; and (iii) fails to demonstrate the TC erred in finding Appellant knew of crimes being committed against the Cham.

1151. First, Appellant's claims misunderstand the requisite *mens rea* for JCE liability. He erroneously asserts that the TC failed to assess his intent "with respect to each alleged crime",[4194] when the TC did in fact correctly assess his intent with respect to each alleged crime.[4195] Appellant's unsubstantiated claims that the TC erred by making "general" findings about Appellant's knowledge of crimes[4196] further ignore that JCE liability does not require knowledge that specific criminal acts have been committed.[4197]

1152. Second, Appellant baselessly asserts that the TC could not infer his intent from the CPK's

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4187 **E465** Case 002/02 TJ, paras 4244-4245. *See also* **E465** Case 002/02 TJ, para. 4302 (TC considered the pattern of statements made by Appellant beginning in 1972 were "mirrored" by statements in 1977).
4188 **F54** Appeal Brief, paras 1924, 2103, 2109.
4189 **F54** Appeal Brief, para. 2112.
4190 **F54** Appeal Brief, para. 2107.
4191 *See* response to Grounds 5 (*non bis in idem*), 94 (persecution), 183, 218 (non-criminal common purpose).
4192 **F54** Appeal Brief, para. 2103 *citing* **F36** Case 002/01 AJ, para. 859 (emphasis added by Appellant).
4193 Ground 236: **F54** Appeal Brief, *Cham*, paras 2062-2074; **F54.1.1** Appeal Brief Annex A, pp. 78-79 (EN), p. 73 (FR), p. 113 (KH). Ground 218: **F54** Appeal Brief, *Cham*, paras 1879-1885; **F54.1.1** Appeal Brief Annex A, p. 74 (EN), pp. 68-69 (FR), p. 105 (KH).
4194 **F54** Appeal Brief, paras 2065, 2069-2074.
4195 **E465** Case 002/02 TJ, paras 4289-4290.
4196 **F54** Appeal Brief, paras 1881, 2065.
4197 *See* Section VIII.C.3. Intent.

policy to arrest, isolate and "smash" enemies,[4198] nor from the existence of a discriminatory policy targeting the Cham,[4199] nor from his continued participation in the JCE.[4200] Appellant fails to substantiate his claims that intent could not be inferred from these findings and relies on erroneous assertions which have been addressed elsewhere.[4201] In any case, Appellant's piecemeal and contradictory approach misrepresents the Judgment.[4202] The TC did not establish Appellant's intent from these findings individually. Rather, the TC considered the totality of its findings that Appellant knowingly supported the CPK policies and that the crimes committed against the Cham constituted the implementation of those policies.[4203]

1153. Regarding the CAH of persecution on political grounds specifically, Appellant misrepresents the TC's reasons by claiming that his intent could not be established as this crime was "not related to the policy on enemies or the discriminatory policy on religious grounds".[4204] Appellant ignores that in establishing his intent the TC specifically referred to its findings on the implementation of policies aiming to disperse the Cham.[4205]

1154. Third, Appellant fails to demonstrate that the TC erred by inferring Appellant's knowledge of crimes being committed against the Cham from his position, his support for the common purpose, and his knowledge of the implementation of policies aimed at establishing an atheistic and homogenous Khmer society of worker-peasants.[4206] Although Appellant alleges errors of law,[4207] he fails to substantiate any of these allegations. Regarding the alleged errors of fact, Appellant merely suggests that alternative findings could have been made.[4208] He fails to demonstrate that the impugned

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4198 **F54** Appeal Brief, paras 2063-2065.
4199 **F54** Appeal Brief, para. 2066.
4200 **F54** Appeal Brief, para. 2067.
4201 **F54** Appeal Brief, paras 2064-2065 (repeating his claim that the TC erred in finding he supported the policy on enemies), 2073 (repeating his claim that persecution requires an intent to exclude individuals from society), 2068 (repeating his claim that persecution on political grounds against the Cham was blocked by *res judicata)*. *See* response to Grounds 227, 234, 83, 150.
4202 For example, Appellant asserts that the TC erred by finding Appellant's criminal intent "*on the sole basis*" of linking the treatment of the Cham at security centres to the CPK policy on enemies. Three paragraphs later he contradictorily asserts that "[t]he use of the conjunction 'accordingly' confirms that the [TC] infers [Appellant's] intent to commit crimes from the existence of discriminatory policies": *see* **F54** Appeal Brief, paras 2063, 2066.
4203 **E465** Case 002/02 TJ, para. 4289.
4204 **F54** Appeal Brief, para. 2068.
4205 **E465** Case 002/02 TJ, para. 4289. *See also* **E465** Case 002/02 TJ, fn. 13997 (cross-referencing to the TC's findings on forced transfers and the common purpose).
4206 **F54** Appeal Brief, paras 1880, 1881, 1883, 1884, 1885.
4207 **F54** Appeal Brief, para. 1881.
4208 *See e.g.* **F54** Appeal Brief, paras 1881, 1883, 1884.

finding was one that no reasonable trier of fact could have made.[4209] The TC found that the commission of crimes against the Cham was *inherent* to the CPK policies.[4210] It similarly found that the JCE's common purpose was *intrinsically* linked (not merely *implied*)[4211] to crimes against the Cham.[4212] Given its findings that Appellant knew of and supported a common purpose and policies which were inherently and intrinsically linked to the commission of crimes against the Cham,[4213] it is only reasonable that the TC found that he not only had knowledge of these crimes but also intended them to occur.

1155. Appellant baselessly and incorrectly claims the TC "committed errors of fact on each of the pieces of circumstantial evidence on which it relied to reach the finding on [Appellant's] knowledge without explaining why its *finding* was the sole reasonable finding possible",[4214] without substantiating his claim that other reasonable findings were open regarding Appellant's knowledge. In any case, this is the incorrect standard to apply with respect to the specific claims that Appellant makes. While a *finding* on which a conviction relies must be the sole reasonable finding possible based on the totality of evidence, a standard of reasonableness[4215] applies to the *individual findings* which may cumulatively lead to the conclusion.[4216] Appellant's unsubstantiated claim that the TC did not reasonably establish that the CPK expressly took measures directed at the Cham during the DK also fails.[4217] Appellant's reference to every ground of his Appeal concerning Cham, many of which are irrelevant to the claim made,[4218] lacks the specificity required for appellate intervention and should be summarily dismissed. In any case, Appellant has not established that any of the TC's findings regarding the Cham were unreasonable.[4219]

1156. Appellant also falsely alleges the TC erred in fact and law by "considering as established

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4209 *See* Standard of Review (Errors of Fact).
4210 **E465** Case 002/02 TJ, para. 4236.
4211 *Cf.* **F54** Appeal Brief, para. 1885.
4212 **E465** Case 002/02 TJ, paras 3988-3998.
4213 *See e.g.* **E465** Case 002/02 TJ, paras 562-624, 3733-3743, 4208.
4214 **F54** Appeal Brief, para. 1881 (emphasis added).
4215 *See* Standard of Review (Errors of Fact).
4216 *See e.g. Stakić* AJ, para. 219 ("Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented"), para. 219, fn. 470 ("With respect to a Trial Chamber's findings of fact on which the conviction does not rely, the Appeals Chamber will defer to the findings of the Trial Judgement where such findings are reasonable").
4217 **F54** Appeal Brief, para. 1882.
4218 For example, Appellant's citation includes grounds concerning *res judicata* (Grounds 83 and 153) and *saisine* (Grounds 46, 78, 79), which do not go to the reasonableness of the TC's findings concerning measures directed at the Cham.
4219 *See* response to Grounds 5, 82-83, 121-122, 141-150, 186.

the fact that [Appellant] had 'stressed the importance of preserving "forever the fruits of the revolution and the Kampuchean race"'" without providing a citation.[4220] Contrary to Appellant's claim, the TC provided a citation,[4221] and Appellant's statement on the preservation of the Kampuchean race is confirmed by numerous sources.[4222]

1157. Further, Appellant misleadingly alleges that the TC erred by relying on his support "of the non-criminal common purpose for the finding of his knowledge of the implementation of policies [...] without explaining how this was the sole reasonable finding possible".[4223] The TC actually found that Appellant "supported the common purpose *and* was privy to the implementation of policies";[4224] it did not infer the latter from the former. Appellant's reference to a "non-criminal common purpose" is also misleading as it is well established that a common purpose is criminal if it is intrinsically linked to policies the implementation of which amounted to the commission of crimes,[4225] as the TC reasonably found was the case.[4226]

1158. Finally, Appellant's baseless accusation of bias must also be rejected.[4227] Appellant provides no evidence whatsoever demonstrating the finding was biased and fails to overcome the strong presumption of impartiality attached to judges.[4228]

Grounds 219, 237, 238, 239, 240, 241: Vietnamese [4229]

1159. **Grounds 219, 237, 238, 239, 240 and 241 should be dismissed as Appellant fails to**

4220 **F54** Appeal Brief, para. 1882 *citing* **E465** Case 002/02 TJ, para. 4236.

4221 *See* **E465** Case 002/02 TJ, paras 4236, fn. 13823 (cross-referencing to Section 13.2.5.4), 3216, fn. 10825.

4222 **E465** Case 002/02 TJ, para. 3216, fn. 10825 *citing* **E3/294** FBIS, *Sihanouk Attends Khieu Samphan Addresses KCP Banquet*, 30 Sept. 1978, EN 00170170; **E3/169** *Khieu Samphan Speech at Anniversary Meeting*, 17 Apr. 1978, EN 00280396 ("We must defend tooth and nail the country the Revolution the power the people the Army the Party and the Kampuchean race."); **E3/562** BBC/SWB, *Phnom Penh Rally Marks 17th April Anniversary*, 15 Apr. 1978, EN S 00010558-63; **E1/217.1** Ek Hen, T. 3 July 2013, 11.30.15-11.33.02, p. 47, lines 21-23 ("He [Appellant] said Khmer had to be united and Khmer shall be free of Vietnamese, or the 'Yuon', and that we had to love one another."). *See also* **E3/4162** BBC SWB *Anniversary Banquet Sihanouk Present,* 27 Sept.1978, EN S 00013141-43; **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, EN 00396544; **E3/2738** Agence France Presse Photos of Sihanouk in the Chinese Press, 17 Oct. 1978, EN 00707380.

4223 **F54** Appeal Brief, para. 1884.

4224 **E465** Case 002/02 TJ, para. 4236 (emphasis added).

4225 *See* **F36** Case 002/01 AJ, para. 1075.

4226 **E465** Case 002/02 TJ, para. 4068.

4227 **F54** Appeal Brief, para. 1883.

4228 *See* response to Ground 4.

4229 Ground 219: **F54** Appeal Brief, *Vietnamese*, paras 1886-1909; **F54.1.1** Appeal Brief Annex A, p. 74 (EN), p. 69 (FR), pp. 105-106 (KH). Ground 237: **F54** Appeal Brief, *Lack of intent to deport*, paras 2075-2076; **F54.1.1** Appeal Brief Annex A, p. 79 (EN), pp. 73-74 (FR), p. 113 (KH). Ground 238: **F54** Appeal Brief, *Lack of intent to commit the crimes of murder and extermination*, paras 2077-2080; **F54.1.1** Appeal Brief Annex A, p. 79 (EN), p. 74 (FR), pp. 113-114 (KH). Ground 239: **F54** Appeal Brief, *Lack of intent to commit the crime of racial persecution*, paras 2081-2085; **F54.1.1** Appeal Brief Annex A, p. 79 (EN), p. 74 (FR), p. 114 (KH). Ground 240: **F54** Appeal Brief, *Lack of intent to commit the crime of genocide by*

establish that the TC erred in fact and law by finding that Appellant held the requisite *mens rea* for liability for genocide, GB, and the CAH of deportation, murder, extermination and persecution committed against Vietnamese.

1160. Appellant's grounds regarding his *mens rea* for the crimes committed against Vietnamese generally fail as Appellant repeatedly (i) misunderstands the requisite *mens rea* for liability pursuant to JCE and A&A; (ii) relies on erroneous claims that the TC erred by finding a policy against the Vietnamese and conflating the Vietnamese state with ethnic Vietnamese; and (iii) makes meritless claims regarding the evidence of his hate speech against the Vietnamese. Each of Appellant's contentions are without merit.

1161. First, contrary to Appellant's repeated claims,[4230] it is not necessary for him to have intended or known of specific criminal acts in order to be liable for crimes.[4231] Similarly, the TC was not required to determine where Appellant was at the time of specific criminal acts or what he said before, during or after the events.[4232]

1162. Appellant also asserts without merit that the TC erred in establishing that crimes were committed against the Vietnamese during the DK period, and thus logically could not find that Appellant knew of the crimes.[4233] Appellant fails to demonstrate, however, that the TC erred in finding crimes were committed against the Vietnamese.[4234]

1163. Second, Appellant's repeated claims that the TC erred by finding the existence of a policy toward the Vietnamese and by conflating calls against the enemy Vietnamese State with calls against the ethnic Vietnamese population of Cambodia are without merit,[4235] as discussed in response to Ground 185.[4236] Appellant fails to demonstrate that the TC erred

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murder, paras 2086-2088; **F54.1.1** Appeal Brief Annex A, p. 79 (EN), p. 74 (FR), p. 114 (KH). Ground 241: **F54** Appeal Brief, *Lack of intent to commit grave breaches of the Geneva Conventions*, paras 2089-2090; **F54.1.1** Appeal Brief Annex A, p. 79 (EN), p. 74 (FR), pp. 114-115 (KH).

4230 **F54** Appeal Brief, paras 1888-1889, 1894, 1903, 2076.

4231 *See* Section VIII.C.3. Intent.

4232 **F54** Appeal Brief, para. 1889. In any case, the TC did make findings on what Appellant said and when: *see e.g.* **E465** Case 002/02 TJ, paras 340 ("*on or about 6 January 1979*, Khieu Samphan briefly met with S-21 chief Kaing Guek Eav *alias* Duch and instructed him that S-21 staff should not panic in the wake of Vietnamese advances into DK territory and that staff should continue working as usual" (emphasis added)), 3406 ("*Throughout 1978 and early 1979*, Pol Pot and Khieu Samphan continued stressing the importance of protecting and preserving the success of the revolution and the 'Kampuchean race' from the Vietnamese 'expansionists and 'annexationists'"(emphasis added)).

4233 **F54** Appeal Brief, para. 1886.

4234 *See* response to Grounds 41, 56, 60, 80, 84, 103-105, 110-112, 126, 128, 130, 151-159, 185, 219, 237-241.

4235 **F54** Appeal Brief, paras 1896, 1900, 1901, 1902, 2079, 2083, 2086.

4236 *See* response to Ground 185.

in relying on his speeches of April 1977,[4237] and 1978,[4238] ignoring that they were corroborated by independent sources.

1164. Third, Appellant's claims regarding specific pieces of evidence of Appellant's hate speech against the Vietnamese are without merit. Appellant notes[4239] that the specific words "permanently clean" referred to by the TC[4240] are from *RF*,[4241] not a speech given by Appellant. However, Appellant fails to demonstrate that the misidentification of these words constituted an actual miscarriage of justice in that it was critical to the ultimate verdict.[4242] The words "permanently clean" themselves were not pivotal to the finding, particularly given the weight of evidence showing he did in fact support the idea of deporting Vietnamese. Indeed, it should also be noted that the words "permanently clean" are recorded in a "special issue" of *RF* containing excerpts from a speech given by the "Comrade representing the Party" at a meeting celebrating the second anniversary of the CPK's victory in April 1977.[4243] Appellant spoke at the mass meeting celebrating the second anniversary and thus, even if he did not speak these words himself, it is likely he at least gave his tacit support for what was said.[4244]

1165. Appellant asserts without merit that it was unreasonable for the TC to rely on two documents containing extracts of a speech Appellant gave on 15 April 1978 because the content of those documents differ.[4245] Given these documents are both only partial transcriptions of the speech, it is unsurprising that their content differs. It is clear that these documents extract and translate different parts of the speech. This in no way demonstrates that what has been extracted by each is unreliable. In any case, Appellant has not demonstrated the TC went beyond its discretion to assess the reliability and

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4237 *See* **E3/200** BBC SWB *Khieu Samphan's Speech at Anniversary Meeting*, 15 Apr. 1977, EN 00004164-70; **E3/286** FBIS *Mass Meeting April Victory*, 18 Apr. 1977, EN 00168203-11; **E3/3376** New York Times Cambodian Leader Cites Progress, 19 Apr. 1977, EN 00445301; **E3/712** International Herald Tribune, *Cambodian Chief Vows more Toil Discipline*, 18 Apr. 1977, EN 00005979; **E3/709** The Sunday Star, *Machineless Society Hailed by President of Cambodia*, 17 Apr. 1977, EN S 00005970.

4238 *See* **E3/1361** FBIS *Third Anniversary Celebrated at 15 April Mass Rally, Khieu Samphan Statement, Resolution adopted*, 17 Apr. 1978, EN 00168813-22; **E3/1389 & E3/562** SWB, Phnom Penh Rally Marks 17th April Anniversary, 18 April 1978, at EN S 00010412-17; **E3/2671** International Telegram from French Ministry of Foreign Affairs to French Embassy entitled "Chronique Cambodgienne 15 fevrier 1 Mai 1978", 19 June 1978, EN 007432300-02; **E3/3169** Stephen Heder, Pol Pot and Khieu Samphan, at EN 00002762-64; **E3/169 & E3/202** *Khieu Samphan Speech at Anniversary Meeting,* 15 Apr. 1978, at EN 00280389-99.

4239 **F54** Appeal Brief, paras 1895, 2080.

4240 **E465** Case 002/02 TJ, para. 4238.

4241 **E3/742** *Revolutionary Flag*, Apr. 1977, EN 00478502.

4242 *See* Standard of Review (Errors of Law, Errors of Fact).

4243 **E3/742** *Revolutionary Flag*, Apr. 1977, EN 00478492-507.

4244 *See* **E465** Case 002/02 TJ, para. 3393.

4245 **F54** Appeal Brief, para. 1898.

weight of the evidence before it.[4246]

1166. Appellant's claim that the TC cited paragraph 3407 as evidence of Appellant's knowledge misrepresents the TC's reasons. While the TC did cite paragraph 3407, it is cited with paragraph 3406. Paragraph 3407 provides context to the findings in paragraph 3406 by detailing the language used in contemporaneous CPK publications to refer to the Vietnamese. Contrary to Appellant's claims,[4247] at no point did the TC find that Appellant wrote these publications or "read each one of them". Appellant also fails to substantiate his claim that the TC distorted this evidence, merely asserting an alternative interpretation.[4248]

Deportation of Vietnamese

1167. Appellant's claims specific to the CAH of deportation of Vietnamese also fail. The TC reasonably found that Appellant intended for Vietnamese to be deported. As Appellant himself notes,[4249] the TC's finding of intent was based on Appellant's statements about the Vietnamese and was "in line with his calls to remove Vietnamese populations from Cambodia back to Vietnam in the early days of DK".[4250] This included evidence of him publicly stating that "Khmer shall be free of Vietnamese"[4251] and that Vietnamese would be sent back to Vietnam.[4252] As explained above, it is immaterial whether Appellant actually knew that Vietnamese were deported "from TK and Prey Veng in late 1975, early 1976".[4253]

1168. Appellant merely asserts that the evidence relied upon by the TC, specifically the testimony of Ek Hen and an extrajudicial interview given by Neou Sarem,[4254] lacked credibility and was of low probative value.[4255] Appellant baselessly asserts that Ek Hen's testimony should have been either excluded due to her "numerous contradictions and

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4246 *See* Standard of Review (Errors of Fact).
4247 **F54** Appeal Brief, para. 1901.
4248 **F54** Appeal Brief, para. 1901.
4249 **F54** Appeal Brief, para. 2075.
4250 **E465** Case 002/02 TJ, para. 4292 *citing to* Section 18.1.2.3.2.
4251 **E1/217.1** Ek Hen, T. 3 July 2013, 11.30.15-11.33.02, p. 47, lines 21-22.
4252 **E3/6934** Transcript of Neou Sarem's Interview by VOA Khmer Service, EN 01003411 ("Khieu Samphan also talked about the solution toward Yuon (Vietnamese people) in Kampuchea [...] He said Vietnamese people said they did not know how to do farming [...] Khieu Samphan said that all people in Kampuchea had to do farming. Those who did not know how to do farming, especially the Vietnamese would be sent back to Vietnam. So the Khmer Rouge had prepared a plan to send the Vietnamese back to Vietnam.").
4253 **F54** Appeal Brief, para. 2076. *See* Section VIII.C.3. Intent.
4254 *See* **E465** Case 002/02 TJ, para. 3390.
4255 **F54** Appeal Brief, paras 1893-1894, 2075.

memory problems" or interpreted in a way seemingly more favourable to him.[4256] Appellant does not substantiate these claims in his brief, nor does he provide any references to the evidence itself; he merely refers by footnote to previous submissions he has made regarding this witness. In any case, his submissions fail to demonstrate that the TC went beyond the deference given to it to assess the weight, reliability, and credibility of evidence.[4257] As for his alternative interpretation of Ek Hen's evidence, Appellant does not explain why the TC should have interpreted Appellant's message as solely one of "solidarity and unity"[4258] while rejecting her clear evidence that Appellant said that "Khmer shall be free of Vietnamese".[4259] Merely asserting that the TC failed to interpret evidence in a particular manner is insufficient to establish an error.[4260]

1169. Appellant also baselessly asserts that the TC erred in its use of Neou Sarem's interview.[4261] Contrary to his claims, Neou Sarem's interview was not inadmissible nor was it impermissibly used to report on Appellant's acts as the sole basis for a conviction. The TC did not use the interview in isolation but alongside, *inter alia*, the in-court testimony of Ek Hen and the contemporaneous evidence of Appellant's speeches. Appellant has not demonstrated that the TC committed any error by using the evidence, or that it went beyond the deference given to it to assess the weight, reliability and credibility of the evidence.[4262] Further, contrary to what Appellant asserts, although Ek Hen and Neou Sarem attended training sessions in different years, Neou Sarem's evidence still corroborates the general facts drawn from Ek Hen's testimony that Appellant spoke at training sessions about removal of Vietnamese from Cambodia.

