

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAIL**

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**NOTICE OF APPEAL AGAINST THE JUDGMENT IN CASE 002/01**

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Pursuant to Internal Rule 105(3), the Co-Lawyers for Nuon Chea (the ‘Defence’) hereby submit Nuon Chea’s notice of appeal (‘Notice’) against the trial judgment in Case 002/01:

1. On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01 (‘Judgment’).<sup>1</sup> On 29 August 2014, the Supreme Court Chamber fixed a deadline of 30 days from said date, or 29 September 2014, for any party to file a 30-page notice of appeal.<sup>2</sup> The Defence hereby notifies the Supreme Court Chamber of its intention to appeal the Judgment on the following 223 grounds.
2. The Defence notes this Chamber’s judgment in Case 001 (‘Duch Appeals Judgment’), which establishes the standard of appellate review at the ECCC. The Defence intends to seek to persuade the Chamber in its appeal brief that the scope of appellate review over errors of fact is considerably broader than the test stated in the Duch Appeals Judgment. Nevertheless, subject to limited exceptions identified expressly herein,<sup>3</sup> the Defence submits that every error of fact concerns a conclusion that no reasonable trier of fact could have made beyond a reasonable doubt. Each such error, individually or cumulative to other errors, led the Trial Chamber to improperly enter at least one conviction, and hence caused a miscarriage of justice. Every error of law similarly invalidates at least part of the Judgment or another decision of the Trial Chamber. Given the space constraints of the instant Notice, these claims are not reiterated in connection with each appeal ground.
3. The Defence notes further that the number and scope of the appeal grounds alleged herein are substantial and were not easily expressed within the 30-page limit fixed by the Chamber. Many of the errors alleged are therefore unavoidably described only in summary form. The Defence will elaborate in full-length appellate submissions.

### **I. Errors concerning the governing law applicable to the tribunal**

*Ground 1.* The Trial Chamber erred in law in relying on sources of customary international law which did not exist in 1975. *See* paras 176-192, 410-458, 688-721.<sup>4</sup>

*Ground 2.* The Trial Chamber erred in law in upholding the validity and constitutionality of the Internal Rules, in particular by failing to hold that the adoption of the Internal Rules

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<sup>1</sup> Document No. E313, ‘Case 002/01 Judgment’, 7 August 2014 (‘Judgment’).

<sup>2</sup> Document No. F3/3, ‘Decision on Defence Motion for Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs’, 29 August 2014.

<sup>3</sup> Certain errors alleged herein concern matters of general importance to the jurisprudence of the ECCC, a basis of appellate review included in the Duch Appeal Judgment. *See* Case File No. 001/18-07-2007-ECCC/SC, Document No. F28, ‘Appeal Judgement’, 3 February 2012 (‘Duch Appeal Judgment’), para. 15.

<sup>4</sup> Unless otherwise stated, all references in the instant Notice refer to the Judgment.

was *ultra vires* the ECCC Plenary, failing to substantiate its conclusion that the Rules merely ‘consolidate applicable Cambodian procedures, supplemented by international standards where necessary and appropriate’, and failing to hold that the substance of the Internal Rules is inconsistent with Article 12(1) of the ECCC Agreement. *See* Document No. E51/14.

## II. Errors concerning the legitimacy and fairness of the proceedings

4. Each of the following errors of law individually or cumulatively invalidates the Judgment, and is additionally of general importance to the jurisprudence of the ECCC.

*Ground 3.* The Trial Chamber erred in law and systematically violated Nuon Chea’s right to be presumed innocent and to be tried by an independent and impartial tribunal comprised of judges with integrity and high moral character. The Case 002/01 Judgment contorts the evidence and the applicable legal standards in a concerted, result-oriented effort to maximize Nuon Chea’s criminal liability and demonize the leadership of the CPK. Accordingly, the Judgment not only fails to respect Nuon Chea’s fundamental right to a fair trial, it calls into question the legitimacy of an institution clearly less concerned with ascertaining truth than with writing the final chapter of a propaganda campaign on behalf of Nuon Chea’s political opponents. In signing their names to this Judgment, the Trial Chamber judges abdicated their responsibility to act as neutral arbiters with the highest standards of judicial ethics, opting instead for a role as servile political actors. Judges such as this could not, and did not, afford Nuon Chea the independent and impartial tribunal to which he is entitled by law. *See* para. 43 in particular, in addition to the Judgment in its totality.

*Ground 4.* The Trial Chamber erred in law and violated Nuon Chea’s right to an independent tribunal in adjudicating on the charges in Case 002/01 notwithstanding the total absence of structural independence within the Cambodian judiciary. *See* para. 43.

*Ground 5.* The Trial Chamber erred in law and violated Nuon Chea’s right to an impartial tribunal in adjudicating on the charges in Case 002/01 notwithstanding the inability of the national Judges to disregard their personal experiences in Democratic Kampuchea and judge Nuon Chea only on the basis of the evidence before them. *See* Document No. F2/1.