1170. Appellant's claim that even if his statements reflected the common purpose, it could still not be inferred that he knew of the deportations, misrepresents the TC's reasoning. The TC did not merely find that his statements reflected the common purpose, but that he openly advocated for removal of Vietnamese with calls "mirror[ing] the substance, form *and ultimate implementation* of the common purpose of deporting all Vietnamese peoples".[4263]

1171. Appellant's contention that the TC erred by incorrectly interpreting the evidence and

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4256 **F54** Appeal Brief, para. 1893. *See also* response to Ground 20.
4257 *See* Standard of Review (Errors of Fact).
4258 **F54** Appeal Brief, para. 1893.
4259 **E1/217.1** Ek Hen, T. 3 July 2013, 11.30.15-11.33.02, p. 47, lines 21-22.
4260 *See* Standard of Review (Errors of Fact).
4261 **F54** Appeal Brief, para. 1894.
4262 *See* Standard of Review (Errors of Fact).
4263 **E465** Case 002/02 TJ, para. 4237 (emphasis added).

misrepresenting Appellant's public statements are without merit. As to Appellant's claim that paragraph 3400 did not support the finding that Appellant advocated for the deportation of Vietnamese, it is clear when read in context that the TC intended to refer to the preceding paragraph, paragraph 3399. Paragraph 3399 *does* support the finding made in paragraph 4271, which is then referred to in paragraph 4237. In paragraph 3399, the TC quotes a speech given by Appellant where he pledges *"[t]o expel resolutely from Cambodian territory* [...] the expansionist, annexationist Vietnamese aggressors" and "exterminate resolutely all agents of the expansionist, annexationist Vietnamese aggressors [...] *from Cambodian territory forever*".[4264] In any case, even if the TC did not mean to refer to paragraph 3399, it is clear that this evidence had been considered by the TC when it made its findings regarding Appellant's knowledge.

1172. With respect to paragraph 4271, Appellant misrepresents the TC's reasons. While the TC does cross-refer to footnote 11437 in paragraph 4271, the relevant part of footnote 11437 is the evidence of Neou Sarem, not the testimony of Ek Hen. This is very clear when read in context, as it is a quote from Neou Sarem's interview that is footnoted. As it is Neou Sarem's evidence that is being discussed when the TC refers to Appellant's lectures in 1975 and 1976, the TC did not contradict itself by dating Ek Hen's evidence to 1975 or 1976.[4265] The TC did refer to the testimony of Ek Hen later in paragraph 4271, but it explicitly dated the training session she attended as occurring "[a]fter the shift in the CPK's policy toward the Vietnamese in 1977".[4266]

Murder and extermination of Vietnamese

1173. Appellant's claims specific to the CAH of murder and extermination of Vietnamese also fail. Appellant asserts that the TC's finding that his words and actions evinced contempt for Vietnamese does not demonstrate he intended to kill them, misrepresenting the Judgment.[4267] The TC found that Appellant's "words and actions [...] evince his contempt for the Vietnamese *and* direct intent to kill, on a large scale, the Vietnamese in Cambodia".[4268] It did not infer an intent to kill from his contempt for the Vietnamese but found that he had both contempt for the Vietnamese and a direct intent to kill them.

4264 **E465** Case 002/02 TJ, para. 3399 *citing* **E3/562** *Phnom Penh Rally Marks 17th April Anniversary,* 16 Apr. 1978, EN S 00010563 (emphasis added).

4265 **F54** Appeal Brief, para. 1893. *See also* response to Ground 20.

4266 **E465** Case 002/02 TJ, paras 3390, 4271.

4267 **F54** Appeal Brief, para. 2077.

4268 **E465** Case 002/02 TJ, para. 4293 (emphasis added).

1174. Appellant's claim that the TC erred by not explaining "how the statements attributed to [Appellant] showed that he intended to kill ethnic Vietnamese in the places where the crimes were committed" misunderstands the *mens rea* required for the crimes of murder and extermination.[4269] Murder requires an intent for the victim to be killed.[4270] Extermination requires a "direct intent to kill on a large scale".[4271] Neither murder nor extermination require an intent for victims to be killed at the specific place where the killings actually occurred. As discussed above, an accused may be liable for crimes even if he does not know or intend the details of specific criminal acts (such as the location).[4272] The TC reasonably found that Appellant both intended to participate in the common purpose[4273] and held a "direct intent to kill, on a large scale, the Vietnamese in Cambodia",[4274] thus satisfying the *mens rea* of both murder and extermination.

Persecution on racial grounds of Vietnamese

1175. Appellant's claims specific to the CAH of persecution on racial grounds of Vietnamese also fail. Contrary to Appellant's assertions that the TC identified no evidence of his discriminatory intent against the Vietnamese[4275] and failed to explain how it was racial discrimination he intended,[4276] the TC's finding of a discriminatory intent on racial grounds was reasonable and sufficiently explained. The TC found that Appellant's words and actions during the DK period evinced his shared intention to kill Vietnamese on a large scale, referring to the evidence cited in paragraph 4238 to support this finding.[4277] Appellant's intent to discriminate on racial grounds was demonstrated by this intent to kill.[4278] This reasoning is in line with decisions from other international tribunals. For example, in *Kvočka*, the ICTY Trial Chamber explained that "if the criminal enterprise entails killing members of a particular ethnic group, and members of that ethnic group were of a differing religion, race, or political group than the co-perpetrators, *that would*

4269 **F54** Appeal Brief, paras 2077, 2080.
4270 **F36** Case 002/01 AJ, paras 387 ("The intent of the accused or of the person or persons for whom he is criminally responsible to either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death."), 410.
4271 **F36** Case 002/01 AJ, para. 522.
4272 *See* Section VIII.C.3. Intent.
4273 **E465** Case 002/02 TJ, para. 4279.
4274 **E465** Case 002/02 TJ, para. 4293.
4275 **F54** Appeal Brief, para. 2082.
4276 **F54** Appeal Brief, para. 2084.
4277 **E465** Case 002/02 TJ, paras 4002-4003, 4293, fn. 14001.
4278 **E465** Case 002/02 TJ para. 4293 ("Further, the Chamber is satisfied that the intent to kill was the result of Khieu Samphan's specific intent to discriminate against the Vietnamese on racial grounds").

demonstrate an intent to discriminate on political, racial, or religious grounds".[4279] Appellant has therefore failed to demonstrate that the TC's finding of discriminatory intent was one no reasonable trier of fact could have made.

1176. Appellant's assertion that the TC failed to establish that Appellant intended to commit racial persecution in TK and Prey Veng,[4280] fails as it adopts a piecemeal approach to the Judgment and misunderstands the law. The TC was not required to demonstrate that Appellant shared an intent to persecute the Vietnamese on racial grounds in relation to each specific discriminatory act and each specific crime site. The TC only needed to establish that Appellant shared the specific intent of other JCE members to commit, through a JCE, the CAH of persecution on racial grounds. It reasonably found that this was demonstrated by Appellant's intent to kill Vietnamese, as discussed above. In any case, contrary to Appellant's claims, Appellant's intent to racially persecute Vietnamese at TK and Prey Veng was established throughout the Judgment. For example, the TC found that racial persecution was established regarding the deportation of Vietnamese in TK.[4281] It also found that Appellant intended to commit these deportations.[4282] It thus follows that Appellant must have intended racial discrimination at TK.

1177. Appellant's claim that the TC "had no evidence to establish [he] intended to kill ethnic Vietnamese" is incorrect,[4283] as discussed above in response to his claims regarding the CAH of murder and extermination.

Genocide of Vietnamese

1178. Appellant's claims regarding the genocide of Vietnamese also fail. Appellant misrepresents the TC's reasons and does not read the TC's finding on genocidal intent in context when he claims that the TC failed to specify which "words and actions" demonstrated his genocidal intent.[4284] The TC's findings on Appellant's genocidal intent in paragraph 4294 flow from, and refer to, its findings on his murderous intent in paragraph 4293.[4285] Paragraph 4293 refers to Appellant's "words and actions during the

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4279 *Kvočka* TJ, para. 288 (emphasis added).
4280 **F54** Appeal Brief, para. 2085.
4281 **E465** Case 002/02 TJ, paras 1188-1192.
4282 **E465** Case 002/02 TJ, para. 4292.
4283 **F54** Appeal Brief, para. 2081.
4284 **F54** Appeal Brief, para. 2086.
4285 **E465** Case 002/02 TJ, para. 4294 (The TC begins with the adverb "[f]urthermore", thus explicitly linking it to the findings made in paragraph 4293. The TC also notes that its findings are "in line with its findings in the preceding paragraph").

DK period" with a cross-reference to paragraph 4238.[4286] Thus, when the TC's findings on Appellant's intent are read in context, it is clear that the "words and actions" referred to by the TC are those discussed in paragraph 4238,[4287] including Appellant's public statements calling for the Vietnamese to be "wiped out", "exterminate[d] resolutely", and "destroy[ed] forever".[4288] These statements clearly evince his genocidal intent.

1179. Appellant's claims that the TC erroneously used a 2007 interview with him to establish his genocidal intent also misrepresents the TC's reasoning.[4289] The TC did not rely on this interview to establish Appellant's genocidal intent; the TC found that his intent was demonstrated by his "words and actions *during the DK period*".[4290] The interview is merely referred to in a footnote to demonstrate Appellant's "lasting ire" at the Vietnamese.[4291] Further, Appellant's complaint that that TC "did not bother to transcribe" the interview should be dismissed, given he does not explain why the TC would be required to transcribe the interview in addition to describing the evidence and citing it with a time-stamp reference. Appellant's failure to raise with the TC any translation issues in relation to this evidence indicates there were none.

1180. That Appellant's words and actions considered by the TC[4292] were sufficient to establish his genocidal intent is well established by international jurisprudence. In *Krstić*, the ICTY Appeals Chamber noted that genocidal intent is not usually susceptible to direct proof, but can often be inferred from the facts and circumstances of the case.[4293] Such facts need not form part of the *actus reus* of the crime.[4294] Factors relevant to this analysis may include the perpetration of other culpable acts systematically directed against the same group (whether committed by the same offender or others); the systematic targeting of victims on account of their membership of a particular group; the repetition of destructive and discriminatory acts, the use of derogatory language towards members of the targeted group;[4295] speeches or projects laying the groundwork for and justifying the acts aimed

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4286 **E465** Case 002/02 TJ, para. 4293, fn. 14001.
4287 **E465** Case 002/02 TJ, para. 4238 cites Section 13.3: Treatment of the Vietnamese, where full citations for Appellant's speeches are provided in paras 3406-3407.
4288 **E465** Case 002/02 TJ, para. 4238.
4289 **F54** Appeal Brief, paras 2087-2088.
4290 **E465** Case 002/02 TJ, para. 4294 (emphasis added).
4291 **E465** Case 002/02 TJ, para. 4294, fn. 14002.
4292 *See* **E465** Case 002/02 TJ, paras 4238, 4294.
4293 *Karadžić* Rule 98*bis* AJ, para. 80, *citing Gacumbitsi* AJ, para. 40, *Rutaganda* AJ, para. 525, *Kayishema & Ruzindana* AJ, para. 159.
4294 *Tolimir* AJ, para. 254; *Krstić* AJ, para. 33. *See also Croatia v. Serbia*, paras 162-163, 478; *Bosnia v. Serbia*, para. 190.
4295 *Karadžić* TJ, para. 550; *Karadžić* Rule 98*bis* AJ, para. 80; *Tolimir* AJ, para. 246; *Popović* AJ, para. 468; *Hategekimana* AJ, para. 133; *Jelisić* AJ, para. 47; *Seromba* AJ, para. 176; *Gacumbitsi* AJ, paras 40-41;

at undermining the foundation of the targeted group;[4296] and the political doctrine which gave rise to the acts.[4297] These factors were all present in this case,[4298] supporting the TC's finding that Appellant acted with genocidal intent against the Vietnamese.

1181. Finally, Appellant's claim that the TC "ignored" that genocidal intent requires an intent to destroy a group "in whole or in part" is patently false.[4299] The TC found that Appellant held "genocidal intent to destroy the Vietnamese *as a racial, national and ethnic group*, as such".[4300] Finding genocidal intent to destroy a group necessarily entails finding an intent to destroy that group either "in whole or in part", whether or not those specific words are used. Further, it is clear that the TC was aware of this requirement as it raised this in its discussion of the *mens rea* of genocide.[4301]

GB committed against Vietnamese

1182. Appellant's claims specific to GB committed against Vietnamese also fail. Appellant simplistically asserts that the TC could not infer intent from his knowledge of the protected status of Vietnamese prisoners,[4302] nor his support for the revolutionary framework concerning enemies,[4303] nor his participation in the JCE.[4304] To the contrary, the TC correctly considered its findings regarding Appellant's knowledge of the protected status of Vietnamese prisoners at S-21, his support for the revolutionary framework concerning enemies, and his shared intent to further the crimes of the JCE cumulatively.[4305] When considered cumulatively, it is clear that Appellant knew that GB were being committed against Vietnamese prisoners at S-21 as part of the common plan and nevertheless continued to participate in the JCE. The only reasonable conclusion that can be reached from this is that Appellant shared the intent to commit GB against Vietnamese prisoners at S-21.

1183. Appellant fails to demonstrate that the TC erred in finding he "was aware of the protected status of Vietnamese detainees at [S-21] and knew of their ill-treatment".[4306] Appellant's

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ISIS-Yazidi Report, para. 152.

4296 *Gacumbitsi* AJ, para. 43; *Kamuhanda* AJ, paras 81-82; *Karadžić* TJ, para. 550; *Tolimir* TJ, para. 745.

4297 *Seromba* AJ, para. 176.

4298 *See* **E465** Case 002/02 TJ, *13.3 Treatment of the Vietnamese. See also* response to grounds under *Treatment of Groups: Vietnamese* and response to Grounds 219, 237, 238, 239, 241.

4299 **F54** Appeal Brief, para. 2087.

4300 **E465** Case 002/02 TJ, para. 4294 (emphasis added).

4301 **E465** Case 002/02 TJ, paras 797-804.

4302 **F54** Appeal Brief, para. 2089.

4303 **F54** Appeal Brief, para. 2090.

4304 **F54** Appeal Brief, para. 2090.

4305 **E465** Case 002/02 TJ, para. 4295.

4306 **E465** Case 002/02 TJ, para. 4239.

repeated claim that the TC erred in finding he had a position of unique standing within the CPK is incorrect.[4307] As to his claims regarding the "principle of secrecy",[4308] Appellant merely asserts that alternative findings should have been made, which falls short of establishing an error on the part of the TC.[4309] Appellant's claims regarding the evidence of a meeting between Duch and Appellant, and his knowledge of confessions, photographs and a movie of Vietnamese prisoners of war should also be dismissed.[4310] Again, Appellant merely asserts that the TC should have reached different conclusions.

iv. Intent to Commit Crimes During Internal Purges and at Security Centres and Execution Sites

Grounds 216, 217 and 235[4311]

1184. **Grounds 216, 217 and 235 should be dismissed as Appellant fails to demonstrate that the TC erred in finding that Appellant intended to commit, as a member of the JCE, the CAH of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and OIA through attacks upon human dignity and enforced disappearances during internal purges and at security centres and execution sites.**

1185. Appellant fails to demonstrate that the TC erred in assessing these crimes. Based on the correct articulation of the law[4312] and a holistic examination of the extensive evidentiary record, the TC properly found Appellant intended the commission of crimes during the purges and at the security centres and execution sites relevant to Case 002/02.[4313]

1186. Appellant contributed to purges[4314] by, *inter alia*, delivering political training sessions dedicated to ferreting out traitors and enemies, and, in his many public speeches, urging cadres to identify enemies and inciting hatred towards them.[4315] He did this while he was undoubtedly aware that crimes were being committed in security centres and at execution

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4307 *See* response to Ground 203.
4308 **F54** Appeal Brief, paras 1904-1905.
4309 **F36** Case 002/01 AJ, para. 1071. *See also* response to Ground 195.
4310 **F54** Appeal Brief, paras 1906-1909.
4311 Ground 216: **F54** Appeal Brief, *Security Centres,* paras 1849-1856; **F54.1.1** Appeal Brief Annex A, p. 73 (EN), p. 68 (FR), pp. 104-105 (KH). Ground 217: **F54** Appeal Brief, *Errors concerning knowledge of crimes committed during the purges,* paras 1857-1878; **F54.1.1** Appeal Brief Annex A, pp. 73-74 (EN), p. 68 (FR), p. 105 (KH). Ground 235: **F54** Appeal Brief, *Security Centres, Execution Sites and Purges,* paras 2053-2061; **F54.1.1** Appeal Brief Annex A, p. 78 (EN), p. 73 (FR), pp. 112-113 (KH).
4312 *See* response to Ground 225. *See also* Section VIII.C.3. Intent.
4313 **E465** Case 002/02 TJ, paras 4283-4287, 4306.
4314 **E465** Case 002/02 TJ, para. 4219.
4315 *See* response to Grounds 204, 227, 228, 229, 230 & 231.

sites throughout the country. His intent that these crimes be committed is further demonstrated by the fact that he had the ability to "avert the horrendous treatment and slaughter of his countrymen" and "selectively exercis[ed] his authority to prevent the commission of crimes" when it suited his own interests,[4316] but took no subsequent measures at any other point to intervene in the atrocities befalling the Cambodian people.

Internal Purges

High Level Purges

1187. Appellant incorrectly alleges that the TC erred by relying on and misrepresenting post-DK statements to prove his knowledge of high-level purges at the time of the events.[4317] The SCC has confirmed that the TC is able to rely upon knowledge after the fact as an element when determining whether Appellant had the requisite intent at the time of the crimes,[4318] as it did in this case. Further, Appellant fails to show that the TC misrepresented his remarks. He disingenuously claims his knowledge of SC members "disappear[ing]" does not establish his knowledge of the purge of such members,[4319] even though he has previously unambiguously acknowledged that in the DK context, the term "disappearance" of high-ranked cadres was equivalent to "arrest".[4320] Appellant also acknowledges that he was aware that those who were considered Vietnamese agents were purged from the SC, claiming that his comment that "half [of] the [SC]" were swept away was actually referring to "Vietnamese agents" who had "infiltrated the ranks of the Central and Standing Committees".[4321] The evidence referred to by Appellant further confirms his knowledge by noting that "we managed to deal with those people completely".[4322] Appellant simply disagrees with the TC's analysis of the evidence. He fails to prove that the finding was one that no reasonable trier of fact could have reached upon a holistic, not piecemeal, assessment of the evidence.[4323]

1188. Appellant disagrees with the TC's evaluation of evidence establishing that he had knowledge that Doeun had been purged.[4324] As detailed in response to Ground 192, the

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4316 **E465** Case 002/02 TJ, para. 4286. *See also* **E465** Case 002/02 TJ, paras 4232-4234 (Appellant secured the release of his sister-in-law from a North Zone security centre).
4317 **F54** Appeal Brief, paras 1858-1861, 1865. *See also* **F54** Appeal Brief, para. 1610.
4318 **F36** Case 002/01 AJ, para. 1082.
4319 **F54** Appeal Brief, paras 1858, 1860.
4320 *See* response to Ground 192.
4321 **F54** Appeal Brief, para. 1860.
4322 **E465** Case 002/02 TJ, para. 4221.
4323 *See* Standard of Review (Errors of Fact).
4324 **F54** Appeal Brief, paras 1862-1863.

TC relied on extensive evidence establishing Appellant's knowledge of Doeun's arrest and execution.[4325] The TC correctly found that Appellant had knowledge that Doeun had been purged as Appellant remained one of the few members of Office 870,[4326] arrest decisions were made by the Commerce Committee to purge a "number of bad groups from the Ministry" at the time,[4327] and reports were no longer addressed to Doeun but to Appellant[4328] as Appellant took over supervisory functions in the Commerce Committee in Doeun's absence.[4329] Appellant's claim that he was not surprised about Doeun's absence from 1977 onwards as he "travelled quite a lot", at a time when Appellant acknowledged that high-level cadres were being arrested "one after another",[4330] is not credible and was rightfully rejected by the TC.[4331]

1189. As for his knowledge of the arrests of Chan Chakrei, Chhouk, Keo Meas and Koy Thuon, Appellant repeats his allegation that the TC erred by relying on the allegedly inconsistent testimony of Em Oeun.[4332] As established in response to Ground 22, however, the TC correctly considered Em Oeun's testimony to be credible.[4333] Further, Appellant fails to establish how the TC made a "peremptory affirmation" in finding that Appellant read *RF* magazines which referred to these purges.[4334] Not only was *RF* printed and delivered to DK ministries and offices of the Party Centre, it was written by members of the SC.[4335] Finally, Appellant again argues that the TC erred by relying on Appellant's book[4336] to establish his knowledge of the purges.[4337] Contrary to Appellant's argument, the TC caveated its reliance on Appellant's book by noting that it considered the book "in a limited sense" due to its references to works of other authors.[4338] The TC also relied upon further evidence from Em Oeun, who testified that Appellant denounced Chan Chakrei at a study session,[4339] and acknowledgment from Appellant that Chan Chakrei and

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4325 *See* response to Ground 192.
4326 **E465** Case 002/02 TJ, para. 4225.
4327 **E465** Case 002/02 TJ, para. 4225 *citing* **E3/962** Commerce Committee Arrest Decision, 17 Oct. 1976, EN 00333254; **E3/174** Commerce Committee Arrest Decision, 17 Oct. 1976, EN 00548780; **E3/846** Commerce Committee Report, 19 Oct. 1976, EN 00234229-31.
4328 **E465** Case 002/02 TJ, para. 618, fn. 1951.
4329 **E465** Case 002/02 TJ, para. 4225.
4330 **E465** Case 002/02 TJ, paras 4225, 4220 *citing* **E3/210** Khieu Samphan WRI, 14 Dec. 2007, EN 00156948-49.
4331 **E465** Case 002/02 TJ, para. 4225 *citing* **E3/37** Khieu Samphan WRI, 14 Dec. 2007, EN 00156753.
4332 **F54** Appeal Brief, para. 1864.
4333 *See* response to Grounds 22 and 204.
4334 **F54** Appeal Brief, para. 1865.
4335 **E465** Case 002/02 TJ, paras 474-475. *See also* response to Ground 193.
4336 **E3/16** Khieu Samphan, *Considerations on the History of Cambodia*, EN 00498220.
4337 **F54** Appeal Brief, para. 1865.
4338 **E465** Case 002/02 TJ, para. 194.
4339 **E465** Case 002/02 TJ, para. 4226.

Chhouk were arrested following a decision made by Pol Pot.[4340]

1190. With respect to Appellant's knowledge of the arrest and execution of Hu Nim, the TC considered a letter written by Hu Nim addressed to Appellant. Contrary to Appellant's argument,[4341] the TC acknowledged that it was not clear whether Appellant had received the letter.[4342] The TC, however, also considered Appellant's close relationship with Hu Nim and Appellant's statements to the CIJs regarding Hu Nim's execution.[4343] Appellant misleadingly quotes specific sections of this statement but fails to undermine the finding that Appellant had acknowledged that Hu Nim was killed after expressing disagreement with CPK policy.[4344] Though Appellant claims this statement holds little weight as it was made post-DK,[4345] the statement clearly establishes Appellant's belief at the time of the crimes that if he spoke out against the Party he would be killed like Hu Nim.

1191. As for Appellant's knowledge of the purges of Chou Chet, Vorn Vet, Sao Phim and Veung Chhaem,[4346] the TC correctly found that hearsay evidence was corroborated by Appellant's own separate admissions to Stephen Heder, Meng-Try Ea and Sopheak Loeung that he had knowledge that Vorn Vet, Sao Phim and Chou Chet were all considered Vietnamese enemies by CPK.[4347] Appellant attempts to distort the TC's findings by stating that Vorn Vet was arrested *after* the Fifth Party Congress and therefore Appellant would not have been in attendance for the arrest.[4348] Appellant quotes the same evidence from Ke Pauk as the TC that the arrest occurred at one in the morning while the "assembly was closed".[4349] He ignores that Ke Pauk explained that the reason he was asked to stay after the assembly closed was to watch footage of the arrest, which therefore must have occurred earlier. He also baselessly claims that the TC could not use Duch's statement that Ke Pauk told him this story.[4350] However, Appellant fails to establish that the TC distorted the evidence of Ke Pauk,[4351] or that it went beyond the broad latitude it

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4340 **E465** Case 002/02 TJ, para. 4226.
4341 **F54** Appeal Brief, para. 1866.
4342 **E465** Case 002/02 TJ, para. 4227.
4343 **E465** Case 002/02 TJ, para. 4227.
4344 **E465** Case 002/02 TJ, para. 4227 *citing* **E3/37** Khieu Samphan WRI, 14 Dec. 2007, EN 00156757 (Appellant stated he "could not make my disagreement [with CPK decisions] public […] I would not have survived if I dared […] The obvious example of that was the case of [Hu] Nim").
4345 **F54** Appeal Brief, para. 1866.
4346 **E465** Case 002/02 TJ, paras 4228-4230.
4347 **E465** Case 002/02 TJ, paras 4228-4229.
4348 **F54** Appeal Brief, para. 1870.
4349 **F54** Appeal Brief, para. 1870. *See also* **E465** Case 002/02 TJ, para. 2321, fn. 7848.
4350 **E465** Case 002/02 TJ, para. 2321, fn. 7847.
4351 **F54** Appeal Brief, para. 1870.

is given to consider and rely on hearsay evidence.[4352]

Low Level Purges

1192. Appellant's argument that the TC erred in finding that he was aware of the purge of lower-level cadres also fails. Contrary to Appellant's claims,[4353] the TC's findings that Appellant had knowledge of the purge of lower-level cadres and the living conditions during DK was based on substantial evidence other than the testimony of Meas Voeun.[4354] Nor did the TC err by referring to acts that occurred at Preah Vihear.[4355]

1193. Further, Appellant repeats his arguments that the TC erred by relying on statements he made on an unknown date and only citing particular passages of his statements.[4356] It is presumed, however, that the TC assessed and weighed all evidence presented, absent an indication that a specific piece of evidence was completely disregarded.[4357] Appellant also fails to rebut the presumption of the *prima facie* authenticity of these documents.[4358]

1194. In finding Appellant's knowledge, the TC relied upon a number of properly weighed sources. Notably, this evidence included Appellant's own admissions that: "we kept track of things" when overseeing arrests, and so everyone who was executed was a traitor;[4359] "we managed to deal with those people completely" (referring to perceived foreign enemies);[4360] and his knowledge of how Pol Pot arrested cadres.

Security Centres

1195. Appellant's claims regarding his alleged lack of knowledge of crimes being committed at security centres[4361] misunderstand the *mens rea* required for JCE and A&A liability. The *mens rea* for JCE liability does not require knowledge of specific criminal incidents,[4362] nor did the TC establish *mens rea* in this way.

4352 *See* response to Ground 32 (Hearsay).
4353 **F54** Appeal Brief, paras 1874, 1878.
4354 *See* response to Ground 211.
4355 *See* response to Ground 211. *See also* **E465** Case 002/02 TJ, paras 4216, 4232, 4234.
4356 **F54** Appeal Brief, paras 1875-1876.
4357 *See* Standard of Review (Errors of Fact).
4358 *See* **F36** Case 002/01 AJ, para. 375. *See also* response to Ground 36.
4359 **E465** Case 002/02 TJ, paras 4221, 4228 *citing* **E3/3169** Stephen Heder, *Pol Pot and Khieu Samphan*, 1991, pp. 25-26, EN 00002770-71.
4360 **E465** Case 002/02 TJ, para. 4221 *citing* **E3/203** Khieu Samphan Interview by Stephen Heder, 4 Aug. 1980, EN 00424013.
4361 **F54** Appeal Brief, paras 1849-1856 (For example, "In the absence of knowledge of crimes committed at S-21, its finding according to which "Khieu Samphan was at all times aware of the essential elements of the crimes committed by direct perpetrators" should be annulled" (para. 1853), "it never mentioned that [Appellant] had knowledge that these crimes were being committed […] Consequently, it could not establish any direct intent to commit the above-mentioned crimes" (para. 1854)).
4362 *See* Section VIII.C.3. Intent.

1196. In any case, contrary to Appellant's largely unsubstantiated claims,[4363] the TC did make reasonable findings demonstrating that Appellant undoubtedly had knowledge that crimes were being committed in the security centres. For example, with respect to S-21, the TC found, *inter alia,* that Appellant would have known of S-21 due to his unique standing in the Party as part of the small group of well-informed CPK leaders at the Party Centre.[4364] Appellant had met Duch and instructed him that S-21 staff should continue working as normal in the face of Vietnamese advances into DK territory.[4365] The TC also reasonably established that Appellant knew that GB were being committed against Vietnamese prisoners there.[4366]

1197. As for KTC, the TC found, *inter alia*, that reports of deaths there were passed up an established chain of command to the "*party*";[4367] that TK District (where KTC was located) was awarded the "Honorary Red Flag of the Central Committee" as a model district by the CC;[4368] and that Appellant is likely to have visited the district with Ta Mok,[4369] who is known to have visited KTC and was "kept apprised of its operation".[4370] Regarding AuKg, the TC concluded that reports regarding the progress of internal purges across the Zone and inside Division 801 were sent directly to the Party Centre.[4371]

1198. Similarly, the TC found that PK security centre operated under the control of sector authorities who reported directly to the Party Centre at Office 870, of which Appellant was a member.[4372] Further, it heard testimony that "[t]he Sector did not have any discretion to decide on [the treatment of enemies] - or such instruction. It had to come from the Centre."[4373] Appellant alleges in Annex A that the TC distorted evidence to incorrectly establish his knowledge of crimes perpetrated at PK security centre through its general finding relating to purges,[4374] but fails to substantiate his argument further in

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4363 **F54** Appeal Brief, paras 1849-1856. *See also* **F54** Appeal Brief, paras 1610-1615.
4364 **E465** Case 002/02 TJ, paras 340, 2373. *See also* paras 4230 (arrest and execution of Phuong at S-21), 4277 (role in arrest and execution of Kang Chap).
4365 **E465** Case 002/02 TJ, paras 340, 2373, 2557, 2558.
4366 *See* response to Ground 241. *See also* **E465** Case 002/02 TJ, paras 340, 4239.
4367 *See e.g.* **E465** Case 002/02 TJ, paras 860, fn. 2560 *citing* **E3/2924** Tram Kak District Record, 11 July 1977, EN 00583752, 2814 (regarding "orders to smash from the sector and the district"); **E1/274.1** Neang Ouch, T. 10 Mar. 2015, 09.10.50-09.13.01, p. 4, lines 9-10.
4368 **E465** Case 002/02 TJ, para. 1126.
4369 **E465** Case 002/02 TJ, para. 1137.
4370 **E465** Case 002/02 TJ, paras 2708-2709; **E3/4626** Pech Chim WRI, EN 00380137 *confirmed by* **E1/290.1** Pech Chim, T. 22 Apr. 2015, 14.25.27-14.30.02, p. 60, lines 3-19.
4371 **E465** Case 002/02 TJ, para. 2884.
4372 *See e.g.* **E465** Case 002/02 TJ, paras 487, 489, 3028-3029, 3031, 3034-3047, 3065, 3076-3080, 3162.
4373 **E465** Case 002/02 TJ, para. 3077, fn. 10402 *citing* **E1/152.1** Phan Van, T. 12 Dec. 2012, 09.56.11-09.58.04, p. 18, lines 6-8.
4374 **F54.1.1** Appeal Brief Annex A, p. 73.

his brief and does not elaborate on what evidence the TC has "distorted".[4375]

v. Intent to Commit Crimes at Cooperatives and Worksites

Ground 234: Cooperatives and worksites[4376]

1199. **Ground 234 should be dismissed as Appellant fails to demonstrate that the Chamber erred in finding that he intended to commit the CAH of murder, enslavement, persecution on political grounds, and OIA/attacks against human dignity and enforced disappearances at the cooperatives and worksites.**

1200. The CPK policy to create and operate cooperatives and worksites was definitively found to involve the commission of crimes.[4377] The Chamber correctly articulated the law on *mens rea* for JCE,[4378] and, based on an overwhelming evidentiary record, which included Appellant's own admissions, found that he intended the commission of these crimes at the cooperatives and worksites relevant to Case 002/02.[4379]

1201. Appellant demonstrated his intent to participate in the common purpose through his high-ranking and significant involvement in the Party, and his outward support for the policies.[4380] As a member of the CC and regular attendee of SC meetings, Appellant was one of very few individuals involved in CPK decision-making processes: developing, monitoring, and implementing economic policies, as well as disseminating instructions and work plans across the country.[4381] Appellant was not interested in simply "social change";[4382] he publicly promoted the policies and the unrealistic quotas,[4383] calling for their fulfilment *at any cost*. By his own admission, the achievement of "the great leap forward" necessitated the imposition of extreme working and living conditions.[4384] Appellant actively enabled this cruel system by overseeing the exportation of rice, with full awareness that the people being forced to work in the name of the CPK policies were doing so under appalling conditions while dying of starvation and lacking medicine.[4385]

1202. Appellant further intended to discriminate against enemies of the Party on political

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4375 **F54** Appeal Brief, paras 1849-1850.
4376 Ground 234: **F54** Appeal Brief, *Cooperatives and worksites*, paras 2039-2052; **F54.1.1** Appeal Brief Annex A, p. 78 (EN), p. 73 (FR), p. 112 (KH).
4377 *See* response to Grounds 181, 183.
4378 *See* response to Ground 225.
4379 *See* response to Grounds 211-215.
4380 *See* response to Grounds 196-207.
4381 *See* response to Ground 203.
4382 **F54** Appeal Brief, para. 2043.
4383 *See* response to Ground 182.
4384 *See* response to Ground 211.
4385 *See* response to Ground 181.

grounds. The CPK policy to establish and operate worksites and cooperatives was not designed for purely economic reasons, but also functioned as a means of implementing the CPK's social and security policies of "defence against enemies" and "radically transforming the population."[4386] The cooperatives served to "slowly expunge the remnants of 'imperialist-feudalist-capitalist outlooks,'"[4387] thus necessitating a distinction between BP and NP.[4388] Real and perceived enemies of the CPK, "including New People, former Khmer Republic officials, traitors, counterrevolutionaries and other detractors of the revolution who were perceived as unable to fulfil revolutionary goals" were systematically targeted through the cooperative system.[4389] Appellant encouraged this unequal treatment, as he conducted political training sessions dedicated to ferreting out traitors and enemies,[4390] and admitted that, "re-education through criticism and self-criticism meetings was ideologically fundamental to the class struggle".[4391]

1203. Appellant has failed to displace the TC's reasonable finding of his intent to commit, as a member of the JCE, the CAH of murder, enslavement, persecution on political grounds, and OIA through attacks against human dignity and enforced disappearances at the cooperatives and worksites, and thus his conviction and sentence for these crimes must stand.[4392]

Ground 211: Errors common to all sites[4393]

1204. **Appellant has failed to establish that the TC erred in finding he was aware of the crimes committed as part of the policy aimed at the creation and operation of cooperatives and worksites.**

1205. The ground fails as Appellant does not establish that the TC erred by (i) finding that Appellant was aware of the fact that crimes were being committed as part of the policy;[4394] (ii) distorting the evidence before it and adopting a deductive approach to find Appellant had knowledge of the crimes;[4395] (iii) relying on facts regarding the conditions

4386 *See* response to Ground 181.
4387 **E465** Case 002/02 TJ, para. 3896, fn. 12990 *citing* **E3/729** *Revolutionary Flag*, Oct. 1975, EN 00357908-09. *See also* paras 980-986 and the citations therein.
4388 *See* response to Ground 181.
4389 **E465** Case 002/02 TJ, para. 3924.
4390 *See* response to Grounds 204, 211.
4391 **E465** Case 002/02 TJ, para. 3967.
4392 **E465** Case 002/02 TJ, paras 4282, 4306, 4326-4327.
4393 Ground 211: **F54** Appeal Brief, *Errors common to all sites*, paras 1816-1840; *see also* paras 1604-1615. **F54.1.1** Appeal Brief Annex A, p. 72 (EN), p. 67 (FR), pp. 102-103 (KH).
4394 **F54** Appeal Brief, paras 1839-1840; **F54.1.1** Appeal Brief Annex A, p. 72.
4395 **F54** Appeal Brief, paras 1816-1828; **F54.1.1** Appeal Brief Annex A, p. 72.

at cooperatives in Preah Vihear that were outside the TC's *saisine;*[4396] and (iv) relying exclusively on Appellant's book[4397] to make findings of his knowledge of the crimes committed against NP.[4398]

TC finding that Appellant was aware of the crimes

1206. First, Appellant's claims regarding the TC's findings of his awareness of crimes must fail. As discussed above,[4399] Appellant misleadingly refers to only one conclusory section of the Judgment[4400] as containing the entirety of the TC's findings of Appellant's knowledge.[4401] Appellant entirely ignores that the TC made findings relevant to his knowledge of crimes throughout the entire Judgment. A proper assessment of the TC's findings of Appellant's knowledge requires considering the TC's reasons *in toto*.

1207. Similarly flawed is Appellant's assertion that the TC failed to prove a link between Appellant and the sites because it did not give reasons on a "site by site" basis.[4402] Appellant provides no authority to support his contention that the TC should have formulated its reasoning following a "site by site" structure.[4403] Appellant also ignores that, in the section of the Judgment he cites, the TC referred to six other sections of the Judgment in support of its findings, including at least two sections addressing specific crime sites.[4404] The TC is further not required to "articulate every step of its reasoning in detail".[4405]

1208. Appellant also baselessly claims that the TC erred in law by failing to articulate a link between himself, the crime sites, and the crimes.[4406] The TC delineated a substantial, thorough, and clear link between Appellant and each specific crime site.[4407] Appellant falsely asserts that the TC's findings were "in breach of the rules relative to the right of evidence"[4408] without ever explaining how any rules were breached.