*Ground 6.* The Trial Chamber erred in law and violated Nuon Chea’s right to present a defence by failing to call the most important fact witness in Case 002, and Nuon Chea’s sole character witness, Heng Samrin. The Trial Chamber did so even while observing that ‘no character witnesses were heard by the Trial Chamber in respect of NUON Chea.’ The international judges erred in law and abdicated their judicial responsibilities by declining to consider the fair trial implications of this decision and deferring the issue to potential appellate review by this Chamber. *See* para. 1104; Document No. E312, para. 111.

*Ground 7.* The Trial Chamber erred in law and violated Nuon Chea’s right to present a defence by refusing to hear other crucially important defence witnesses, including Rob Lemkin, Ouk Bunchhoen, numerous witnesses concerning the circumstances which justified the evacuation of Phnom Penh, and others. This violation of Nuon Chea’s fair trial rights was aggravated by the Chamber’s failure to deal with these issues in the Judgment, relegating them to subsidiary decisions. *See* paras 50-54; *see also, e.g.*, Document Nos E312, E294/1.

*Ground 8.* The Trial Chamber erred in law and violated Nuon Chea's right to present a defence by excluding testimony and other evidence concerning events after 1979.<sup>5</sup>

*Ground 9.* The Trial Chamber erred in law and violated Nuon Chea's right to present a defence by refusing to permit defence teams to conduct their own investigations, amplifying a similarly erroneous holding by the CIJs. *See* Document No. E211/2.

*Ground 10.* The Trial Chamber erred in law by refusing to conduct further investigations into matters not properly addressed during the judicial investigation, including by failing to consider the shortcomings of that investigation and their implications for Nuon Chea's right to present a defence. *See* para. 42; *see also*, Document No. E116, para. 19.

*Ground 11.* The Trial Chamber erred in law and violated Nuon Chea's right to confront the evidence against him by systematically limiting defence counsel's efforts to challenge the credibility, reliability and probative value of the evidence. The Chamber did so in part by deciding to place strict limits on testimony concerning events during the judicial investigation based on an erroneous interpretation of Rule 76(7).<sup>6</sup>

*Ground 12.* The Trial Chamber erred in law and violated Nuon Chea's right to confront the evidence against him by preventing the Defence from confronting witnesses, notably Duch, with the inconsistent statements of other witnesses.<sup>7</sup>

*Ground 13.* The Trial Chamber erred in law and violated Nuon Chea's right to present a defence by holding that only those documents on each party's Rule 80 document lists were eligible for admission, subject to narrowly framed exceptions.<sup>8</sup>

*Ground 14.* The Trial Chamber erred in law and violated Nuon Chea's right to confront the evidence against him by prohibiting the use of documents not in evidence for impeachment purposes, except under highly circumscribed conditions.<sup>9</sup>

*Ground 15.* The Trial Chamber erred in law and violated Nuon Chea's right to meaningfully confront the evidence against him by deciding to show witnesses prior statements before testifying.<sup>10</sup>

<sup>5</sup> Judgment, paras 55-58; *see also, e.g.*, **E1/94.1**, pp. 73:5-75:7; **E1/105.1**, pp. 70:3-72:19, 74:18-75:23, 81:14-82:14, 82:17-83:16; **E1/123.1**, pp. 26:2-27:13; **E1/150.1**, pp. 78:12-79:8, 87:5-7, 88:11-14, 90:7-13; **E1/192.1**, pp. 24-26. This ruling – like all of those concerning procedural features of the trial discussed in the present section – was reflected in numerous decisions over the course of the trial. It is not possible here to identify every instance in which the Trial Chamber enforced each of these rules. This Chamber should however interpret these as general objections to the Trial Chamber's practices as they were applied throughout the trial.

<sup>6</sup> Judgment, paras 42, 59-62; *see also, e.g.*, **E1/122.1**, pp. 86:21-99:3; **E1/137.1**, pp. 59:10-64:8; **E1/23.1**, pp. 24:4-27:5; **E1/128.1**, pp. 18-22; **E1/32.1**, pp. 73-75; **E1/38.1**, pp. 101-112; **E1/39.1**, pp. 76-81; **E1/58.1**, pp. 82-84; **E1/78.1**, p. 69; **E1/108.1**, pp. 42-45; **E1/191.1**, pp. 101-103; **E71/1**, p. 2; **E251**.

<sup>7</sup> Judgment, paras 59-62; *see also, e.g.*, **E1/59.1**, pp. 37:1-44:13.

<sup>8</sup> Judgment, para. 44; *see also*, **E131/1**, p. 4.

<sup>9</sup> Judgment, paras 59-62; *see also e.g.*, **E199**; **E1/91.1**, pp. 5:22-6:19; **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01' ('Closing Submissions'), paras 60-67.

<sup>10</sup> Judgment, paras 59-62; *see also e.g.*, **E141**; **E141/1**; Closing Submissions, paras 68-70.