1209. Contrary to his claim that no "probative element" confirmed Appellant's knowledge of

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4396 **F54** Appeal Brief, paras 1829-1830.
4397 **E3/16** Khieu Samphan, *Considerations on the History of Cambodia*, EN 00498220.
4398 **F54** Appeal Brief, paras 1836-1838.
4399 *See* Section VIII.3.C. Intent.
4400 **E465** Case 002/02 TJ, Section 18.1.2: *Knowledge Concurrent with the Commission of the Crimes.*
4401 **F54** Appeal Brief, paras 1816-1840.
4402 **F54** Appeal Brief, para. 1840.
4403 **F54** Appeal Brief, para. 1840. *See also* paras 1604-1615.
4404 *See e.g.* **E465** Case 002/02 TJ, fns 13740-13742, 13744-13745, 13752-13755, 13765.
4405 *See* Standard of Review (Reasoned Decision).
4406 **F54** Appeal Brief, paras 1604-1615, 1840.
4407 *See* response to Grounds 212, 213, 214, 215.
4408 **F54** Appeal Brief, para. 1839.

the crimes during the DK,[4409] the TC relied on a variety of factors which cumulatively proved that Appellant had contemporaneous knowledge of the living conditions in cooperatives and worksites. Considering the "systematic vertical reporting regime within the ranks of the CPK",[4410] witness testimonies, Appellant's own statements,[4411] his position in the Party and proximity to other senior leaders,[4412] his public support of the common plan,[4413] and contemporaneous documents, the TC correctly established Appellant's knowledge of the living conditions in cooperatives and worksites.[4414]

1210. Evidence of such knowledge included Appellant's own statements conceding that food was generally "not abundant",[4415] that those in cooperatives and worksites were "not free",[4416] and that conditions deteriorated "because things had to be expedited".[4417] Appellant also acknowledged that, "in 1978 when drought threatened to destroy our main crops and […] the conflict with Vietnam intensified […] the only force we had was the strength of the people".[4418] He further testified that cooperatives were instituted in order to "fight together for the production of paddy *no matter what*".[4419] Contemporaneous speeches evinced his knowledge that, despite food shortages, production and construction were increased,[4420] and "all people" were working "without rest".[4421] Post-

4409 **F54** Appeal Brief, paras 1839-1840.
4410 **E465** Case 002/02 TJ, para. 3913.
4411 **E465** Case 002/02 TJ, para. 1022 *citing* **E3/4049** Khieu Samphan Interview, undated, EN 00789058. *See also* **E465** Case 002/02 TJ, paras 1254, 4213, 4221, 4217 *citing* **E3/16** Khieu Samphan, *Considerations on the History of Cambodia*, p. 67, EN 00498286 ("This was the principle of vigilance to prevent enemy agents some countries from being able to bore holes from within the Kampuchean revolutionary state authorities. So then, it was imperative to grasp the history of each person and to make it easy for cadres and the peasants to grasp the history of each person, the easiest thing to do was to differentiate them into Old People and New People.").
4412 **E465** Case 002/02 TJ, para. 4208.
4413 **E465** Case 002/02 TJ, para. 4262.
4414 *See also* response to Grounds 181 & 183, 182.
4415 **E465** Case 002/02 TJ, para. 4211 *citing* **E1/197.1** Khieu Samphan, T. 27 May 2013, 14.55.22-14.58.10, p. 83, lines 17-22.
4416 **E465** Case 002/02 TJ, para. 3885, fn. 12966.
4417 **E465** Case 002/02 TJ, para. 4211 *citing* **E3/4043** Khieu Samphan Interview, undated, EN 00786110.
4418 **E465** Case 002/02 TJ, para. 4210 *citing* **E1/528.1** Khieu Samphan, T. 23 June 2017, 10.44.44-10.47.14, p. 35, lines 14-17.
4419 **E465** Case 002/02 TJ, para. 4210 *citing* **E1/528.1** Khieu Samphan, T. 23 June 2017, 10.48.43-10.52.56, p. 36, line 12 (emphasis added).
4420 *See e.g.* speeches *cited in* **E465** Case 002/02 TJ, paras 3906-3916, including **E3/200** *Khieu Samphan's Speech at Anniversary Meeting*, 15 Apr. 1977, EN S00004166; **E3/169** *Khieu Samphan Speech at Anniversary Meeting*, 17 Apr. 1978, EN 00280400; **E3/1361** FBIS, *Third Anniversary Celebrated at 15 April Mass Rally: Khieu Samphan Statement*, 16 Apr. 1978, EN 00168820-21; **E3/562** SWB BBC, *Phnom Penh Rally Marks 17th April Anniversary*, 16 Apr. 1978, EN S00010564; **E3/200** SWB BBC, *Khieu Samphan's Speech at Anniversary Meeting*, 15 Apr. 1977, EN S00004165-70.
4421 **E465** Case 002/02 TJ, para. 3916 *citing* **E3/118** FBIS, *Khieu Samphan 21 April Victory Message on Phnom Penh Radio,* 21 Apr. 1975, EN 00166994-95 (referring to "all people" building dykes, digging canals and water reservoirs, increasing production, cultivating two rice harvests annually, "working day and night […] without rest").

DK interviews demonstrated he knew that "both healthy people and the sick people had to work" including those who were "moderately sick".[4422] Appellant described how "[p]eople were forced to work without food, while they could barely walk, but even so, they were made to work", and admitted he was responsible for purchasing medicine from abroad to combat the lack of medicine available to those at worksites and cooperatives.[4423]

1211. Further evidence of Appellant's knowledge included his public support for CPK policies including the "liberation" of Phnom Penh, the creation of "cooperatives, food rationing, child labour and worksites",[4424] and his lectures on how to identify enemies and uncover traitors, including NP and the Vietnamese.[4425] By virtue of his position and responsibilities, Appellant had knowledge of the directives given to workers on what was expected of them in relation to quotas, working hours and conditions.[4426] A 1976 *RF* noted: "We said it was normal for the people to suffer shortages in 1975 and 1976, that it is normal for them to suffer shortages in 1977, and that it will be normal when they suffer shortages in 1978".[4427] Contemporaneous documents establish that Appellant was kept abreast of "reports on the quantities of rice sent to state warehouses, […] and on the export of rice and other goods" pursuant to quotas.[4428] The TC found that, in spite of "evident limitations", the CPK demanded even more output, including increasing rice production and the construction of even more dams and canals.[4429] Appellant acknowledged that he was responsible for the distribution of equipment and products to the zones[4430] and the TC heard testimony that Appellant visited export production warehouses and conducted meetings with the workers, where he denounced as enemies "those who were lazy to work".[4431]

1212. Appellant's claims that his presence at SC meetings does not establish his knowledge of

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4422 **E465** Case 002/02 TJ, para. 4214 *citing* **E3/4050** Khieu Samphan Interview, undated, EN 00789062.
4423 **E465** Case 002/02 TJ, para. 4214 *citing* **E3/4043** Khieu Samphan Interview, undated, EN 00786109-10.
4424 **E465** Case 002/02 TJ, para. 598.
4425 **E465** Case 002/02 TJ, paras 607, 3967, 4221. Although the content of his speeches was "dictated by Pol Pot", Appellant "generally agreed with what he said" *see* **E465** Case 002/02 TJ, para. 598.
4426 *See* Section VIII. B: Roles and Functions.
4427 **E465** Case 002/02 TJ, para. 1638.
4428 **E465** Case 002/02 TJ, para. 619.
4429 **E465** Case 0020/2 TJ, paras 1517 *citing* **E3/201** Speech by Khieu Samphan at 15th April Anniversary Meeting in Phnom Penh, 19 Apr. 1977, EN 00419514 (reporting Khieu Samphan as saying that dams and construction projects were advancing rapidly and that "[a]cross the nation, all construction sites will fulfil the 1977 plan by the end of May."), 3905 *citing* **E3/139** *Revolutionary Flag*, Nov. 1976, EN 00455280.
4430 **E465** Case 002/02 TJ, para. 619.
4431 **E465** Case 002/02 TJ, para. 620 *citing* **E1/502.1** Beit Boeurn alias Bit Na, T. 28 Nov. 2016, 10.06.40-10.50.02 p. 21, line 22-p. 29, line 18, 10.52.03-11.00.11, p. 31, line 9-p. 33, line 19.

crimes is also without merit.[4432] He contradicts this claim by his own words: "all important tasks were decided within the framework of the [SC]".[4433] Appellant attended SC meetings at which the implementation of the worksites and cooperatives policy was discussed and monitored.[4434] Decades after the DK, far from asserting his lack of contemporaneous knowledge, Appellant maintained that he was dedicated to his positions "with all my heart and soul"[4435] and continued to align himself with the Party.[4436]

Alleged distortion of evidence and use of deductive reasoning

1213. Second, Appellant erroneously claims that TC erred in relying on post-DK statements and making general findings by deliberately distorting interviews and ignoring exculpatory evidence.[4437] Appellant merely asserts that the TC failed to consider relevant evidence, without showing that no reasonable trier of fact could have reached the same conclusion as the TC.[4438]

1214. As in Case 002/01,[4439] Appellant's claim that the TC erred by using post-DK remarks to prove Appellant's contemporaneous knowledge lacks merit. Despite taking extensive issue with the Case 002/02 TC's reliance on specific post-DK remarks,[4440] he fails to establish that the TC erred in its assessment and use of this evidence.[4441] It is presumed that the TC assessed and weighed all evidence presented, absent an indication that a specific piece of evidence was completely disregarded.[4442] Appellant has failed to demonstrate any such indication, and the TC is not obliged to justify why it rejected parts of the evidence while relying on other parts.[4443] The impugned statements were further

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4432 **F54** Appeal Brief, para. 1742.
4433 **E3/205** Open Letter from Khieu Samphan, 16 Aug. 2001, EN 00149526 *cited in* **E465** Case 002/02 TJ, para. 4232.
4434 *See* **E465** Case 002/02 TJ, para. 4313.
4435 **E3/205** Open Letter from Khieu Samphan, 16 Aug. 2001, EN 00149524 *cited in* **E465** Case 002/02 TJ, para. 4232.
4436 *See e.g.* **E465** Case 002/02 TJ, paras 4210 *citing* **E1/528.1** Khieu Samphan, T. 23 June 2017, 10.47.14-10.48.43, p. 35, line 22-p. 36, line 3 (Appellant provides insight on what the "Communist Party of Kampuchea leadership hoped to" do during DK by creating cooperatives), 4221 *citing* **E3/203** Khieu Samphan Interview by Stephen Heder, 4 Aug. 1980, EN 00424013 ("we [the Party] managed to deal with those people completely").
4437 **F54** Appeal Brief, para. 1816.
4438 *See* Standard of Review.
4439 **F36** Case 002/01 AJ, para. 1082.
4440 **F54** Appeal Brief, paras 1817-1827.
4441 *See e.g.* response to Grounds 227, 228, 229, 230, 231 (Supporting and promoting the common purpose and its policies).
4442 *See* Standard of Review.
4443 *See* Standard of Review.

not the only evidence relied on in establishing Appellant's knowledge, as discussed above.

1215. Appellant also fails to establish that the TC ignored exculpatory evidence contained in his statements. The TC acknowledged that Appellant made contradictory statements with respect to his knowledge, and noted the claims he contends are exculpatory.[4444] Further, statements that Appellant claims were "deliberately omitted" do not demonstrate any lack of contemporaneous knowledge of the crimes, but simply describe Appellant's desire to "keep searching" for evidence of poor conditions during DK.[4445]

1216. As to the two statements which Appellant claims (i) were made after the events and (ii) lack authenticity,[4446] it is for the party disputing the authenticity of a document which is judicially presumed to be *prima facie* authentic to rebut this presumption.[4447] Appellant failed to do so, simply repeating arguments already addressed by the TC, which noted Appellant's testimony was "subject to the appropriate caution and corroboration".[4448] Appellant baselessly argues that the TC was biased or speculating when it found that remarks made in one of these statements were "demonstrable of [Appellant's] wider knowledge of working conditions at worksites".[4449] He fails to establish that the statements contained evidence that is exculpatory and in any event, that it was not considered by the TC.[4450]

Evidence of Preah Vihear

1217. Appellant erroneously argues that the TC erred in relying on facts about the conditions in cooperatives in Preah Vihear that were outside its *saisine*.[4451] The TC did not rely upon acts that occurred at Preah Vihear to establish that crimes were committed there, but merely considered that Appellant's statements regarding the area evinced his "contemporaneous knowledge of the imprisonment and ill-treatment of civilians" in general and demonstrated his "influence and authority".[4452]

1218. Contrary to Appellant's claims that his remarks were distorted and actually prove he was

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4444 **E465** Case 002/02 TJ, para. 4210 ("In court, Khieu Samphan claimed that he was unaware that the construction of the country entailed 'such great loss' during the DK period"). *See also* para. 4212.
4445 **F54** Appeal Brief, paras 1817-1819.
4446 **F54** Appeal Brief, paras 1819-1828.
4447 **F36** Case 002/01 AJ, para. 375.
4448 **E465** Case 002/02 TJ, para. 194 (emphasis added).
4449 **F54** Appeal Brief, para. 1820 *citing* **E465** Case 002/02 TJ, fn. 13757.
4450 **F54** Appeal Brief, paras 1821-1823, 1825.
4451 **F54** Appeal Brief, paras 1829-1830.
4452 **E465** Case 002/02 TJ, paras 4216, 4232, 4234.

unaware of the conditions,[4453] "'learnt' of the arrests 'accidentally'",[4454] and believed they were isolated incidents,[4455] Appellant states that his relatives were arrested "along with many other people"[4456] and admitted he learned this in "mid-1978".[4457] Appellant stated that he requested a report on the incident and Meas Voeun testified that he sent the report as requested.[4458] Even if Appellant's version of events is to be believed, he made no attempt to ensure that arbitrary arrests were not committed throughout DK after learning of them in 1978.

Knowledge of discrimination of NP

1219. Finally, Appellant argues that the TC erred by relying on Appellant's book[4459] to establish he was aware of the crimes against NP.[4460] Appellant acknowledges that contrary to his own argument, the TC was clear this book was relied on "in a limited sense" due to its references to works of other authors.[4461] He then incorrectly asserts that the TC used this book "exclusively" to find Appellant was aware of the discriminatory treatment of NP.[4462] Appellant ignores the substantial evidence the TC relied on,[4463] including that he encouraged cadres to assign more work to NP and deprive them of adequate food,[4464] and "urged cadres to identify enemies […], urged seething anger and 'vigilance' against them, and warned that traitors would be killed".[4465]

Ground 212: Tram Kak[4466]

1220. **Ground 212 should be dismissed as Appellant fails to demonstrate that the TC erred in finding that Appellant was aware of the crimes committed at TK as part of the policy aimed at the creation and operation of cooperatives and worksites.**

1221. The ground fails as Appellant has not demonstrated that the TC relied on insufficient

4453 **F54** Appeal Brief, para. 1831.
4454 **F54** Appeal Brief, para. 1831.
4455 **F54** Appeal Brief, paras 1832-1833.
4456 **F54** Appeal Brief, para. 1832.
4457 **E465** Case 002/02 TJ, para. 4232.
4458 **E465** Case 002/02 TJ, para. 4233 *citing* **E1/130.1** Meas Voeun, T. 4 Oct. 2012, 14.07.34 -14.13.35, p. 71, line 17-p. 73, line 15.
4459 **E3/16** Khieu Samphan, *Considerations on the History of Cambodia from the Early Stage to the Period of Democratic Kampuchea*, EN 00498220.
4460 **F54** Appeal Brief, paras 1836-1837.
4461 **F54** Appeal Brief, para. 1837 *citing* **E465** Case 002/02 TJ, para. 194.
4462 **F54** Appeal Brief, para. 1838.
4463 *See* response to Ground 243 & 221.
4464 *See* **E465** Case 002/02 TJ, para. 4281.
4465 **E465** Case 002/02 TJ, para. 4285.
4466 Ground 212: **F54** Appeal Brief, *Tram Kak*, para. 1841. **F54.1.1** Appeal Brief Annex A, p. 72 (EN), p. 67 (FR), p. 103 (KH).

evidence.[4467] Appellant relies on a flawed argument that the TC was required to refer to specific sites, in this case TK,[4468] in a specific section of the Judgment. As Appellant fails to further substantiate this ground,[4469] it should be summarily dismissed.

1222. Regardless, in the impugned section of the Judgment, the TC referred to evidence that it considered was "demonstrable of his wider knowledge of working conditions at worksites",[4470] as well as to its findings regarding the TK cooperatives.[4471] Appellant's awareness of the crimes committed as part of the cooperatives and worksites policy was established through the TC's reliance on considerable evidence, including Appellant's own admissions, CPK policies and documents, and Appellant's unique positions within the Party.[4472] The TC also found that the population of TK was "enslaved for the purpose of constructing extensive irrigation infrastructure […] in line with the CPK's economic plans",[4473] noting Appellant's reference to the fact that cooperatives were "expanded throughout the country […] to build the irrigation system".[4474]

1223. The TC made numerous findings from which it could reasonably infer Appellant's knowledge of the conditions at TK: the established hierarchical chain of command by which information about the conditions at TK was provided to the Party and *Angkar*;[4475] the awarding of the "Honourary Red Flag of the Central Committee" (the "CPK's highest honour") to TK district officials by the CC, of which Appellant was a member;[4476] and the showcasing of the TK cooperatives to international delegates as well as its emphatic descriptions in *RF*.[4477] The TC further noted that Appellant was likely to have visited the district,[4478] and made findings regarding Appellant's close relationship with Ta Mok,[4479] who regularly visited TK and was aware of the crimes there.[4480]

4467 **F54** Appeal Brief, para. 1841.
4468 **F54** Appeal Brief, para. 1841.
4469 Appellant relies on paragraphs 4283-4287 of the Judgment to support this ground. This section is titled *Security centres, execution sites and internal purges*, and does not relate to TK or cooperatives in general: **F54** Appeal Brief, para. 1841 *citing* **E465** Case 002/02 TJ, paras 4283-4287.
4470 **E465** Case 002/02 TJ, para. 4214, fn. 13757.
4471 **E465** Case 002/02 TJ, paras 4210-4211, fns 13745, 13752.
4472 *See* response to Grounds 181 & 183, 182, 211.
4473 **E465** Case 002/02 TJ, para. 3922.
4474 **E1/528.1** Khieu Samphan, T. 23 June 2017, 10.48.43-10.52.56, p. 36, lines 15-21. *See also* **E465** Case 002/02 TJ, para. 3906.
4475 *See e.g.* **E465** Case 002/02 TJ, paras 856, 868, 896, 979. *See also* response to Grounds 190 and 191.
4476 **E465** Case 002/02 TJ, paras 1126-1129.
4477 **E465** Case 002/02 TJ, paras 1127-1129.
4478 **E465** Case 002/02 TJ, para. 1137.
4479 **E465** Case 002/02 TJ, para. 904 (Ta Mok inducted Appellant into the CPK in 1969).
4480 *See e.g.* **E465** Case 002/02 TJ, paras 905, 955, 1110-1111.