*Ground 16.* The Trial Chamber erred in law and violated Nuon Chea's right to confront the evidence by allowing leading questions based on witnesses' prior statements.<sup>11</sup>

*Ground 17.* The Trial Chamber erred in law in holding that 'there is no procedural requirement before the ECCC to call witnesses with personal knowledge to authenticate documents on the case file.' *See* para. 42; *see also, e.g.*, Document No. 162, para. 7; Document No. E185, para. 28.

*Ground 18.* The Trial Chamber erred in law and violated Nuon Chea's right to confront the evidence against him by affording each defendant less time than the Co-Prosecutors to question each witness, and rigidly adhering to an equal time division between the defence as a whole and the Co-Prosecutors and civil parties.

*Ground 19.* The Trial Chamber erred in law and violated Nuon Chea's right to present a defence by placing strict and inadequate limits on the length of final trial briefs.

*Ground 20.* The Trial Chamber erred in law by consistently failing to provide reasoned decisions. *See* fn 147; Document No. E295/6/3, para. 89.

*Ground 21.* The Trial Chamber erred in law in systematically failing to respond to defence submissions concerning the reliability of prosecution evidence, reasonable inferences consistent with Nuon Chea's innocence, fair trial rights, and numerous other issues. *See e.g.* Document No. E295/6/3, paras 102-110, 146-164, 270-283, 290-7, 306-9, 418-438, 482-4.

### **III. Errors concerning severance and facts and policies outside the scope of the trial**

*Ground 22.* The Trial Chamber erred in law and violated Nuon Chea's right to legal certainty by failing to clearly specify which factual allegations were within the scope of the trial and the consequences of severance, including as to the relevance, admissibility and probative value of evidence. *See* paras 45-49; *see also, e.g.*, Document Nos E124, E124/7 (and attached annexes), E141, E1/213.1, pp. 41:5-43:25, 50:1-14.

*Ground 23.* The Trial Chamber flagrantly erred in law in relying on facts outside the temporal jurisdiction of the Tribunal to establish the elements of various modes of liability. The Trial Chamber further erred in law in making findings of fact concerning allegations outside the scope of the Closing Order. The Trial Chamber violated Nuon Chea's right to confront the evidence against him and to fair notice of the crimes charged. *See* paras 104-7, 117-8, 120-6, 133-51, 878-84, 887, 889, 918, 920, 923-4, 926, 928-30.

*Ground 24.* The Trial Chamber flagrantly erred in law in defining the nature and scope of the alleged CPK policies concerning Khmer Republic officials and New People beyond the temporal jurisdiction of Case 002/01. *See* paras 118, 787, 814, 817, 834, 845, 873.

*Ground 25.* The Trial Chamber erred in fact in finding that the CPK imposed 'increasingly difficult working conditions on members of cooperatives' prior to 1975. This question is of significance to the jurisprudence of the Tribunal. *See* paras 114, 116.

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<sup>11</sup> Judgment, paras 59-62; *see also e.g.*, E1/181.1, pp. 37:13-39:14.

*Ground 26.* The Trial Chamber flagrantly erred in law in finding that a CPK policy of ‘smashing those who had been found to be enemies’ existed, defining the nature and scope of said policy and relying on evidence outside the scope of the trial to do so. The Trial Chamber violated Nuon Chea’s right to confront the evidence against him and to fair notice of the crimes charged. Alternatively, the Trial Chamber erred in fact in so finding based on the limited record before it. *See* paras 117-118; *see also*, paras 104-112, 123, 169, 195, 199, 340, 347, 469, 510, 530, 613-6, 726-7, 737, 772, 784, 787-8, 795-6, 805, 815, 818, 840, 844-5, 847, 853, 887, 903-4, 908, 912, 919, 926.

*Ground 27.* The Trial Chamber flagrantly erred in law by considering in detail Nuon Chea’s alleged role at S-21 and deliberately seeking to give the impression that his role was direct and extensive. The Trial Chamber violated Nuon Chea’s right to confront the evidence against him and to fair notice of the crimes charged. This question is of significance to the jurisprudence of the Tribunal. *See* paras 342-346.

*Ground 28.* The Trial Chamber flagrantly erred in law in relying on implementation evidence to find that a policy of forced marriage existed. The Trial Chamber violated Nuon Chea’s right to confront the evidence against him and to fair notice of the crimes charged. Alternatively, the Trial Chamber erred in fact in so finding based on the limited record before it. This question is of significance to the jurisprudence of the Tribunal. *See* para. 130.

*Ground 29.* The Trial Chamber flagrantly erred in law in making findings concerning the purported total number of deaths during Democratic Kampuchea. The Trial Chamber violated Nuon Chea’s right to confront the evidence against him and to fair notice of the crimes charged. Alternatively, the Trial Chamber erred in fact in so finding based on the limited record. This question is of significance to jurisprudence of the Tribunal. *See* para. 174.

#### **IV. Errors concerning the use of evidence**

5. The following errors pervade the Judgment, systematically compromise its findings, and accordingly invalidate the Judgment in full. These errors furthermore underlie many of the substantive factual errors alleged throughout this Notice. The effect of these errors in relation to specific findings will be articulated as appropriate in the Defence appeal brief.

*Ground 30.* The Trial Chamber erred in law in relying extensively and often decisively on expert evidence to establish directly the key facts in dispute between the parties. In so doing, the Trial Chamber far exceeded the boundaries of expert testimony pursuant to all applicable legal standards. *See e.g.*, paras 31, 105-107, 111, 117, 120, 124, 528 (and others).

*Ground 31.* The Trial Chamber erred in law in relying extensively on unauthenticated secondary sources, such as work from authors including Ben Kiernan and Elizabeth Becker, to establish key facts in dispute between the parties without any or adequate assessment of probative value. The effect of this error was aggravated by the disproportionate reliance on Anglo-American and French sources. *See e.g.*, paras 114, 118, 121 (and others).

*Ground 32.* The Trial Chamber erred in law in failing to adequately articulate the standards pursuant to which it evaluated the credibility and reliability of out of court statements and hearsay evidence in the absence of cross-examination. *See* para. 34;

Document No. E96/7 (in both cases, failing to adequately articulate the applicable standards). Alternatively, the Chamber erred in law and fact in incorrectly applying those standards.

- i. The Trial Chamber erred in law and fact in relying on WRIs while inadequately or incorrectly assessing their probative value.
- ii. The Trial Chamber erred in law and fact in relying on interviews from sources such as DC-Cam and SOAS while inadequately or incorrectly assessing their probative value.
- iii. The Trial Chamber erred in law and fact in relying on Case 001 transcripts while inadequately or incorrectly assessing their probative value.
- iv. The Trial Chamber erred in law and fact in relying on civil party applications and victim complaints while inadequately or incorrectly assessing their probative value.
- v. The Trial Chamber erred in law and fact in relying on hearsay evidence while inadequately or incorrectly assessing its probative value.

*Ground 33.* The Trial Chamber erred in law and fact in inadequately or incorrectly assessing the credibility, reliability and probative value of live evidence heard at trial.

- i. The Trial Chamber erred in law in relying on the opinions of fact witnesses, including Stephen Heder and Francois Ponchaud, concerning events outside their personal experience. *See e.g.*, paras 114, 118, 120, 205, 207 (and others).
- ii. The Trial Chamber erred in law and fact in relying repeatedly on the testimony of Kaing Guek Eav while inadequately or incorrectly assessing its probative value, despite this Chamber's harsh criticism of his credibility and its conclusion that he repeatedly gave misleading testimony before this Tribunal.
- iii. The Trial Chamber erred in law in relying on the testimony of Stephen Heder notwithstanding its systematic failure to respect Nuon Chea's right to confront Heder's testimony during his appearance before the Trial Chamber. *See* Document E287/2. The Trial Chamber furthermore erred in law and fact in failing to give adequate consideration to Heder's past association with the CIJs and the Co-Prosecutors in assessing his evidence.
- iv. The Trial Chamber erred in law and fact in relying on witnesses, notably Rochoem Ton, that the Chamber itself implicitly held gave false evidence before the ECCC, while inadequately or incorrectly assessing its probative value.
- v. The Trial Chamber erred in law and violated Nuon Chea's right to be presumed innocent by systematically rejecting exculpatory aspects of his testimony while (i) relying repeatedly on his testimony for inculpatory purposes and (ii) relying on the allegations of civil parties, in all cases with little to no discussion or analysis. *See e.g.*, fns 970, 2597 (relying on Nuon Chea's statements without referencing relevant contrary statements).

*Ground 34.* The Trial Chamber erred in law in holding that unsworn civil party testimony was admissible for the truth of its contents, and without reduced probative value. *See* Document No. E267/3, paras 21-22. The Trial Chamber further erred in law in relying on victim impact testimony for the truth of its contents throughout the Judgment.

*Ground 35.* The Trial Chamber erred in law and fact in relying on documents while inadequately or incorrectly assessing their probative value.

*Ground 36.* The Trial Chamber erred in law in holding that torture tainted evidence could not be used for the truth of its contents under any circumstances. This error is of general importance to the jurisprudence of the ECCC. *See* para. 35.

## **V. Errors concerning the structure of the CPK**

*Ground 37.* The Trial Chamber erred in fact in mischaracterizing the hierarchical nature of the CPK and failing to recognize the fractious nature of the Party and the independent authority of officials in the national administrative structure, including zone leaders. While this error permeates the judgment, key factual conclusions include:

- i. 'Although the CPK Statute vested the highest level of operational authority in the Central Committee, effective control over the CPK was ultimately exercised by an extra-statutory body known as the Standing Committee.' *See* para. 203.
- ii. 'Zones and Autonomous Sectors accordingly compiled reports for the Party Centre based on the information passed up to them from the lower echelons. The reports were sent frequently, sometimes daily, although some reports summarized events over longer periods of time.' *See* para. 276.
- iii. 'Consistent with the procedures followed throughout military campaigns between 1970 and 1975, whereby the senior leaders received reports and issued instructions to Zone leaders commanding the forces on the ground, the Zone secretaries commanding military units in control of Phnom Penh after liberation, sought and received instructions from POL Pot, NUON Chea, SON Sen and other senior leaders, in particular members of the Central Committee, at B-5. Further, the evacuation of Phnom Penh was supervised by a committee, created by the Central Committee in June 1974, chaired by SON Sen and including KOY Thuon and various Zone leaders.' *See* para. 739.
- iv. 'Zone secretaries and officials, such as ROS Nhim and SAO Phim, reported to Angkar or the leadership, copying POL Pot, SON Sen, VORN Vet, NUON Chea and/or Office 870, on former Khmer Republic officials and other enemy situations, and fighting on the border with Vietnam. They also asked for instructions.' *See* para. 773.
- v. Sao Phim, Koy Thuon, Ta Mok and Vorn Vet 'sought and received instructions from POL Pot, NUON Chea, SON Sen and other senior leaders at B-5.' *See* para. 807.
- vi. 'While accepting that it fell to the Zones to implement the Party's policies concerning population movements and targeting of Khmer Republic officials, the Chamber is satisfied that the Zones were not acting independently. Rather, the Party Centre, including NUON Chea, relied upon the Zones, whose secretaries were often members



of the Central or Standing Committees, and on the CPK's hierarchical structure to give effect to its policies and decisions. This was both consistent with the provisions of the CPK Statute and demonstrated in reality. The Central Committee, of which NUON Chea was the Deputy Secretary, was responsible for instructing Zone-level, Sector-level and other Party organisations to carry out activities according to the Party's political line, and instructions were relayed downwards from the Party Centre to the lower Zones in turn.' *See* para. 859.

- vii. Crimes were committed by 'Khmer Rouge soldiers from various Zones acting within the new structure of the RAK and officials acting within the established administrative hierarchy.' *See* para. 892.
- viii. The decisions of the Party leadership were 'conveyed through the administrative and military hierarchy and then implemented by Khmer Rouge forces', who 'accepted the *de facto* authority of NUON Chea through the Party Centre and implemented Party policy'. *See* para. 905.
- ix. A 'strict, hierarchical administrative structure' existed within the CPK, which included a 'strict reporting line through which the lower echelons briefed senior leaders on key matters and requested guidance.' *See* para. 913.
- x. Ros Nhim ordered the execution of Khmer Republic officials in Pursat 'as part of the dissemination of orders through the ranks'. *See* para. 923.
- xi. 'Nuon Chea exercised *de facto* authority over Ruos Nhim'. *See* para. 934.

Other findings are found at paras 223, 242, 741, 798, 848, 885, 904-5 and 923. The Trial Chamber furthermore omitted numerous critical facts, including evidence of widespread killing autonomous from Party Center directives, outright conflict among opposing zone-based CPK factions, Vietnamese designs on Cambodian territory, clear manifestations of rebellion such as the Siem Reap bombing, the limited nature of communications emanating from Nuon Chea, and the inaccuracy of information reported within the CPK hierarchy.<sup>12</sup>

*Ground 38.* The Trial Chamber erred in fact in repeatedly describing the policies and conduct of the 'Khmer Rouge' (instead of, for instance, CPNLAF where appropriate) a phrase with no fixed meaning which obscures the factional divisions within the CPK.

*Ground 39.* The Trial Chamber erred in fact in holding that the GRUNK/FUNK was a mere façade for the CPK and that Sihanouk had relinquished all power to the CPK. *See* paras 100, 229-231, 731-2, 762. The Trial Chamber similarly erred in holding that the DK government was in every significant respect a façade for the CPK. *See* paras 233-239.

*Ground 40.* The Trial Chamber erred in fact in characterizing democratic centralism as granting all participants in any decision-making process a functional veto in almost all cases. *See* paras 223-228.

## **VI. Errors concerning Nuon Chea's role in the CPK**

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<sup>12</sup> *See* submissions made in Closing Submissions, paras 190-206, E1/232.1, pp. 23-25.

*Ground 41.* The Trial Chamber erred in fact in finding that Nuon Chea had responsibility for ‘the discipline of cadres and other internal security matters’. *See* paras 328-9, 347.

*Ground 42.* The Trial Chamber erred in fact in holding that Nuon Chea ‘had considerable influence on DK military policy and its implementation’. *See* paras 334-341, 347.

*Ground 43.* The Trial Chamber erred in fact and in law in concluding repeatedly that Nuon Chea had a role in and control over the implementation of CPK policy because he ‘exercised the ultimate decision-making power of the Party.’ The Trial Chamber further erred in law and fact in deducing from these supposed powers that Nuon Chea had and used ‘*de jure* and *de facto* authority to instruct Khmer Rouge cadres and soldiers’ to commit crimes. *See* paras 348, 884, 887, 896, 907-8, 923-4, 926.