Ground 213: Trapeang Thma Dam[4481]

1224. **Ground 213 should be dismissed as Appellant fails to demonstrate that the TC erred in finding that he was aware of the crimes committed at TTD as part of the policy aimed at the creation and operation of cooperatives and worksites.**

1225. Appellant erroneously argues that the TC erred (i) in finding Appellant had knowledge of the crimes committed at TTD "at the time of the events";[4482] (ii) by making a "general finding" of knowledge by way of "deductive reasoning";[4483] and (iii) by "deliberately omitt[ing] […] exculpatory" evidence.[4484]

1226. Appellant misunderstands the requisite knowledge for JCE liability.[4485] It is not necessary for Appellant to have known the precise crimes that were committed at the time of the events to be criminally liable.[4486]

1227. Second, Appellant's piecemeal approach to the evidence has not established the TC committed any legal errors in its reasoning and holistic assessment of the evidence.[4487] As detailed above, the TC's finding that Appellant was aware of the crimes committed as part of the policy aimed at the creation and operation of cooperatives and worksites was supported by substantial evidence.[4488]

1228. Further, Appellant erroneously contends that "[n]o piece of evidence placed in the case file enabled the finding that [he] was aware of the crimes committed at the TTD site".[4489] Appellant ignores an abundance of evidence demonstrating his knowledge of the conditions at TTD, including: senior leadership's awareness of poor conditions,[4490] such as disease[4491] and shortages of food and medicine;[4492] that international delegations, which Appellant was responsible for receiving,[4493] visited TTD and were provided with

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4481 Ground 213: **F54** Appeal Brief, *The Trapeang Thma Dam*; paras 1842-1844. **F54.1.1** Appeal Brief Annex A, p. 72 (EN), p. 67 (FR), p. 103 (KH).
4482 **F54** Appeal Brief, para. 1842.
4483 **F54** Appeal Brief, para. 1842.s
4484 **F54** Appeal Brief, para. 1844.
4485 Appellant was convicted of crimes at TTD pursuant to both JCE by A&A liability: *see* **E465** Case 002/02 TJ, paras 4306 (JCE), 4318, 4328 (A&A).
4486 *See* Section VIII.C.3. Intent (the TC properly *inferred* Appellant's intent from, *inter alia*, his knowledge of crimes and continuing participation in the common plan).
4487 *See* response to Ground 18.
4488 Grounds 181 & 183, 182, 211.
4489 **F54** Appeal Brief, para. 1844.
4490 **E465** Case 002/02 TJ, para. 1307.
4491 **E465** Case 002/02 TJ, para. 1317.
4492 **E465** Case 002/02 TJ, paras 1256, 1259. Appellant's assertion in **F54** Appeal Brief, para. 1607 that the TC's finding that he was aware of the SC report recording these shortages was "unreasonable and partial" is unsubstantiated and accordingly should be dismissed. Furthermore, Appellant was responsible for the supply of medicine and would have been aware of these conditions: *see* response to Ground 211.
4493 **E465** Case 002/02 TJ, paras 1222, 1258-1259. *See also* response to Ground 211.

propaganda detailing conditions there;[4494] Appellant's knowledge that construction was done without machinery;[4495] Appellant's encouragement that cadres implement the Party Centre's policies "at any and every cost" and his insistence that the labour force be "working day and night" "without rest";[4496] the description of water shortages and poor living conditions in *RY*, CPK reports, telegrams to Office 870, and media articles;[4497] and that a workforce of 10,000 to 20,000 people, including children, was used on the construction site.[4498]

1229. Third, Appellant erroneously alleges that the TC "deliberately omitted" exculpatory elements and contradicted itself by concluding that Appellant was aware of the conditions at TTD while finding that "attempts were made by local authorities to hide certain aspects" of the conditions.[4499] Appellant himself, however, acknowledges that the TC fully recited the evidence he considers "exculpatory".[4500] The TC further considered specific issues that Nuon Chea and the Co-Prosecutors raised regarding visits to crime sites,[4501] and noted that it would "assess all of the information before it, including the visits of CPK leaders to specific crime sites".[4502] Appellant merely disagrees with the TC's conclusion. He fails to demonstrate that the finding regarding his knowledge of the crimes was one no reasonable trier of fact could have reached upon a holistic assessment of the evidence.[4503]

Ground 214: 1st January Dam[4504]

1230. **Ground 214 should be dismissed as Appellant fails to demonstrate that the TC erred in fact by finding that Appellant was aware of the crimes committed at 1JD as part**

4494 **E465** Case 002/02 TJ, paras 1216, 1217, 1222, 1253.
4495 **E465** Case 002/02 TJ, para. 1296 fn. 4433 *citing* **E3/201** Speech by Khieu Samphan at 15th April Anniversary Meeting in Phnom Penh, 19 Apr. 1977, EN 00419514.
4496 **E465** Case 002/02 TJ, para. 4314.
4497 **E465** Case 002/02 TJ, paras 1239, 1240, 1244-1248, 1250, 1285, 1318.
4498 **E465** Case 002/02 TJ, paras 1262 *citing* **E3/771** *Revolutionary Youth*, July-Aug. 1977, EN 00509686-87 (reporting tens of thousands of workers), 1265 *citing* **E3/230** SC Minutes regarding economic matters, 22 Feb. 1976, EN 00182547 (proposing to use "additional adolescent children from the base areas and handing them over to Industry for management"), **E3/226** SC Minutes, 10 June 1976, EN 00183372 (Pol Pot discussing the use of young children).
4499 **F54** Appeal Brief, paras 1843-1844 *citing* **E465** Case 002/02 TJ, paras 1260, 4213. *See also* **F54** Appeal Brief, para. 1606.
4500 **F54** Appeal Brief, para. 1843 *citing* **E465** Case 002/02 TJ, para. 1254.
4501 **E465** Case 002/02 TJ, para. 1261. Notably, Appellant did not make any submissions in relation to his visit to TTD even though the submissions were made by both Nuon Chea and the Co-Prosecutors.
4502 **E465** Case 002/02 TJ, para. 1261.
4503 *See* Standard of Review.
4504 Ground 214: **F54** Appeal Brief, *1st January Dam*, para. 1845; **F54.1.1** Appeal Brief Annex A, pp. 72-73 (EN), p. 67 (FR), pp. 103-104 (KH).

of the policy aimed at the creation and operation of cooperatives and worksites.

1231. The ground fails as Appellant does not establish that the TC relied on insufficient evidence.[4505] Appellant simply repeats his flawed claim that the TC erred by not referring to 1JD in a particular section of the Judgment.[4506] He misleadingly claims that "no piece of evidence is provided concerning this site",[4507] ignoring evidence-based findings of his knowledge made in other sections of the Judgment.[4508] The TC reasonably found that the SC, whose meetings Appellant regularly attended,[4509] was specifically informed of conditions at 1JD.[4510] The TC's finding that Appellant was aware of the crimes committed as part of the policy aimed at the creation and operation of cooperatives and worksites was supported by an extensive evidentiary record.[4511] Appellant makes no further arguments in support of this ground. As this ground is unsubstantiated, it should be summarily dismissed.

Ground 215: Kampong Chhnang Airfield[4512]

1232. **Ground 215 should be dismissed as Appellant fails to establish that the TC erred in finding that he was aware of the crimes committed as part of the policy aimed at the creation and operation of KCA.**

1233. The ground fails as Appellant's claims that the TC distorted the evidence to prove his knowledge of crimes at KCA are baseless. He incorrectly alleges the TC erred by (i) failing to refer to a single piece of evidence;[4513] (ii) using a deductive approach and relying on "out-of-context" evidence;[4514] and (iii) finding that Appellant had responsibility for KCA.[4515]

1234. First, Appellant's claim that the TC did not refer to any evidence concerning Appellant's knowledge of the site is misleading. The TC undertook a holistic analysis of the evidence to correctly find that Appellant was aware of the crimes committed at worksites including

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4505 **F54** Appeal Brief, para. 1845.
4506 **F54** Appeal Brief, para. 1845.
4507 **F54** Appeal Brief, para. 1845.
4508 *See e.g.* **E465** Case 002/02 TJ, paras 1486-1497, 1517-1518, 4210-4218, 4251, 4280-4282, 4306, 4313-4315. *See further* response to Grounds 211, 217.
4509 *See* response to Ground 203.
4510 **E465** Case 002/02 TJ, paras 1483-1497.
4511 *See* response to Grounds 181 & 183, 182, 211.
4512 Ground 215: **F54** Appeal Brief, *Kampong Chhnang Airfield*, paras 1846-1848; **F54.1.1** Appeal Brief Annex A, p. 73 (EN), pp. 67-68 (FR), p. 104 (KH).
4513 **F54** Appeal Brief, para. 1846.
4514 **F54** Appeal Brief, para. 1847.
4515 **F54** Appeal Brief, paras 1847-1848.

KCA.[4516] Appellant baselessly claims that the particularity of the KCA site renders the TC's general findings on worksites invalid.[4517] Appellant fails to establish, however, how KCA differs from other large-scale construction projects which he publicly supported,[4518] and the significance of any such differences.

1235. Second, Appellant's argument regarding context fails, as he does not establish that his statements were read "out-of-context".[4519] His argument regarding a "deductive approach" to evidence analysis[4520] also fails. As outlined in response to Ground 211,[4521] Appellant fails to establish how the TC's consideration of his own words, concurrently with other evidence, is a "deductive approach" that has occasioned a miscarriage of justice.[4522]

1236. Third, Appellant's argument that KCA was built primarily as a military site and therefore in "no way corresponds" to the responsibilities of Appellant also fails.[4523] The TC correctly established that whilst KCA was initially intended as a military project,[4524] once the purges of the North Zone and East Zone started, the worksite was then populated by those considered "enemies", who were sent to KCA to be "tempered and refashioned".[4525] The TC correctly found that "underpinning the construction of [KCA] was the defence of the country as part of DK's military strategy",[4526] but its construction diverged from this purpose and was also undertaken in "furtherance of the common purpose of rapidly implementing socialist revolution through a 'great leap forward' in order to, among other things, defend the country against enemies" which included internal CPK cadres.[4527] The Office of the General Staff monitored the progress of KCA's construction and reports on the situation in the West Zone that involved KCA were sent to the "upper levels of *Angkar*".[4528]

1237. Further, Appellant's argument that KCA somehow operated beyond the control of the SC is unsupported by evidence. Pursuant to Appellant's senior role within the Party,

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4516 *See* response to Ground 211.
4517 **F54** Appeal Brief, para. 1847.
4518 *See* **E465** Case 002/02 TJ, para. 4213.
4519 **F54** Appeal Brief, para. 1847.
4520 **F54** Appeal Brief, para. 1847.
4521 *See* response to Ground 211.
4522 *See* Standard of Review (Errors of law, Errors of fact).
4523 **F54** Appeal Brief, paras 1847-1848.
4524 **E465** Case 002/02 TJ, para. 1735.
4525 **E465** Case 002/02 TJ, para. 1735.
4526 **E465** Case 002/02 TJ, para. 3923.
4527 **E465** Case 002/02 TJ, para. 3923.
4528 **E465** Case 002/02 TJ, para. 1727.

Appellant was kept apprised of the progress at KCA throughout its entire construction, as the SC considered building KCA as early as October 1975 during a meeting at which Appellant was present.[4529] Further undermining Appellant's argument, reports to SC meetings from KCA continued through 1976.[4530] In May 1976, Appellant was present at a SC meeting where KCA was discussed, specifically, the arrival of the drilling group at KCA to commence construction was noted.[4531] Division 502 led the construction of KCA, under command of Sou Met.[4532] Sou Met lived in Phnom Penh and had regular meetings with Son Sen and Duch.[4533] Sou Met's responsibilities, which would include the oversight of KCA, were discussed in SC meetings.[4534]

1238. The TC was also satisfied that "a number of delegations of senior leaders visited" KCA.[4535] Reports on the situation in the West Zone, which included KCA, were sent to "the upper levels of *Angkar*" and the TC found that in at least at one SC meeting at which Appellant was present, Son Sen reported on the progress of the airfield.[4536] Contrary to Appellant's argument,[4537] Appellant's attendance at the SC meetings where the construction of KCA was discussed is relevant. It can reasonably be inferred that at these meetings, the construction progress, including working hours, conditions, and the "enemy" situation, were discussed, as surviving reports from the West Zone to "*Angkar*" discussed enemies attempting to escape KCA as well as other issues relating to purges, educational sessions and security throughout the West Zone.[4538]

1239. The TC also reached logical conclusions that Appellant was aware of the conditions at KCA as the worksite transitioned from a solely military site to a reeducation and tempering facility for purged military pursuant to the established CPK policy against

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4529 **E465** Case 002/02 TJ, para. 1723 *citing* **E3/182** SC Minutes, 9 Oct. 1975, EN 00183407 (Appellant was present at this meeting).

4530 **E465** Case 002/02 TJ, para. 1723 *citing* **E3/229** SC Minutes regarding national defence matters, 22 Feb. 1976, EN 00182627 (Appellant was present at this meeting).

4531 **E465** Case 002/02 TJ, para. 1724 *citing* **E3/222** SC Minutes, 15 May 1976, EN 00182666 (minutes from a meeting at which Appellant was present indicating that the drilling group had arrived).

4532 **E465** Case 002/02 TJ, para. 1726.

4533 **E465** Case 002/02 TJ, para. 1726.

4534 **E465** Case 002/02 TJ, para. 1726 *citing* **E3/224** SC Minutes, 30 May 1976, EN 00182669 (reporting that the Southwest and southern parts of Phnom Penh were under the responsibility of Comrade Met and Comrade Pin.)

4535 **E465** Case 002/02 TJ, para. 1788.

4536 **E465** Case 002/02 TJ, paras 1727, 4258.

4537 **F54** Appeal Brief, para. 1418.

4538 **E465** Case 002/02 TJ, para. 1727, fn 5853 *citing* **E3/1094** Zone M-401 Report, 4 Aug. 1978, EN 00315368-69 (reporting on individuals' attempts to escape from the Airfield as well as on a number of other issues related to security, cooperatives, purges, educational sessions and agricultural production in the different sectors and districts of the West Zone).

"enemies".[4539] Appellant was aware of the purges of the East Zone,[4540] during which "about 5000 subordinate soldiers" were sent to work at KCA,[4541] and "an unspecified number of East Zone cadres were also removed and sent to [KCA] for re-education or tempering".[4542] The TC made findings based on "Khieu Samphan's position of unique standing within the Party and closeness to Pol Pot and Nuon Chea" at the time of "tumultuous purges of [East Zone] personnel".[4543] In his own words, Appellant noted that cadres assigned to work under those who were purged "were also arrested along with them because it was said they were networks or elements" which led to "many" arrests.[4544] It is entirely implausible that Appellant was not apprised of these purges and the enemy policy under which the cadres suffered at KCA.

1240. Consequently, Appellant fails to establish that the TC erred in fact in its consideration of the evidence before it, which included admissions by Appellant. Appellant has not demonstrated that the factual finding was one that no reasonable trier of fact could have reached upon a holistic, as opposed to piecemeal, assessment of the evidence.[4545]

vi. Intent to Commit Forced Marriage including Rape

Ground 210: Errors on knowledge of crimes in relation to marriage[4546]

1241. **Ground 210 should be dismissed as Appellant fails to establish that the TC erred in finding that he had the requisite knowledge of the policy of forced marriage and of the crimes committed as a result of the policy.**

1242. The ground fails as Appellant does not establish that the TC "prejudge[d] the facts" as a result of findings it made in Case 002/01,[4547] "relied on isolated testimony",[4548] and "erred in its interpretation of circumstantial evidence".[4549] Appellant cites 148 paragraphs of the Appeal Brief in support of this ground.[4550] Most of these paragraphs are irrelevant

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4539 *See* response to Grounds 179, 181 & 183.
4540 **E465** Case 002/02 TJ, paras 4229 (Appellant "provided a reasonably detailed account of the purge of the East Zone Committee"), 4284 (Appellant was aware of the purge of "Division 170 Commander Chan Chakrei and Division 170 Commander Chhouk").
4541 **E465** Case 002/02 TJ, para. 2037. The commanders of these soldiers were sent to S-21.
4542 **E465** Case 002/02 TJ, para. 2038.
4543 **E465** Case 002/02 TJ, para. 4230.
4544 **E465** Case 002/02 TJ, para. 4231 *citing* **E3/4041** Khieu Samphan Interview, undated, EN 00790270.
4545 *See* Standard of Review.
4546 Ground 210: **F54** Appeal Brief, *Errors on knowledge of crimes in relation to marriage,* paras 1928-1931; **F54.1.1** Appeal Brief Annex A, pp. 71-72 (EN), p. 66 (FR), p. 102 (KH).
4547 **F54** Appeal Brief, para. 1928.
4548 **F54** Appeal Brief, para. 1929.
4549 **F54** Appeal Brief, paras 1929-1930.
4550 **F54** Appeal Brief, para. 1928, fn. 3756.

to this ground and have been addressed elsewhere.[4551] Appellant has not substantiated his argument in support of this ground and, as such, it should be summarily dismissed.

1243. In any event, as discussed in response to Ground 4, Appellant has failed to establish that the TC "prejudge[d] the facts" of Case 002/02 by virtue of the findings regarding the regulation of marriage made in Case 002/01.[4552] Further, Appellant's arguments regarding the testimony of Chea Deap are also flawed and must fail.[4553] These erroneous arguments regarding Chea Deap's testimony are repetitious and addressed elsewhere in this Response.[4554]

1244. Appellant incorrectly claims that neither this evidence, nor his "connection with trade" establishes that Appellant was behind the organisation of forced marriages or that he had any knowledge thereof.[4555] Appellant's piecemeal approach to the evidence fails to establish the TC committed any legal errors in its deductive reasoning and its holistic assessment of the evidence.[4556] The TC correctly found the evidence of the above witnesses was consistent with "CPK ideological discourse, including the speeches made by [Appellant]" in which he insisted that there was a duty to serve the revolution and respect Party discipline unconditionally.[4557] As outlined elsewhere, the TC found that the instruction to local authorities to force marriages came from the upper echelon.[4558] Following a holistic analysis of this evidence, the TC correctly concluded that pursuant to Appellant's instructions, marriages were to be arranged by all ministries.[4559]

1245. Appellant also argues without merit that his connection with the "Party Centre" does not establish any knowledge, as the "two reports" relied upon by the TC do not refer to his knowledge[4560] and the analysis undertaken by the TC to support its findings of knowledge do not refer to any such reports.[4561] To the contrary, the TC correctly found that forced

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4551 **F54** Appeal Brief, paras 1929 (fn. 3759 *citing* paras 1233-1242 (Grounds 230, 15, 21, 22, 25, 26)), 1930 (fn. 3762 *citing* paras 1221-1232 (Grounds 166, 244)), 1930 (fn. 3763 *citing* paras 1652-1803 (Grounds 196, 190)), 1931 (fn. 3765 *citing* paras 1244-1280 (Grounds 167, 168, 169, 170, 165, 162)).

4552 *See* response to Ground 4.

4553 **F54** Appeal Brief, para. 1929.

4554 *See* response to Ground 166.

4555 **F54** Appeal Brief, para. 1930.

4556 *See* response to Ground 18.

4557 **E465** Case 002/02 TJ, para. 3590.

4558 *See* response to Ground 168; **E1/290.1** Pech Chim, T. 22 Apr. 2015, 13.54.48-13.57.22, p. 49, lines 1-3 ("The upper level officials gave their authorization, and it was up to us to organize those marriages, whether they were individual or collective."); **E1/297.1** Khoem Boeun, T. 5 May 2010, 15.03.38-15.07.05, p. 72, line 15-16 ("do you concur with the statement of Pech Chim? A: Yes, I do.").

4559 **E465** Case 002/02 TJ, para. 3569.

4560 **F54** Appeal Brief, para. 1931.

4561 **F54** Appeal Brief, para. 1931, fn. 3766 *referring to* **E465** Case 002/02 TJ, paras 4247-4249, 4303-4308, 4326-4327. *See also* response to Ground 168.

marriage was an established CPK policy used as a means to increase the population, as publicly endorsed by the Party (including by Appellant)[4562] and discussed in issues of *RF*.[4563] Appellant's arguments also overlooks the fact that the TC referred to meetings where the policy and its implementation were discussed in various districts.[4564] Appellant has failed to show that the TC's evaluation of evidence was wholly erroneous or that the factual finding was one that no reasonable trier of fact could have reached upon a holistic, as opposed to piecemeal, assessment of the evidence.[4565]

1246. Finally, Appellant fails to substantiate his argument that the TC incorrectly found that from 1974 the CPK had begun arranging the marriages of cadres.[4566] Appellant refers only to his own Appeal Brief and isolated testimony to prove that there was a "lack of evidence" relating to forced marriages prior to 1975.[4567] Appellant ignores evidence that the policy on family building was first declared in *RY* in February 1974,[4568] and witness testimony evidencing a clear policy prior to 1975,[4569] which then continued throughout DK. Further, Appellant relies on an unsubstantiated argument that FUNK's policy to eradicate polygamy was "irreconcilable" with a policy of forced marriages resulting in marital rapes.[4570] This argument is inherently flawed as the eradication of polygamy only serves to limit men to one wife. It does nothing to stop forced marriages resulting in marital rapes.