*Ground 44.* The Trial Chamber erred in fact in finding that Nuon Chea was commonly referred to as Brother Number Two and that he was at any time the Acting Prime Minister of Democratic Kampuchea. *See* paras 312, 321-3, 775. Although this error did not cause a miscarriage of justice and is not of general importance to the jurisprudence of the Tribunal, the Defence submits that it is open to review pursuant to an expansive interpretation of the Supreme Court Chamber’s appellate jurisdiction. *See* para. 2, *supra*.

#### **VII. Errors concerning the chapeau elements of crimes against humanity**

*Ground 45.* The Trial Chamber erred in law in failing to hold that (i) the definition of crimes against humanity established by IMT and NMT law included an armed conflict nexus requirement, which remained unchanged until at least 1979 and/or (ii) the status of customary international law in 1975 was uncertain, and accordingly requires proof of the armed conflict nexus consistent with the principle of *in dubio pro reo*. *See* Document Nos E95/8; E95/8/1/4.

*Ground 46.* The Trial Chamber erred in law in excluding the state policy requirement from the definition of crimes against humanity by (i) applying an erroneous legal standard, whether the Trial Chamber had erred in the Duch Judgment; (ii) misreading the available legal sources; and/or (iii) failing to apply the principle of *in dubio reo*. *See* paras 180-181.

*Ground 47.* The Trial Chamber erred in law and fact in holding that a widespread and systematic attack existed on discriminatory grounds which victimized millions of civilians. This error was comprised of a series of errors in fact, including but not limited to: “New People” were perceived as political and social enemies of the revolution and the collective system’; and ‘any who opposed, or were perceived to oppose, the revolution and collective system were targets for mistreatment and acts of violence’. *See* paras 193-195.

#### **VIII. Errors concerning alleged willful killings of civilians who refused to obey orders during the Phase I movement**

6. Each of the errors alleged in sections VIII through XII concerns a conclusion of the Trial Chamber that one or more deaths occurred during either the Phase I or II population movement. In each case, the Defence submits that the evidence cited in support of the Trial Chamber’s conclusion: (i) fails on its face to establish that a death occurred or was unlawfully caused by the CPK; (ii) ought not to have been relied upon for the truth of its

contents; (iii) constitutes an out of court statement without cross-examination or any or adequate corroboration; (iv) was not subject to any assessment of probative value; and/or (v) is anecdotal and does not support the general nature of the conclusion.

*Ground 48.* The Trial Chamber erred in fact in relying on the testimony of civil party Denise Affonco as the sole support for the conclusion that a friend of hers who stayed to wait for her husband ‘was killed on the spot’. *See* paras 474, 553 (fn 1654).

*Ground 49.* The Trial Chamber erred in fact in relying on the testimony of civil party Pin Yathay as the sole support for the conclusion that a boy who tried to return to his house to retrieve something ‘was killed on the spot’. *See* paras 474, 553 (fn 1654).

*Ground 50.* The Trial Chamber erred in fact in relying on the WRI of Khoem Nareth as the sole support for the conclusion that a particular incident in which civilians ‘who did not immediately obey [the evacuation order] were killed on the spot’ occurred. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 51.* The Trial Chamber erred in fact in relying on the WRI of civil party Sot Sem as the sole support for the conclusion that a particular group of people was shot dead for refusing to leave their house during the evacuation of Phnom Penh. *See* paras 474 (fn 1404), 553 (fn 1654).

*Ground 52.* The Trial Chamber erred in fact in relying on the WRI of Seang Chan as the sole support for the conclusion that a particular incident in which civilians were shot to death because they did not know which route to take occurred. *See* paras 474 (fn 1404), 553 (fn 1654).

*Ground 53.* The Trial Chamber erred in fact in relying on the WRI of Khiev Horn as the sole support for the conclusion that particular incidents in which civilians ‘who did not immediately obey [the evacuation order] were killed on the spot’ occurred. *See* paras 474 (fn 1404), 553 (fn 1654).