D. AIDING AND ABETTING

1247. The TC correctly found that Appellant aided and abetted the CAH of murder with *dolus eventualis* committed at IJD, TTD, KCA, S-21, KTC and PK.[4571] Appellant's six grounds[4572] regarding his liability under A&A fail, as he ignores relevant findings, adopts a piecemeal approach to the evidence and the Judgment, and misconstrues the law regarding both the *actus reus*[4573] and *mens rea* requirements.[4574]

1248. The evidence in this case establishes the *actus reus* for A&A liability, i.e., Appellant

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4562 **E465** Case 002/02 TJ, paras 3550-3555.
4563 **E465** Case 002/02 TJ, paras 3554-3555.
4564 **E465** Case 002/02 TJ, para. 3567.
4565 *See* Standard of Review.
4566 **F54.1.1** Appeal Brief Annex A, p. 72; **F54** Appeal Brief, para. 1812.
4567 **F54** Appeal Brief, para. 1813.
4568 **E465** Case 002/02 TJ, paras 3540-3542.
4569 **E465** Case 002/02 TJ, para. 273.
4570 **F54** Appeal Brief, para. 1814.
4571 **E465** Case 002/02 TJ, paras 4312-4318.
4572 Grounds 209, 245-249.
4573 *See* response to Grounds 247-247.
4574 *See* response to Grounds 209, 245, 248-249.

rendered practical assistance, encouragement, or moral support of the Party Centre's formulation and executions of the criminal initiatives,[4575] and to the CPK cadres in the implementation of the policy,[4576] which had a substantial effect on the commission of the perpetrated crimes.[4577]

1249. Appellant need not have specifically directed his contribution to the perpetration of a certain specific crime.[4578] Nor was a plan or agreement between Appellant and the principal perpetrator required.[4579] Indeed, it is unnecessary for a principal perpetrator to even be aware of Appellant's contribution.[4580] Although Appellant's conduct must have had a substantial effect on the commission of the crimes,[4581] there is no requirement for a causal relationship, or that such conduct was a condition precedent to crimes.[4582] The conduct constituting A&A can occur before, during or after the commission of the crimes,[4583] and in a different place from the crimes.[4584] It is sufficient if Appellant's conduct amounted to tacit approval and encouragement of the crimes if this conduct substantially contributed to the crimes.[4585] While Appellant's authority is a factor in those circumstances, it is not necessary to show he had authority over the direct perpetrators.[4586] An accused may also aid and abet by omission if it is proven that had the accused acted, the commission of the crime would have been substantially less likely.[4587]

4575 **E465** Case 002/02 TJ, paras 4313, 4317.
4576 **E465** Case 002/02 TJ, para. 4314.
4577 Case 001-**E188** *Duch* TJ, para. 533; **E313** Case 002/01 TJ, para. 704; *Blaškić* AJ, para. 46; *Šainović* AJ, para. 1649; *Popović* AJ, paras 1732, 1783; *Taylor* AJ, para. 368.
4578 **E465** Case 002/02 TJ, para. 3723; **E313** Case 002/01 TJ, paras 707-710; *Taylor* AJ, para. 481; *Šainović* AJ, paras 1649, 1663; *Popović* AJ, para. 1758; *Stanišić & Simatović* AJ, paras 106, 108. *Contra* **F54** Appeal Brief, paras 2133, 2135. *See further* response to Ground 246.
4579 **E465** Case 002/02 TJ, para. 3722; Case 001-**E188** *Duch* TJ, para. 534; **E313** Case 002/01 TJ, para. 704; *Tadić* AJ, para. 229(ii); *Brđanin* AJ, para. 263; *Seromba* AJ, para. 57.
4580 *Tadić* AJ, para. 229(ii); *Kalimanzira* AJ, para. 87; *Brđanin* AJ, para. 263.
4581 *See, e.g. Tadić* AJ, para. 229(iii); *Gotovina & Markač* AJ, para. 127; *Ntawukulilyayo* AJ, para. 214; *Taylor* AJ, para. 481.
4582 *Popović* AJ, paras 1740, 1783; *Ndahimana* AJ, para. 149; *Taylor* AJ, para. 522. *Contra* **F54** Appeal Brief, para. 2131. *See further* response to Ground 246.
4583 As the TC noted (**E465** Case 002/02 TJ, para. 3723), given the overarching requirement that assistance, encouragement or moral support must have a substantial effect on the commission of the crime, this requirement cannot be fulfilled where assistance is provided *exclusively* after the time of perpetration. However, as long as the requirement of substantial effect is fulfilled, conduct such as an agreement made *before or during* the commission of a crime, of assistance to be provided after the fact, may suffice.
4584 *Mrkšić & Šljivančanin* AJ, para. 81; *Ntagerura* AJ, para. 372; *Fofana & Kondewa* AJ, para. 72.
4585 *Šainović* AJ, para. 1687; *Brđanin* AJ, paras 273, 277 (referring to the 'silent spectator'); *Ndahimana* AJ, para. 147; *Kayishema & Ruzindana* AJ, paras 201-202 (referring to the 'approving spectator'); *Sesay* AJ, para. 541. *Contra* **F54** Appeal Brief, para. 2134. *See further* response to Ground 247.
4586 *Blagojević & Jokić* AJ, para. 195; *Nahimana* AJ, para. 672; *Sesay* AJ, para. 541.
4587 *Popović* AJ, paras 1812, 1741; *Mrkšić & Šljivančanin* AJ, paras 49, 97, 100, 146; *Nahimana* AJ, para. 482; *Šainović* AJ, paras 1679, 1682, fn. 5510.

1250. The *mens rea* for A&A liability was also proved, in that evidence established that Appellant knew, at the time he provided the assistance, that murders with *dolus eventualis* would probably[4588] be committed, and that his conduct assisted or facilitated the commission of these murders.[4589] In addition, the evidence established that Appellant was aware of the essential elements of the crime, including the perpetrator's state of mind, but he need not have shared the perpetrator's intent to commit the crime.[4590] Nor was he required to know the precise crime to be committed by the principal perpetrator, as he was aware that one of a number of crimes would likely be committed, and one of those crimes was in fact committed.[4591] There is further no legal requirement that Appellant knew every detail of the crime that were eventually committed;[4592] he was, however, as required, aware of the "essential elements" of the crime[4593] (for example, that people would be killed), not the details of specific criminal acts (for example, the location, time and victims).

1. ACTUS REUS

Ground 246: Lack of actus reus required for murders with dolus eventualis in TK, 1JD, TTD and KCA[4594]

1251. **Ground 246 should be dismissed as Appellant fails to demonstrate that the TC erred in law and in fact in finding that the *actus reus* for murder with *dolus eventualis* was established under A&A at TK, 1JD, TTD, and at the KCA.**

1252. The ground fails since Appellant does not demonstrate that the TC erred in law and in fact in finding that he (i) morally supported and implicitly encouraged the decision-making apparatus for the establishment and operation of cooperatives and worksites;[4595]

4588 *Contra* **F54** Appeal Brief, paras 2120-2123. *See further* response to Ground 245.

4589 Case 001-**E188** *Duch* TJ, para. 535; **E313** Case 002/01 TJ, para. 704; *Blaškić* AJ, paras 45-46, 49-50; *Popović* AJ, para. 1732; *Nahimana* AJ, para. 482.

4590 **E313** Case 002/01 TJ, para. 704; *Šainović* AJ, para. 1772; *Ndahimana* AJ, para. 157; *Brima* AJ, para. 244. *See also Šainović* AJ, para. 1773 ("The degree of knowledge pertaining to the details of the crime required to satisfy the *mens rea* of aiding and abetting will depend on the circumstances of the case, including the scale of the crimes and the type of assistance provided").

4591 *Blaškić* AJ, para. 50; *Šainović* AJ, para. 1772; *Nahimana* AJ, para. 482; *Sesay* AJ, para. 546.

4592 *Šainović* AJ, para. 1773.

4593 *See e.g. Farben* Judgment, p. 1153 ("[O]ne may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, *aids,* orders, or *abets*. But the evidence must establish action of the character we have indicated, *with knowledge of the essential elements of the crime*. […] In some instances, a policy is set without clear indication that *essential factual elements required to make it criminal* were disclosed." (emphasis added)); *Šainović* AJ, para. 1772; *Haradinaj* AJ, para. 58; *Nahimana* AJ, para. 482; *Taylor* AJ, paras 404, 422.

4594 Ground 246: **F54** Appeal Brief, *Lack of actus reus required for murders with dolus eventualis in TK, 1JD, TTD and KCA,* paras 2125-31; **F54.1.1** Appeal Brief Annex A, p. 81 (EN), p. 76 (FR), pp. 116-117 (KH).

4595 **E465** Case 002/02 TJ, para. 4313.

(ii) encouraged and morally supported the CPK cadres to implement the CPK's policy at any cost;[4596] and (iii) contributed substantially to the commission of crimes.

The TC correctly found Appellant provided moral support and implicit encouragement to the decision-making apparatus

1253. First, Appellant's claim that the TC failed to provide sufficient reasons for its finding[4597] ignores the TC's holistic approach of the evidence in reaching its findings. Sufficient reasoning does not require repeating all the evidence it accepted for each of its findings.[4598] Indeed, the findings regarding the *actus reus* of A&A must be read together with the underlying factual findings. Contrary to Appellant's claim,[4599] the TC expressed with sufficient clarity the basis of its findings that through his attendance and participation in various CPK meetings, Appellant "morally supported and implicitly encouraged the decision-making apparatus which continued to push forth with the planning and implementation of criminal initiatives".[4600] Appellant's argument that the TC failed to explain what were these criminal initiatives, and the linkage to crimes committed at TK, 1JD, TTD, and KCA[4601] ignores the TC's findings on many initiatives that caused the death of workers due to prevailing conditions,[4602] such as: the unrealistic target of "three tonnes of rice per hectare";[4603] the irrigating initiatives involving the manual construction of dykes, canals, dams, and reservoirs by tens of thousands of underfed workers "at a pace never before attained";[4604] or the construction of KCA in harsh and unsafe conditions.[4605]

1254. Second, Appellant incorrectly claims that implicit encouragement is limited to the situation where the accused is present at the scene.[4606] Appellant ignores the international jurisprudence which consistently holds that "acts of aiding and abetting can be made at a

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4596 **E465** Case 002/02 TJ, para. 4314.
4597 **F54** Appeal Brief, paras 2126-27.
4598 *See* Standard of Review (Reasoned Decision).
4599 **F54** Appeal Brief, paras 2126-27.
4600 **E465** Case 002/02 TJ, para. 4313.
4601 **F54** Appeal Brief, paras 2126-27.
4602 **E465** Case 002/02 TJ, para. 3921.
4603 **E465** Case 002/02 TJ, paras 972, 979, 1448, 3899, 3904, 3922, 4259.
4604 **E465** Case 002/02 TJ, para. 4266 *citing* **E3/273** FBIS, *Khieu Samphan Report*, 5 Jan. 1976, EN 00167816).
4605 **E465** Case 002/02 TJ, paras 1723, 1727, 1755-60, 3908, 4258.
4606 **F54** Appeal Brief, para. 2128 *citing Brđanin* AJ, para. 277. However, *Brđanin* does not state that for a conduct to amount to tacit approval and encouragement of the crime, it must involve a presence at the crime scene: it merely discusses cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, based on the accused's authority combined with his presence at / or very near the crime scene.

time and place removed from the actual crime."[4607] As the Appeals Chamber explained in *Taylor*: "while an accused may be physically distant from the commission of the crime, he may in fact be in proximity to and interact with those ordering and directing the commission of crimes".[4608] The law is clear, an individual can be found liable for A&A a crime by conduct amounting to tacit approval and encouragement of the crime as long as that conduct substantially contributed to the crime.[4609]

The TC correctly found Appellant provided encouragement and moral support to the CPK cadres in the implementation of the policy at any and every cost

1255. Appellant does not present new arguments,[4610] but merely refers to his argumentation in Grounds 211 and 229 regarding his visits to cooperatives and worksites and his statements on the labour force. Appellant fails to demonstrate that it was unreasonable for the TC to conclude that he encouraged and morally supported the CPK cadres in the implementation of the policy at any and every cost. As the TC correctly found, through his speeches, instructions, and lectures, Appellant encouraged the population to work harder, "day and night", "without rest" and to "eat less"[4611] to build the country, and impelled them to fulfill or "overfulfill" the CPK targets of production "under all circumstances", despite the abject conditions he observed during his site visits.[4612]

The TC correctly found that Appellant substantially contributed to the crimes

1256. Appellant misconstrues the legal standard to establish substantial contribution by claiming, without citing any authority, that "there is no proven causal link".[4613] The law does not require a causal relationship.[4614]

1257. Ignoring the TC's holistic approach of evidence, Appellant contends that the TC failed to explain how his encouragement and moral support had a substantial effect on the

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4607 *Taylor* AJ, para. 480 *citing Fofana & Kondewa* AJ, para. 72; *Kalimanzira* AJ, para. 87, fn 238; *Mrkšić* et al. AJ para. 81; *B. Simić* AJ, para. 85; *Blaškić* AJ, para. 48.

4608 *Taylor* AJ, para. 480.

4609 *Šainović* AJ, para. 1687; *Brđanin* AJ, para. 273; *Sesay* AJ, para. 541; *Furundžija* TJ, paras 232-35.

4610 **F54** Appeal Brief, paras 2129-30.

4611 **E465** Case 002/02 TJ, para. 3739, fn. 12473.

4612 **E465** Case 002/02 TJ, para. 4314, fns 14026-27.

4613 **F54** Appeal Brief, para. 2131.

4614 *Blaškić* AJ, paras 43, 48; *Blagojević & Jokić* AJ, para. 187; *B. Simić* AJ, para. 85; *Popović* AJ, paras 1740, 1783; *Ndahimana* AJ, para. 149; *Taylor* AJ, para. 522. This position is fully supported by the post-WWII jurisprudence which established the principle that an accused may be held criminally responsible for their failure to object to the criminal operation in such a way as to contribute to its success. *See e.g. Einsatzgruppen* Judgment, pp. 572, 580-581; *Pohl Case*, pp. 1002-4 (cited fully in response to Grounds 227-231).

deaths of workers.[4615] Based on the totality of the evidence, the TC properly concluded that Appellant's assistance and moral support substantially contributed and facilitated the commission of the crime against humanity of murder (through *dolus eventualis*) at cooperatives and worksites. Indeed, Appellant attended and participated in various meetings of the CPK leadership on the production of rice,[4616] establishment of cooperatives,[4617] construction of irrigation structures,[4618] the military airfield,[4619] and their progress.[4620] He also gave numerous speeches promoting the CPK's objective of transforming the entire population into a society of worker-peasants.[4621] While being aware of the crimes committed,[4622] Appellant provided encouragement and moral support, lauding the labour force for "working day and night" and "without rest" to build the country and impelling the population to fulfill the CPK's unrealistic production quotas [4623] in order to export large quantities of rice while people starved.[4624]

Ground 247: Lack of actus reus for dolus eventualis murders at S-21, KTC, and PK[4625]

1258. **Ground 247 should be dismissed as Appellant fails to demonstrate that the TC erred in law and fact in finding that the *actus reus* for murder with *dolus eventualis* was established under A&A at S-21, KTC, and PK.**

1259. The ground fails as Appellant does not show that the TC erred in law and in fact in finding that his practical assistance and moral support to the "Party Centre" in the formulation and execution of the purges policy constituted a substantial contribution to the commission of *dolus eventualis* murders committed in the security centres.

1260. Appellant misconstrues the legal standard required of *actus reus* for A&A, by arguing that the practical assistance and moral support must specifically "be provided for the commission of the crime of murder [...] not for the development and implementation of

4615 **E465** Case 002/02 TJ, para. 4315.
4616 **E465** Case 002/02 TJ, para. 3901 *citing* **E3/226** Standing Committee Minutes 10 June 1976, EN 00183369; para. 968 *citing* **E3/224** Standing Committee Minutes, 30 May 1976, EN 00182669; para. 3891.
4617 **E465** Case 002/02 TJ, para. 3736.
4618 **E465** Case 002/02 TJ, para. 3736.
4619 **E465** Case 002/02 TJ, para. 1723 *citing* **E3/182** Standing Committee Minutes, 9 Oct. 1975, EN 00183393.
4620 **E465** Case 002/02 TJ, para. 1727 *citing* **E3/222** Standing Committee Minutes, 15 May 1976, EN 00182666; paras 355, 364, 1474, 4258.
4621 **E465** Case 002/02 TJ, para. 3897.
4622 **E465** Case 002/02 TJ, para. 3916.
4623 **E465** Case 002/02 TJ, para. 4314.
4624 **E465** Case 002/02 TJ, paras 1594-95, 3907, 3909, 3914, 4265-66, 4276; *see also* paras 619, 621, 3889.
4625 Ground 247: **F54** Appeal Brief, *Lack of actus reus for dolus eventualis murders at S-21, KTC, and PK,* paras 2132-36; **F54.1.1** Appeal Brief Annex A, p. 81 (EN), p. 76 (FR), p. 117 (KH).

a policy".[4626] Appellant's unsupported claim[4627] is incorrect. "Specific direction" is not an element of A&A liability under customary international law.[4628] As the TC correctly held in accordance with international jurisprudence, all that is required to satisfy the *actus reus* requirement, is that the accused provided practical assistance or moral support which had a substantial effect on the perpetration of the crime.[4629]

1261. Appellant claims that the TC failed to provide sufficient reasons for its findings,[4630] but again ignores the TC's holistic approach of the evidence. The TC detailed the basis of its findings that he provided practical assistance and moral support to the "Party Centre" and thereby, contributed substantially to the *dolus eventualis* murders in the security centres.[4631] Appellant ignores the TC's findings about his participation in CPK leadership meetings deciding the fate of enemies,[4632] as well as his calls for the execution of traitors.[4633] Indeed, the TC found *inter alia* that (i) he participated in a SC meeting at which the fate of Chou Chet *alias* Sy was decided;[4634] (ii) he conducted investigations to determine whether or not individuals were enemies;[4635] (iii) he presided over a political education event where he lectured on identifying "enemies" and uncovering "traitors";[4636] (iv) he exhorted the population to seek out "infiltrated enemies" and those opposing or obstructing the revolution;[4637] and (v) he instructed commerce cadres to denounced "those who were lazy to work as enemies of the Party".[4638]

2. MENS REA

Ground 245: Aiding and abetting in Law[4639]

1262. **Ground 245 should be dismissed as Appellant fails to establish that the TC erred in law by finding that the *mens rea* for A&A includes knowledge that "a crime would**

4626 **F54** Appeal Brief, paras 2133, 2135; *see also* paras 1604-1615.
4627 **F54** Appeal Brief, paras 2133, 2135.
4628 **E313** Case 002/01 TJ, paras 707-10; *Taylor* AJ, para. 481; *Šainović* AJ, paras 1649, 1663; *Popović* AJ, para. 1758; *Stanišić & Simatović* AJ, paras 106, 108.
4629 **E465** Case 002/02 TJ, para. 3722. *See e.g. Tadić* AJ, para. 229(iii); *Gotovina & Markač* AJ, para. 127; *Ntawukulilyayo* AJ, para. 214; *Taylor* AJ, para. 481.
4630 **F54** Appeal Brief, paras 2132-36, in particular 2133.
4631 **E465** Case 002/02 TJ, para. 4317.
4632 **E465** Case 002/02 TJ, para. 4316, fn. 14030, *referring to* paras 4221-34.
4633 **E465** Case 002/02 TJ, para. 4316, *referring to* para. 4272.
4634 **E465** Case 002/02 TJ, para. 4228; *See also* response to Grounds 28 (evidence obtained through torture), 217 (knowledge of crimes committed during the purges).
4635 **E465** Case 002/02 TJ, para. 4228.
4636 **E465** Case 002/02 TJ, paras 4272, *referring to* para. 607.
4637 **E465** Case 002/02 TJ, para. 4272, *referring to* paras 3942-43.
4638 **E465** Case 002/02 TJ, para. 4272, *referring to* para. 620.
4639 Ground 245 **F54** Appeal Brief, *Aiding and Abetting in Law*, paras 2120-2123; *see also* paras 1604-1615; **F54.1.1** Appeal Brief Annex A, p. 81 (EN), p. 75 (FR), p. 116 (KH).

likely be committed".

1263. Appellant conflates two distinct aspects of the *mens rea* for A&A when he implies that, since an accused must act with "knowledge that the acts performed [...] assist [in] the commission of the specific crime of the principal", there is necessarily a requirement that he must know that the crime *will*, as opposed to "would likely" be committed.[4640]

1264. Knowledge of the likelihood of crimes being committed and knowledge of the contribution of the accused's assistance to those crimes are two separate cognitive elements. The TC clearly distinguished between them when it found that an accused "must know that a crime would likely be committed *and* that his conduct assists or facilitates the commission of a crime".[4641] An alternative formulation of this same test given by the TC in Case 001 highlights this distinction even more clearly:

> Liability for [A&A] requires proof that the accused *knew that a crime would probably be committed*, that the crime was in fact committed, and that the accused *was aware that his conduct assisted* the commission of that crime.[4642]

1265. Thus, an accused must first know that the commission of a crime is "probable", or "likely". Second, he must be aware, i.e. know, that his assistance will facilitate the crime *if it occurs*. The first limb recognises that absolute certainty as to a crime being committed in the future is impossible, given the possibility of intervening events. This is particularly pertinent where assistance is given at a time and/or place removed from the crime.[4643] Whilst some jurisprudence[4644] omits express reference to this first limb, it is recognised in the fact that an accused can only be responsible as an accessory *if* the crime occurs.[4645] He is not exposed to liability for crimes that "would likely", but did not in fact, materialise.