*Ground 54.* The Trial Chamber erred in fact in relying on the statement of Pam Moeun in the submission of the government of Norway to the Commission on Human Rights as the sole support for the conclusion that particular incidents in which civilians ‘who did not immediately obey [the evacuation order] were killed on the spot’ occurred. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 55.* The Trial Chamber erred in fact in relying on the civil party application of Sot Sem as the sole support for the conclusion that any killings occurred during the evacuation of Phnom Penh. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 56.* The Trial Chamber erred in fact in relying on the civil party application of Pok Sa Em as the sole support for the conclusion that particular civilians who protested the order to evacuate were killed. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 57.* The Trial Chamber erred in fact in relying on the civil party application of Suong Khit as the sole support for the conclusion that particular civilians who argued against the order to evacuate were killed. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 58.* The Trial Chamber erred in fact in relying on the civil party application of Mea Chhin as the sole support for the conclusion that particular civilians were fired at for refusing to evacuate Phnom Penh. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 59.* The Trial Chamber erred in fact in relying on the civil party application of Sen Sophon as the sole support for the conclusion that particular civilians who tried to fight with CPNLA soldiers were killed. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 60.* The Trial Chamber erred in fact in relying on the civil party application of Chey Yeun as the sole support for the conclusion that particular civilians were killed in their houses because they would not leave as ordered. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 61.* The Trial Chamber erred in fact in relying on the civil party application of Pal Rattanak as the sole support for the conclusion that particular civilians who were hesitant to leave were killed. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 62.* The Trial Chamber erred in fact in relying on the civil party application of Yann Nhar as the sole support for the conclusion that her neighbours' families were shot dead. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 63.* The Trial Chamber erred in fact in relying on the victim complaint of Eam Teang as the sole support for the conclusion that a particular group of people was shot to death when they asked to wait for their families. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 64.* The Trial Chamber erred in fact in relying on the civil party application of Meas Mut as the sole support for the conclusion that a particular family was killed because they did not want to leave their belongings. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 65.* The Trial Chamber erred in fact in relying on the civil party application of Beng Boeun as the sole support for the conclusion that particular civilians who did not leave Phnom Penh quickly enough were killed. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 66.* The Trial Chamber erred in fact in relying on a refugee account at E3/4590, ERN 00820450 as sole support for the conclusion that any civilians 'who did not immediately obey [the evacuation order] were killed on the spot'. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 67.* The Trial Chamber erred in fact in relying on the refugee account at E3/4590, ERN 00820568 as the sole support for the conclusion that particular civilians who did not give up their belongings were shot right away. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 68.* The Trial Chamber erred in fact in relying on the civil party application of Khoem Naret as sole support for the conclusion any civilians 'who did not immediately obey [the evacuation order] were killed on the spot'. *See* paras 474 (fn 1402), 553 (fn 1654).

*Ground 69.* The Trial Chamber erred in fact in relying on Sor Buon's alleged observations as the sole support for the conclusion that a particular civilian who refused to leave his home was shot. *See* paras 474 (fn 1404), 553 (fn 1654).

*Ground 70.* The Trial Chamber erred in fact in relying on the civil party application of Hum Ponak as the sole support for the conclusion that a particular group of civilians who opposed orders was killed in front of her. *See* paras 474 (fn 1404), 553 (fn 1654).

*Ground 71.* The Trial Chamber erred in fact in relying on the victim complaint of Phuong Mom as the sole support for the conclusion that a particular group of civilians who did not agree to leave their home was killed. *See* paras 474 (fn 1404), 553 (fn 1654).

*Ground 72.* The Trial Chamber erred in fact in relying on the victim complaint of Sun Henri as the sole support for the conclusion that particular civilians were killed for looking back or arguing, and that other particular civilians were killed inside their homes for refusing to evacuate. *See* paras 474 (fn 1404), 553 (fn 1654).

*Ground 73.* The Trial Chamber erred in fact in finding that those who sought to return to Phnom Penh during the evacuation were shot. *See* para. 486.

### **IX. Errors concerning alleged willful killings of civilians for other reasons during the Phase I movement**

*Ground 74.* The Trial Chamber erred in fact in finding that Khmer Rouge soldiers shot and killed ‘several people driving vehicles’. *See* para. 490.

*Ground 75.* The Trial Chamber erred in fact in finding that Khmer Rouge soldiers shot and killed film actor Kong Savuon. *See* para. 490.

*Ground 76.* The Trial Chamber erred in fact in finding that Khmer Rouge soldiers shot and killed those who ‘simply became too weak to continue’. *See* para. 490.

*Ground 77.* The Trial Chamber erred in law and fact in relying on victim impact testimony to find that ‘CHHENG Eng Ly recounted seeing a Khmer Rouge soldier tear apart a crying baby’. *See* paras 490, 553 (fn 1655).

*Ground 78.* The Trial Chamber erred in fact in relying on Yim Sovann’s testimony as the sole support for the conclusion that Khmer Rouge soldiers killed certain people at O’Russey market. *See* paras 490, 553 (fn 1655).

*Ground 79.* The Trial Chamber erred in law and fact in relying on the victim impact testimony of civil party Thouch Phandarasar as the sole support for the conclusion that a man was killed along the road to Sihanoukville during the evacuation. *See* para. 490, fn 1462.

*Ground 80.* The Trial Chamber erred in fact in relying on the testimony of civil party Mom Sam Oeurn as the sole support for the conclusion that particular civilians were killed along the street during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 81.* The Trial Chamber erred in fact in relying on the testimony of civil party Chum Sokha as the sole support for the conclusion that civilians were killed trying to break into a rice warehouse during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 82.* The Trial Chamber erred in fact in relying on the testimony of Sydney Schanberg as the sole support for the conclusion that particular incidents in which civilians were shot and killed during the evacuation of Phnom Penh occurred. *See* para. 490, fn 1462.

*Ground 83.* The Trial Chamber erred in fact in relying on the civil party application of Meas Saran as the sole support for the conclusion that a particular incident in which civilians were killed along the road during the evacuation of Phnom Penh occurred. *See* para. 490, fn 1462.