1266. A wealth of jurisprudence from the *ad hoc* tribunals, as well as post-WWII case law, support the TC's holding. As the *Blaškić* Appeal Judgment, cited by the TC,[4646] correctly

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4640 **F54** Appeal Brief, paras 2120-2123 *citing* **F17** Case 002/01 Appeal Brief, paras 87-89.
4641 **E465** Case 002/02 TJ, para. 3722 (emphasis added) *citing, inter alia,* **E313** Case 002/01 TJ, para. 704.
4642 Case 001-**E188** *Duch* TJ, para. 535 (emphasis added).
4643 *See e.g. Mrkšić & Šljivančanin* AJ, para. 81; *Ntagerura* AJ, para. 372; *Fofana & Kondewa* AJ, para. 72.
4644 **F54** Appeal Brief, para. 2121 *citing* **F17** Case 002/01 Appeal Brief, para. 88 *citing in turn*, *Rukundo* AJ, para. 53; *Kalimanzira* AJ, para. 86; *Ntawukulilyayo* AJ, para. 222; *Gotovina & Markač* AJ, para. 127; *Lukić & Lukić* AJ, paras 427, 440, 458.
4645 *See further Tadić* AJ, para. 229(i); *Lukić & Lukić* AJ, paras 428, 440 ("It is well established that the *mens rea* of aiding and abetting requires that an aider and abettor know that his acts would assist in the commission of the crime by the principal perpetrator". The use of "would" here demonstrates conditionality: the accused knows it "would assist in the commission of a crime" *if that crime occurs*).
4646 **E465** Case 002/02 TJ, para. 3722.

set out, liability results when an accused "is aware that one of a number of crimes *will probably be committed*, and one of those crimes is in fact committed".[4647] The *Blaškić* Appeals Chamber cited (and quoted) the *Furundžija* Trial Judgment for this proposition, which, in turn, conducted a lengthy survey of post-WWII cases.[4648] Contrary to Appellant's assertion,[4649] *Blaškić* has since been followed and applied in many subsequent ICTY and SCSL appeal judgments.[4650]

1267. Further jurisprudence refers to the accused's knowledge of crimes that are *intended*,[4651] but whose commission is, by definition, not certain until they occur. As the IMT found:

> Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, *with knowledge of his aims*, *gave him their co-operation*, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if *they knew what they were doing*.[4652]

1268. Indeed, the post-WWII tribunals were clear that, in finding defendants criminally responsible for that 'knowing participation',[4653] knowledge that a specific crime would certainly be committed with their assistance was not required.[4654] General awareness that a crime, or a range of crimes, were planned or were being committed, and thus would likely be committed in future, sufficed. For example, the IMT found Von Schirach guilty of CAH without requiring his prior knowledge of which crimes would be committed against the Jews when he participated in their deportation. The judges relied on his knowledge "that the best the Jews could hope for was a miserable existence in the ghettos of the East" and the fact that bulletins describing the Jewish extermination were in his office.[4655]

4647 *Blaškić* AJ, para. 50 *citing Furundžija* TJ, para. 246 (emphasis added). In the same Judgment, the ICTY Appeals Chamber *also* endorsed the following formulation of the *mens rea* of A&A: "In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal." (*Blaškić* AJ, para. 45). The fact that the ICTY Appeals Chamber endorsed both of these formulations simultaneously makes it clear that what an accused is required to *know* is that his act will assist the perpetration of a crime. He is *not* required to *know* that the crime will be committed – he is simply required to appreciate that it is *probable* that the crime will be committed, and that, if it is, that his acts will have assisted in the commission of the crime.

4648 *Furundžija* TJ, paras 236-249.

4649 **F54** Appeal Brief, para. 2121; **F17** Case 002/01 Appeal Brief, para. 88.

4650 *See e.g. Šainović* AJ, para. 1772; *Sesay* AJ, para. 546; *B. Simić* AJ, para. 86; *Haradinaj* AJ, para. 58.

4651 *See e.g. Nahimana* AJ, para. 482 ("It is not necessary to know the precise crime which was *intended* and which in the event was committed"); *Sesay* AJ, para. 546.

4652 IMT Judgment, p. 226 (emphasis added).

4653 *See e.g. Justice* Judgment, p. 1093.

4654 *Contra* **F54** Appeal Brief, paras 1604-1615.

4655 IMT Judgment, pp. 318-319.

1269. Similarly, in the *Justice* Judgment, the US Military Tribunal convicted Klemm because he acted knowing generally of the "policies and methods" of the Nazi leadership covering a range of criminal activity.[4656] The Tribunal also convicted Flick, a businessman who contributed money to Himmler, for being an accessory to crimes perpetrated by the SS (Schutzstaffel)[4657] on the basis that he assisted at a time when the "criminal activities" of the SS were common knowledge.[4658] In the *Einsatzgruppen* Case,[4659] the Tribunal determined that Klingelhöfer would be guilty as an accessory if he located, evaluated and turned over lists of Communist party functionaries to the SS with awareness that those people would be executed *when found*.[4660] As the proposed victims were yet to be located, crimes against them were merely "likely" at the time of the assisting act.

1270. Thus, the TC's formulation is grounded in CIL that had crystallised by the post-WWII period. Appellant's contention that the requirement in article 25(3)(c) of the Rome Statute that an accused act "[f]or the purpose of facilitating" a crime should override this established standard[4661] is misplaced. As the SCSL Appeals Chamber held, "the Rome Statute has no bearing on the *mens rea* elements of [A&A] liability under [CIL]".[4662]

Ground 209: Awareness that crimes would be committed[4663]

1271. **Ground 209 should be dismissed as Appellant fails to demonstrate that the TC erred in finding that he was aware of the likelihood of the crimes.**

1272. The TC correctly articulated the law on the *mens rea* for A&A.[4664] Appellant disputes this point without articulating a substantive argument or citing any legal sources,[4665] simply referring to two other alleged errors, which in turn, refer back to this alleged error.[4666] Such a contention does not serve to demonstrate an error invalidating the

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4656 *Justice* Judgment, p. 1094 (Among other facts, he "knew of abuses in concentration camps. He knew of the practice of severe interrogations. He knew of the persecution and oppression of the Jews and Poles and gypsies. He must be assumed to have known, from the evidence, the general basis of Nacht und Nebel procedure under the Department of Justice.").

4657 *Flick* Judgment, p. 1216.

4658 *Flick* Judgment, pp. 1216-1223 (these included the persecution and extermination of Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave-labor program and the mistreatment and murder of prisoners of war).

4659 **E465** Case 002/02 TJ, para. 3722.

4660 *Einsatzgruppen* Judgment, p. 569 (emphasis added).

4661 **F54** Appeal Brief, para. 2121; **F17** Case 002/01 Appeal Brief, para. 88.

4662 *Taylor* AJ, para. 435.

4663 Ground 209: **F54** Appeal Brief, *Awareness that crimes would be committed*, paras 1808-1811; **F54.1.1** Appeal Brief Annex A, p. 71 (EN), p. 66 (FR), pp. 101-102 (KH).

4664 **E465** Case 002/02 TJ, para. 3722. *See* response to Ground 245.

4665 **F54** Appeal Brief, paras 1808-1811.

4666 **F54** Appeal Brief, para. 1808, fn. 3503 *citing* paras 2137-2140; para. 2138, fn. 4107 *referring to* paras 1808-1810; para. 2140, fn. 4111 *referring to* paras 1808-1815.

Judgment or occasioning an actual miscarriage of justice.

1273. Appellant held a long-standing awareness that crimes were likely to be committed during the DK period through the implementation of CPK policies. His pre-DK activities denote this awareness, while providing context to his mindset and involvement in the Party by demonstrating his progressive ascent through Party ranks, as he ultimately became a leader himself.[4667] It is clear from the fate of others who were perceived as not fully supporting all the Party's objectives and means to achieving those objectives that his ascent only happened because of his wholehearted support for the means by which the Party's objectives were being carried out. Appellant also played a crucial role in supporting the CPK movement between 1970 and 1975, which legitimised the Party and its policies in advance of April 1975, thus paving the way for the MOP and the resultant crimes.[4668]

1274. During the DK, Appellant gained more power, and thus, more knowledge of the likelihood of the crimes. He was one of the very few individuals involved in the Party's decision-making processes.[4669] As a function of his high-ranking roles, he: oversaw trade matters and the implementation of the SC decisions; attended meetings, both domestically and abroad; delivered speeches praising the implementation of the policies; held political training seminars focused on the identification of "enemies"; and received correspondence from prominent international organisations condemning the dire situation in the DK.[4670] Through his close relationship with Pol Pot and Nuon Chea,[4671] as well as his frequent visits to worksites,[4672] he remained consistently aware of the crimes and of the inhumane conditions,[4673] which were decimating the entire population.[4674]

1275. Appellant employs a piecemeal approach to the TC's reasoning when he contests the TC's reasonable finding that he was aware of the likelihood of the crimes, and thus his conviction for these crimes must stand.[4675]

4667 *See* response to Grounds 196, 197.
4668 *See* response to Grounds 198, 199.
4669 *See* response to Ground 203.
4670 *See* response to Grounds 201-202, 204-207.
4671 **E465** Case 002/02 TJ, paras 589, 4225.
4672 *See e.g.* **E465** Case 002/02 TJ, paras 1254, 4213.
4673 *See* response to Ground 200.
4674 **E465** Case 002/02 TJ, paras 4214, 4265, 4314.
4675 **E465** Case 002/02 TJ, para. 4318.

Ground 248: Lack of mens rea for dolus eventualis murders at TK, 1st January Dam, Trapeang Thma Dam, and at the Kampong Chhnang Airfield[4676]

1276. **Ground 248 should be dismissed as Appellant has failed to establish that the TC erred in law or in fact in concluding that Appellant possessed the requisite *mens rea* to A&A murder with *dolus eventualis* at the worksites and cooperatives.**

1277. Appellant's claims against the TC's findings regarding his intent to A&A murder with *dolus eventualis* at the worksites and cooperatives are ill-defined and unfounded, as Appellant fails to advance any substantive argumentation.[4677] Appellant simply refers the reader back to another alleged error, which in turn, refers the reader back to this alleged error.[4678] Such a contention does not serve to demonstrate an error invalidating the Judgment or occasioning an actual miscarriage of justice.

1278. Appellant's considerable involvement in the CPK policy aimed at the creation and operation of cooperatives and worksites was plainly established,[4679] as was his connection to each of the worksites.[4680] Based on the correct articulation of the law,[4681] and an extensive evidentiary record, the TC reasonably assessed Appellant's *mens rea* for A&A murder with *dolus eventualis*, taking into account his role and responsibilities in the Party, his proximity to other senior leaders, his public support for the policy, the systematic reporting regime of the CPK, and his speeches made during the DK period, as well as his statements made after the DK.[4682] As a regular attendee and participant in meetings of the SC, CC and Party Congresses, Appellant was present when reports were furnished regarding the implementation of the common purpose, including at cooperatives and worksites.[4683] Appellant was aware of the shortages in medicine and food, and the inhumane conditions, which allowed for the loss of human life on a colossal scale.[4684] With full awareness of this deadly toll, he nevertheless demonstrated enthusiasm for the implementation of this policy – an enthusiasm which, based on his

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4676 Ground 248: **F54** Appeal Brief, *Lack of mens rea for dolus eventualis murders at TK, 1st January Dam, Trapeang Thma Dam, and at the Kampong Chhnang Airfield*, paras 2137-2139; **F54.1.1** Appeal Brief Annex A, pp. 81-82 (EN), p. 76 (FR), pp. 117-118 (KH).

4677 **F54** Appeal Brief, paras 2137-2139.

4678 **F54** Appeal Brief, para. 2138, fn. 4107 *citing* paras 1808-1810; para. 1808, fn. 3503 *referring to* paras 2137-2140.

4679 *See* response to Ground 211.

4680 *See* response to Grounds 212-215.

4681 *See* response to Ground 86.

4682 *See e.g.* **E465** Case 002/02 TJ, paras 4206-4208, 4210-11, 4214, 4313-4314.

4683 **E465** Case 002/02 TJ, paras 4258, 4313.

4684 **E465** Case 002/02 TJ, paras 4212, 4216; *see also* **E465** Case 002/02 TJ, para. 4314, fn. 14027, *referring to* paras 4213-4216.

own testimony, continues to this day.

1279. Appellant has failed to advance arguments that would render erroneous the TC's finding that he had the requisite *mens rea* to A&A the CAH of murder with *dolus eventualis* committed at the worksites and cooperatives, and thus his conviction for these crimes must stand.

Ground 249: Lack of mens rea for dolus eventualis murders at S-21, KTC and PK[4685]

1280. **Ground 249 should be dismissed as Appellant has failed to demonstrate that the TC erred in concluding that Appellant possessed the requisite *mens rea* to A&A murder with *dolus eventualis* at the security centres.**

1281. Appellant's claims against the TC's findings regarding his intent to A&A murder with *dolus eventualis* at the security centres are ill-defined and unfounded, as Appellant simply refers the reader back to another alleged error, which in turn, refers the reader back to this alleged error.[4686] This contention does not demonstrate an error invalidating the Judgment or occasioning an actual miscarriage of justice.

1282. Appellant's considerable involvement in the CPK policy to identify, arrest, isolate, and "smash" enemies was plainly established.[4687] Based on the correct articulation of the law,[4688] and a holistic review of the extensive evidentiary record, the TC reasonably assessed Appellant's intent to A&A murder with *dolus eventualis* at the security centres and within the context of the internal purges, taking into account his role and responsibilities in the Party, his knowledge of the circumstances of arrests, his public support for the policy, his speeches made during the DK period, and his statements made after the DK.[4689] The TC further considered that he was apprised of the arrest, imprisonment, mistreatment and execution of real or perceived enemies of the CPK, and his general knowledge of the mistreatment of real or perceived enemies of the CPK by cadres across the country.[4690] His acts had "a substantial effect" on the CPK cadres' commission of the crimes,[4691] and it was clear that the implementation of the policy

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4685 Ground 249: **F54** Appeal Brief, *Lack of mens rea for dolus eventualis murders at S-21, KTC and PK,* para. 2140; **F54.1.1** Appeal Brief Annex A, p. 82 (EN), p. 76 (FR), p. 118 (KH).
4686 **F54** Appeal Brief, para. 2140, fn. 4111 *citing* paras 1808-1815; para. 1808, fn. 3503 *referring to* paras 2137-2140.
4687 *See* response to Grounds 216, 217 & 235.
4688 *See* response to Ground 245.
4689 *See* response to Grounds 216, 217 & 235.
4690 **E465** Case 002/02 TJ, para. 4316.
4691 **E465** Case 002/02 TJ, para. 4317.

would likely result in deaths at the security centres and during the purges.[4692] With full awareness of the likelihood of these deadly consequences, Appellant continued to provide practical assistance and moral support to the CPK in developing and executing this policy, thereby assisting and facilitating the commission of murder with *dolus eventualis* at security centres and within the context of internal purges.[4693]

1283. Appellant has failed to advance an argument which establishes any error in the TC's finding that he had the requisite *mens rea* to A&A the CAH of murder with *dolus eventualis* committed at the security centres, and thus his conviction for these crimes must stand.[4694]

IX. CONVICTION AND SENTENCING

1284. The TC correctly issued a reasonable, personalised sentence, taking into account the context and form of the crimes Appellant committed.[4695] Appellant's five grounds[4696] relating to his sentence fail to demonstrate that the TC abused its considerable discretion.[4697] Consistent with the entirety of his brief, he makes sweeping allegations of bias against the TC, without ever displacing the presumption of judicial impartiality. His claims are, yet again, premised on his own selective reading of the Judgment, which omits relevant findings regarding the particular circumstances of this case. As explained below, Appellant fails to show any error on the part of the TC that would warrant SCC intervention regarding his sentence.

Ground 252: Demonstration of bias regarding the objectives of the sentence[4698]

1285. **Ground 252 should be dismissed as Appellant fails to establish that the TC erred in law or abused its discretion in setting out the purpose of sentencing.**

1286. Appellant baselessly claims that the TC erred in stating the purpose of a sentence, and further, that the articulated purpose demonstrated an alleged bias against him.[4699] The SCC has previously considered this articulation of the law, holding it to be proper, and

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4692 *See* response to Ground 209.
4693 **E465** Case 002/02 TJ, para. 4317.
4694 **E465** Case 002/02 TJ, paras 4317-4318, 4328.
4695 **E465** Case 002/02 TJ, paras 4346-4376, 4382-4386, 4389-4391, 4396-4403.
4696 Grounds 252-256.
4697 The SCC has emphasised the Chamber's discretion over sentencing and its own deferential review on appeal, *see* Case 001-**E188** Duch AJ, para. 354. *See also* **F36** Case 002/01 AJ, para. 1107; *D. Milošević* AJ, para. 297.
4698 Ground 252: **F54** Appeal Brief, *Demonstration of bias regarding the objectives of the sentence,* paras 2145-2148; **F54.1.1** Appeal Brief Annex A, p. 84 (EN), p. 78 (FR), p. 119 (KH).
4699 **F54** Appeal Brief, para. 2145.

finding that there was "no indication" it amounted to an expression of bias against an accused.[4700]

1287. Additionally, Appellant erroneously asserts that the TC disregarded the principles of sentencing by rendering an excessive and exemplary sentence that minimised individual deterrence and retribution.[4701] Here, he makes the same "obscure" argument rejected by the SCC in his unsuccessful appeal against the Case 002/01 sentence.[4702] His claim is unconvincing, as the Case 002/02 TC clearly referred to an individualised sentence reflecting the culpability of the accused, with the primary objectives of deterrence and punishment, in line with the law at the ECCC and the *ad hoc* tribunals.[4703] Appellant fails to demonstrate that his sentence was excessive in light of all relevant circumstances,[4704] nor has he demonstrated any legal error, abuse of discretion, or bias on the part of the TC through its statement on the purpose of sentencing.

Ground 253: Errors regarding the gravity of the crimes committed[4705]

1288. **Ground 253 should be dismissed as Appellant fails to establish that the TC committed a discernible error in exercising its discretion while assessing the gravity of the crimes.**

Appellant's claims regarding the inclusion of out of scope evidence[4706]

1289. Appellant erroneously claims that the TC committed an error invalidating the Judgment when determining the gravity of the crimes, by attributing responsibility for crimes of which he was never accused.[4707] This contention is based on an incorrect reading of the Judgment which ignores relevant findings. As Appellant notes, the TC correctly stated the law on the determination of gravity: the Chamber must consider "the particular

4700 **F36** Case 002/01 AJ, para. 1110.
4701 **F54** Appeal Brief, paras 2146-2148.
4702 **F36** Case 002/01 AJ, para. 1110.
4703 **E465** Case 002/02 TJ, para. 4348. There, the TC notes that a sentence serves the purposes of "deterrence […] and punishment, though not revenge" and that it "must be proportionate and individualised," *see* fns 14086 and 14087 and the citations therein. The articulation of the law is in line with the purposes of sentencing stated in both Cases 001 and 002/01, as well as the Cambodian Criminal Code, *see* **E313** Case 002/01 TJ, para. 1067; Case 001-**E188** *Duch* TJ, paras 580-581; Criminal Code of the Kingdom of Cambodia, 30 Nov. 2009, art. 96. These principles are further reflected in jurisprudence from the *ad hoc* tribunals, which note that deterrence and retribution are the primary objectives of a sentence, and that rehabilitation is secondary given the different aims of international and national systems, *see e.g. Brima* SJ, paras 14-17; *Čelebici* AJ, para. 806; *Kordić & Čerkez* AJ, paras 1073-1083; *Aleksovski* AJ, para. 185.
4704 *See* response to Grounds 253, 254, 255, 256.
4705 Ground 253: **F54** Appeal Brief, *Errors regarding the gravity of the crimes committed*, paras 2149-2157; **F54.1.1** Appeal Brief Annex A, p. 84 (EN), p. 78 (FR), p. 119 (KH).
4706 **F54** Appeal Brief, paras 2149-2151.
4707 **F54** Appeal Brief, paras 2150-2151.

circumstances of the case, as well as the form and degree of the participation of the accused in the crime."[4708] Such circumstances include the "brutality" of the offences.[4709]

1290. In determining the gravity of the crimes, the TC considered the conditions suffered by the detainees at security centres and noted that "some were raped", citing one instance of sexual assault proven beyond a reasonable doubt at KTC.[4710] Though the Closing Order did not charge rapes or other acts of sexual violence at KTC, these acts were relevant for examining the general conditions at KTC,[4711] and were in fact held to reflect "aspects of the conditions".[4712] Appellant was further found to have had contemporaneous knowledge of the ill-treatment of civilians at security centres.[4713] As such, and contrary to his claim,[4714] in considering rape as an aspect of the conditions at security centres, the TC properly limited its sentencing considerations to matters proven beyond a reasonable doubt against Appellant. Assuming *arguendo* that this evidence was considered in error, Appellant has failed to show that, without this evidence, a different finding concerning the gravity of the crimes would have been reached. Numerous other CAH have been proven and identified.

Appellant's claims regarding his role in the commission of the crimes[4715]

1291. Appellant contends, without merit, that the TC erred in assessing the gravity of the crimes by failing to take into account the form and degree of his participation.[4716] In sentencing Appellant, the TC considered that he was a "key actor responsible for the formulation of the Party policies that are the subject of Case 002/02."[4717] Noting his involvement in the JCE,[4718] as well as his role as an aider/abettor,[4719] the TC found that Appellant's

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4708 **F54** Appeal Brief, para. 2150 *citing* **E465** Case 002/02 TJ, para. 4349.
4709 **E465** Case 002/02 TJ, para. 4349, fn. 14091 *citing* **E313** Case 002/01 TJ, para. 1068, Case 001-**F28** *Duch* AJ, para. 375, **F36** Case 002/01 AJ, para. 1118. *See also* **E465** Case 002/02 TJ, para. 4362.
4710 **E465** Case 002/02 TJ, para. 4365 *citing* para. 2738.
4711 **E465** Case 002/02 TJ, paras 2641, 2734, 2738.
4712 **E465** Case 002/02 TJ, para. 2738.
4713 **E465** Case 002/02 TJ, paras 4232-4234.
4714 **F54** Appeal Brief, para. 2151.
4715 **F54** Appeal Brief, paras 2152-2157.
4716 **F54** Appeal Brief, para. 2152.
4717 **E465** Case 002/02 TJ, para. 4382.
4718 *See e.g.* **E465** Case 002/02 TJ, paras 4382 ("he implemented key economic aspects of the common purpose"); 4383 ("he publicly called for the elimination of high-ranking members of the Khmer Republic administration"); 4384 (Appellant "openly promoted the Party's policy to rapidly increase DK's population, vitiating the importance of Buddhist tradition and normalising the policy of forced marriage").
4719 *See e.g.* **E465** Case 002/02 TJ, para. 4383 ("Khieu Samphan actively supported the use of cooperatives and worksites despite his awareness that starvation and illness were ongoing problems," which is relevant not only for his dissemination of the policies, but also for his responsibility as an aider/abettor for the CAH of murder with *dolus eventualis* at the cooperatives and worksites).

involvement in the crimes was "extensive and substantial."[4720] Appellant attempts to minimise his role in the JCE[4721] by ignoring the substantial findings on his participation therein, for which he was found criminally responsible for thirteen CAH, four GB, and the genocide of the Vietnamese.[4722]

1292. Further, as "the appropriate sentence will always have to be determined based on the facts of the specific case and the level of culpability of the individual accused",[4723] Appellant's submissions fall flat. Appellant's claim is wholly uncompelling, as it is based on a mere comparison of sentences imposed by other tribunals in other cases,[4724] which the SCC has previously found is "inapt to show an error on the part of the Trial Chamber in its exercise of discretion in imposing an appropriate sentence."[4725]

Ground 254: Errors regarding the aggravating factors[4726]

1293. **Ground 254 should be dismissed as Appellant fails to establish that the TC committed a discernible error invalidating the sentence in its assessment of the weight and application of aggravating factors.**

Appellant's claim regarding the abuse of his position of authority and influence[4727]

1294. Appellant's claim that the Chamber erred in finding that the abuse of his position of authority constituted an aggravating factor must fail,[4728] as it based on a selective reading of the Judgment and misrepresents the authority Appellant in fact exercised. The TC based its finding as to Appellant's abuse of authority on his contribution to the crimes, undertaken in multiple official capacities, "including as a member of the Central Committee, a member of Office 870, President of the State Presidium, and highest official in GRUNK."[4729] Neither Appellant's misrepresentation of the TC's findings,[4730]

4720 **E465** Case 002/02 TJ, para. 4385.
4721 **F54** Appeal Brief, para. 2155.
4722 **E465** Case 002/02 TJ, para. 4306-4307.
4723 **F36** Case 002/01 AJ, para. 1112.
4724 **F54** Appeal Brief, paras 2153, 2154, 2156.
4725 **F36** Case 002/01 AJ, para. 1112.
4726 Ground 254: **F54** Appeal Brief, *Errors regarding the aggravating factors*, paras 2158-2167; **F54.1.1** Appeal Brief Annex A, p. 84 (EN), p. 78 (FR), p. 120 (KH).
4727 **F54** Appeal Brief, paras 2158-2162.
4728 **F54** Appeal Brief, para. 2158.
4729 **E465** Case 002/02 TJ, para. 4389.
4730 **F54** Appeal Brief, para. 2158, fns 4143-4145 *citing* **E465** Case 002/02 TJ, para. 4320 (where the TC held that Appellant did not have effective control prior to or during the commission of the crimes, and thus was not liable under the mode of superior responsibility), para. 593 (which does not correspond with Appellant's argument but rather represents the Chamber's finding that, through his role as GRUNK Deputy Prime Minister, Appellant legitimised the CPK's agenda internationally), paras 596-599 (where the TC

nor his contemplation that a different individual before a different tribunal received a different assessment of aggravating and mitigating factors,[4731] suffice in demonstrating a discernible error in the TC's exercise of discretion on this point.

1295. Appellant further claims that the TC double counted his abuse of authority as an aggravating factor as well as in its assessment of the gravity of the crimes.[4732] Trial Chambers have "the discretion to decide whether it is more appropriate to consider certain factors as contributing to the gravity of the crime or as aggravating factors"[4733] and an Appellant bears the burden of demonstrating that a Trial Chamber impermissibly double counted the factor at issue.[4734] The TC correctly stated that "the same fact cannot be used both to demonstrate the gravity of the crime and as an aggravating factor"[4735], thereby confirming that it "was cognisant that double counting is impermissible."[4736]

1296. In support of this alleged error, Appellant points to the TC's finding that, "as a Central Committee member and an attendee at Standing Committee meetings, [he] was privy to important matters and crucial decisions, and thus enjoyed elevated standing within the party."[4737] This is unquestionably a statement of Appellant's role in the gravity analysis, and as such, there is no error. Appellant further notes the TC's statement that Appellant "used his position of influence to support and therefore legitimise the implementation of CPK policies" while discussing the gravity of the crimes.[4738] Though the TC's phrasing is imperfect, a Chamber may properly consider different aspects of an individual's acts and conducts in assessing the gravity of the totality of the culpable conduct, without impermissibly double counting the same factor.[4739] Further, the TC explicitly clarified that its gravity assessment "considered the number and vulnerability of victims, the scale and brutality of the crimes in its assessment of the gravity of these crimes"[4740] without

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held that Appellant's responsibilities as President were "mostly confined to diplomatic duties within the DK and the general promotion of the CPK line").

4731 **F54** Appeal Brief, para. 2159.

4732 **F54** Appeal Brief, para. 2160.

4733 **E313** Case 002/01 TJ, para. 1078 *citing Popović* TJ, para. 2138, *Vasiljević* AJ, para. 157.

4734 *Taylor* AJ, para. 687; *Deronjić* SJ Appeal, para. 107; *Sesay* AJ, para. 1234.

4735 **E465** Case 002/02 TJ, para. 4350.

4736 *See Deronjić* SJ Appeal, para. 107. There, the Appeal Chamber noted that, though the TC had considered aggravating circumstances and gravity under the same heading, it nevertheless distinguished between the two and was cognisant that double counting is impermissible. The Chamber thus dismissed the appeal, as Appellant failed to point to a specific finding in the sentence "that makes it clear that the Trial Chamber additionally took into account [an aggravating factor] as part of the gravity of the crime".

4737 **E465** Case 002/02 TJ, para. 4382 (Section 20.2.5, Gravity of the Crimes; Section 20.2.5.4, Role of Khieu Samphan) *impugning* **F54** Appeal Brief, para. 2160.

4738 **F54** Appeal Brief, para. 2161, fn. 4148 *citing* **E465** Case 002/02 TJ, para. 4383.

4739 *Taylor* AJ, para. 687.

4740 **E465** Case 002/02 TJ, para. 4386.

any mention of the abuse of authority.[4741]

1297. Assuming *arguendo*, the SCC finds this factor was double counted, the ground still fails, as Appellant has not demonstrated that the alleged error invalidated the sentence.[4742] The double-counting of one single factor has a limited impact on the TC's determinations with regard to the appropriate sentence for the *totality* of crimes committed,[4743] and does little to invalidate the sentence in light of all relevant factors considered.[4744]

Appellant's claims regarding the consideration of the level of education[4745]

1298. Appellant claims, without merit, that the TC erred in considering his level of education as an aggravating factor without providing sufficient justification.[4746] The SCC has previously found that an individual's "high level of education" can be considered as an aggravating factor,[4747] and the TC justified the relevance of his education to the crimes, explicitly holding that Appellant's background as lawyer and economist enabled him to "know the import and consequences of his actions".[4748] Appellant further erroneously relies on a comparison of sentences imposed by in other cases,[4749] while acknowledging that the weight assigned to aggravating factors, including an individual's education, must

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4741 This framing distinguishes the case at hand from that which Appellant relies on as support, *M. Nikolić* SJ Appeal, *cited in* **F54** Appeal Brief, para. 2162. There, the Appeal Chamber found the TC had "explicitly stated [...] that it considered not only his position of authority but also his role as an aggravating circumstance," by using the word 'role' in considering both the gravity of the offence and the aggravating factor, *see* paras 60-61, fn. 164. In the present case, the TC excluded the abuse of authority from its summary of factors considered in establishing gravity. *See also Deronjić* SJ Appeal, paras 107, 110.

4742 **F36** Case 002/01 AJ, para. 99.

4743 *See e.g. D. Milošević* AJ, para. 336 (though the Trial Chamber "on several occasions [...] took into account the same facts when assessing both the gravity of the crimes and the aggravating circumstances" the Appeal Chamber found that these factors were nevertheless relevant for determining the sentence "and even when properly taken into account only once, still warrant a sentence comparable to that imposed by the Trial Chamber," so no reduction in sentence was warranted).

4744 **E465** Case 002/02 TJ, paras 4361-4376, 4382-4386, 4389-4391, 4396-4399, Factors include, *inter alia*: "the large number of victims, the fact that many victims were extremely vulnerable, the disastrous impact of the crimes upon them and their relatives, as well as the massive scale and brutality of these crimes," *see* para. 4362; the intent to "damage the social fabric of Cambodian society," *see* para. 4369; "the gravity of genocide," *see* para. 4370; "the extreme physical, emotional and psychological damage" to the victims, *see* para. 4372; Appellant's "extensive and substantial" involvement in the crimes, *see* para. 4385; Appellant's high level of education, which allowed him to "know the import and consequences of his actions," *see* para. 4390; and the absence of any mitigating factors or character witnesses, *see* paras 4398-4399.

4745 **F54** Appeal Brief, paras 2163-2167.

4746 **F54** Appeal Brief, paras 2163, 2166.

4747 **F36** Case 002/01 AJ para. 1114.

4748 **E465** Case 002/02 TJ, para. 4390, fn. 14176 *citing* paras 564-569 (where the TC found Appellant studied law and economics, focused on economic reform in Cambodia, became the leader of the *Marxist Circle* as a student, and that his dissertation on economic reform in Cambodia "prefigured aspects of CPK ideology").

4749 **F54** Appeal Brief, para. 2165. *See* response to Ground 253.

be assessed in view of the particular circumstances of a case.[4750]

Ground 255: Errors regarding the mitigating factors[4751]

1299. **Ground 255 should be dismissed as Appellant fails to establish that the TC committed a discernible error in exercising its discretion while assessing the weight and application of mitigating factors to Appellant's sentence.**

Appellant's claims regarding his cooperation with the ECCC[4752]

1300. Appellant claims, without merit, that his sentence should have been reduced due to his cooperation with the ECCC.[4753] The TC correctly found that Appellant's engagement with the ECCC "did not exceed the legally required minimum participation in court hearings" and thus was neither a mitigating nor an aggravating factor for the purposes of his sentencing.[4754] Appellant merely disagrees with the TC's assessment of his participation.[4755] Appellant further claims that the TC did not consider his acknowledgement of the suffering of CPs,[4756] while omitting that each "apology" he made was accompanied by his justification for the suffering of the innocent victims of the Khmer Rouge regime and a minimisation of his role in that suffering.[4757]

Appellant's claims regarding his age and health[4758]

1301. Appellant baselessly claims that the TC erred by failing to give reasons for its assessment of his age as a mitigating factor.[4759] Appellant's claims are unconvincing. First, they are contradictory, acknowledging that the TC accorded his age "some minimal weight"[4760] while subsequently claiming it "dismiss[ed] his age as a mitigating factor."[4761] Second, the relevance of the consideration of age in the Case 002 Severance Decision[4762] is unclear, particularly given that, as Appellant admits, the TC did accord some weight to

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4750 **F54** Appeal Brief, para. 2164.
4751 Ground 255: **F54** Appeal Brief, *Errors regarding the mitigating factors*, paras 2168-2177; **F54.1.1** Appeal Brief Annex A, pp. 84-85 (EN), p. 78 (FR), p. 120 (KH).
4752 **F54** Appeal Brief, paras 2168-2171.
4753 **F54** Appeal Brief, para. 2171.
4754 **E465** Case 002/02 TJ, para. 4397, fn. 14186.
4755 *See e.g.* **F54** Appeal Brief, para. 2169.
4756 **F54** Appeal Brief, para. 2170.
4757 **E465** Case 002/02 TJ, para. 4345.
4758 **F54** Appeal Brief, paras 2172-2177.
4759 **F54** Appeal Brief, para. 2172.
4760 **F54** Appeal Brief, para. 2172 *citing* **E465** Case 002/02 TJ, para. 4398.
4761 **F54** Appeal Brief, para. 2174.
4762 **F54** Appeal Brief, para. 2172.

his age in his sentencing. Finally, his claims in support of a reduced sentence due to his age again rely on a comparison of sentences imposed by other tribunals in other cases.[4763]

1302. With regard to Appellant's claims that the TC failed to consider his health,[4764] the TC correctly noted that ill-health is only considered as a mitigating factor in exceptional circumstances.[4765] Considering an expert medical opinion on Appellant's health,[4766] which found, *inter alia*, his "heart sounds, pallor, breathing, and muscle tones were all normal"[4767], he "exercises in the evening, can walk without assistance, and can read and prepare documents"[4768], his "mental state is normal [...] his short-term memory, concentration and attention are all excellent for his age"[4769], the TC correctly concluded that "the circumstances of this case" were not so exceptional so as to warrant consideration of ill-health as a mitigating factor.[4770]

Ground 256: Error regarding good moral character[4771]

1303. **Ground 256 should be dismissed as Appellant fails to establish that the TC committed a discernible error in exercising its discretion while weighing character witnesses in Appellant's sentence.**

1304. Appellant claims, without merit, that the Case 002/02 TC committed an error by failing to assign weight to character witnesses who spoke on his behalf in the Case 002/01 trial proceedings.[4772] The Case 002/02 TC noted that the Case 002/01 TC heard five such witnesses, to which limited weight was accorded for sentencing,[4773] upheld on appeal to

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4763 **F54** Appeal Brief, paras 2173-2174. *See* response to Ground 253.
4764 **F54** Appeal Brief, paras 2175-2177.
4765 **E465** Case 002/02 TJ, para. 4398 *citing Simić* Sentencing Decision, paras 97-98, *Kordić & Čerkez* TJ, para. 848. The *Simić* TC opined that "issues concerning the ill health of a convicted person should normally be a matter for consideration in the execution of the sentence to be meted out. Hence, it is only in exceptional circumstances or 'rare' cases where ill health should be considered in mitigation"; the *Kordić and Čerkez* TC noted that poor health could be considered as a mitigating factor, but "[s]uch factors will vary with the circumstances of each case, as must be contemplated by the reference to 'individual circumstances.'"
4766 **E465** Case 002/02 TJ, para. 4398 *citing* **E460/5** TC KS Fitness Report Decision.
4767 **E460/5** TC KS Fitness Report Decision, para. 3.
4768 **E460/5** TC KS Fitness Report Decision, para. 5.
4769 **E460/5** TC KS Fitness Report Decision, para. 6.
4770 **E465** Case 002/02 TJ, para. 4398.
4771 Ground 256: **F54** Appeal Brief, *Error regarding good moral character*, paras 2178-2183; **F54.1.1** Appeal Brief Annex A, p. 85 (EN), p. 79 (FR), pp. 120-121 (KH).
4772 **F54** Appeal Brief, para. 2178.
4773 **E465** Case 002/02 TJ, para. 4399, fn. 14190.

the SCC.[4774] In this current appeal, Appellant references these same witnesses.[4775] As noted above,[4776] Appellant does not demonstrate that the TC failed to consider these statements. The fact that the TC did not change its prior assessment of the evidence does not constitute an error. Appellant has not demonstrated that the TC disregarded that evidence; it simply did not find it sufficient to affect its determination of an appropriate sentence.[4777]

1305. In addition, Appellant mischaracterises the evidence on which he seeks to rely. The witnesses cited may have come "to testify on the facts that unanimously proved his good character",[4778] but they did not give "unanimously laudatory accounts".[4779] For example, François Ponchaud testified that, for the period through 1970, he admired Appellant, but "what happened next was a different story".[4780] Philip Short testified that Appellant did what he was told during the DK regime, and that *up to 1975* he had a reputation for honesty and probity.[4781] Nou Hoan testified to Appellant's character by referring to a Cambodian proverb: one rotten apple can rot all the other apples in the basket, and when Appellant went to live with the black hearted Khmer Rouge, he became part of the rotten apples. He also testified that Appellant did not love his nation, rather, he destroyed it.[4782]

1306. Others admitted to lack of knowledge of Appellant's actions during the DK regime, or had no contact with him during the DK and/or did not know Appellant personally.[4783] This evidence is certainly not sufficient to change the TC's determination of an appropriate sentence, particularly in light of the seriousness of the crimes of which

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4774 **F36** Case 002/01 AJ, paras 1115-1116.

4775 **F54** Appeal Brief, para. 2178, fns 4179, 4181 *citing* the testimony of the same witnesses to whom Appellant refers in **F17** Case 002/01 Appeal Brief, para. 656, fn. 1361 *referring to* **E295/6/4** Khieu Samphan's Final Trial Brief, para. 208, fns 348-349.

4776 *See* response to Ground 16.

4777 **E465** Case 002/02 TJ, para. 4399 fn. 14190 *referencing* its prior consideration of five character witnesses who testified on Appellant's behalf. *See also* **E313** Case 002/01 TJ, paras 1099-1103.

4778 **F54** Appeal Brief, para. 2179.

4779 **F54** Appeal Brief, para. 2180.

4780 **E1/178.1** François Ponchaud, T. 9 Apr. 2014, 09.36.52-09.38.48, p. 10, line 25.

4781 **E1/189.1** Philip Short, T. 6 May 2014, 11.35.42-11.37.10, p. 52, lines 19-22.

4782 **E1/199.1** Nou Hoan, T. 30 May 2013, 10.29.36-10.32.02, p. 35, line 23-p. 36, line 12, 13.52.55-13.54.53, p. 76, lines 4-17.

4783 *See e.g.* **E1/194.1** Prum Sou, T. 21 May 2013, 14.41.29-14.43.44, p. 84, lines 5-14, 15.20.48-15.25.45, p. 92, line 7-p. 93, line 8 (stating he did not know the role Appellant played during the DK, had no contact with him from 1967-1990, no knowledge of speeches; witness' personal observations and analysis are speculation based on what he knew of Appellant in the past and what he saw and heard of him in 2000 and after); **E1/203.1** Sok Roeu, T. 7 June 2013, 13.33.57-13.39.01, p. 78, line 2-p 79 line 11, 13.48.19-13.50.06, p. 83, lines 10-23, 14.49.30-14.54.46, p. 19, line 19-p. 100, line 16 (Appellant's bodyguard after the DK period, stated he never spoke with Appellant about what happened between 1975-1979, lacked knowledge of Appellant's conduct during the DK period); **E1/103.1** Ong Thong Hoeung, T. 7 Aug. 2012, 14.02.27-14.04.19, p. 74, lines 8-10 (stating never met Appellant in person until testimony).

Appellant stands convicted. Appellant has failed to demonstrate any discernible error in the TC's exercise of discretion in assessing these statements, which have previously been considered by both the Case 002/01 TC and SCC. As such, SCC intervention is unwarranted.

X. CONCLUSION

1307. In sum, the Co-Prosecutors respectfully submit that Appellant has failed to establish any errors warranting appellate intervention in this case. The TC legally and reasonably convicted Appellant of committing, through a JCE, (i) CAH, (ii) genocide, and (iii) GB, and of A&A the crime against humanity of murder with *dolus eventualis*. As a senior leader of Democratic Kampuchea who was found to be extensively and substantially involved in these crimes,[4784] Appellant was appropriately sentenced to life imprisonment. Accordingly, the Co-Prosecutors respectfully request that the SCC:

(1) DISMISS Appellant's appeal in its entirety; and

(2) AFFIRM the convictions and sentence entered by the TC in its Judgment issued on 16 November 2018.

Respectfully submitted,

Date	**Name**	**Place**	**Signature**
12 October 2020	CHEA Leang National Co-Prosecutor	Phnom Penh	
	Brenda J. HOLLIS International Co-Prosecutor		

4784 **E465** Case 002/02 TJ, para. 4385.