*Ground 84.* The Trial Chamber erred in fact in relying on the civil party application of Morm Phai Buon as the sole support for the conclusion that patients at Preah Angk Duong hospital were killed during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 85.* The Trial Chamber erred in fact in relying on the civil party application of Kung Narin as the sole support for the conclusion that six particular civilians were shot and killed during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 86.* The Trial Chamber erred in fact in relying on the WRI of Norng Ponna as the sole support for the conclusion that a particular incident in which civilians were killed outside a pagoda during the evacuation of Phnom Penh occurred. *See* para. 490, fn 1462.

*Ground 87.* The Trial Chamber erred in fact in relying on the victim complaint of Kev Chhem as the sole support for the conclusion that particular incidents in which civilians were shot and killed during the evacuation of Phnom Penh occurred. *See* para. 490, fn 1462.

*Ground 88.* The Trial Chamber erred in fact in relying on the refugee account of Pech Ling as the sole support for the conclusion that a particular incident in which patients in hospitals were killed during the evacuation of Phnom Penh occurred. *See* para. 490, fn 1462.

*Ground 89.* The Trial Chamber erred in fact in relying on the civil party application of Phuong Phalla as the sole support for the conclusion that civilians who tried to swim across the river under the Kbal Thnal bridge were shot and killed during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 90.* The Trial Chamber erred in fact in relying on the civil party application of Pal Rattanak as the sole support for the conclusion that civilians were pushed off buildings during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 91.* The Trial Chamber erred in fact in relying on the civil party application of Ly Ream as the sole support for the conclusion that particular incidents in which civilians were killed between on the way to Kirirom during the evacuation occurred. *See* para. 490, fn 1462.

*Ground 92.* The Trial Chamber erred in fact in relying on the victim complaint of Tieng Sokhom as the sole support for the conclusion that particular incidents in which civilians were shot and killed during the evacuation of Phnom Penh occurred. *See* para. 490, fn 1462.

*Ground 93.* The Trial Chamber erred in fact in relying on the victim complaint of Chou Kim Lan as the sole support for the conclusion that particular incidents in which civilians were killed during the evacuation of Phnom Penh occurred. *See* para. 490, fn 1462.

*Ground 94.* The Trial Chamber erred in fact in relying on the victim complaint of Sun Henri as the sole support for the conclusion that the driver of his family's boat was shot and killed during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 95.* The Trial Chamber erred in fact in relying on the civil party application of Sam Pha as the sole support for the conclusion that particular civilians who chose their own paths were shot and killed during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 96.* The Trial Chamber erred in fact in relying on the civil party application of Sem Virak as the sole support for the finding that particular civilians were killed for failing to follow the indicated route during the evacuation of Phnom Penh. *See* para. 490, fn 1462.

*Ground 97.* The Trial Chamber erred in fact in holding, in addition to and separate from its numerous errors concerning individual deaths, that a large number of killings occurred during the evacuation of Phnom Penh. Key findings in this regard include: 'numerous victims who refused to leave their homes in Phnom Penh, as well as those who did not immediately follow the instructions of the Khmer Rouge soldiers [...] were shot and killed on the spot [and] there was substantial evidence of individual killing of victims both in Phnom Penh and during the course of the evacuation for no discernable reason'. *See* para. 553.

#### **X. Errors concerning the alleged killing of Khmer Republic soldiers and officials during the Phase I movement**

*Ground 98.* The Trial Chamber erred in fact in relying on Kim Vandy's testimony as the sole support for the conclusion that his uncle was unlawfully killed by CPK forces on 17 April 1975. *See* para. 507, fn 1518.

*Ground 99.* The Trial Chamber erred in law and fact in relying on the WRI of Khen Sok as the sole support for the conclusion that a particular Khmer Republic soldier who refused to leave Phnom Penh was executed on the spot during the evacuation. *See* para. 507, fn 1518.

*Ground 100.* The Trial Chamber erred in law and fact in relying on the WRI of Ut Seng as the sole support for the conclusion that two particular Khmer Republic soldiers were executed on the spot during the evacuation of Phnom Penh. *See* para. 507, fn 1518.

*Ground 101.* The Trial Chamber erred in law and fact in relying on the refugee account at E3/4590, ERN (En) 00820451 as the sole support for the conclusion that Khmer Republic soldiers were killed at Preaek ket Mealea hospital during the evacuation of Phnom Penh. *See* para. 507, fn 1518.

*Ground 102.* The Trial Chamber erred in law and fact in relying on the DC-Cam statement of Khat Khe as the sole support for the conclusion that particular incidents in which Khmer Republic soldiers were executed on the spot during the evacuation of Phnom Penh occurred. *See* para. 507, fn 1518.

*Ground 103.* The Trial Chamber erred in law and fact in relying on the civil party application of Eam Tres as the sole support for the conclusion that six particular Khmer Republic soldiers were executed on the spot during the evacuation. *See* para. 507, fn 1518.

*Ground 104.* The Trial Chamber erred in law and fact in relying on the civil party application of Both Soth as the sole support for the conclusion that a particular Khmer Republic soldier was executed on the spot during the evacuation. *See* para. 507, fn 1518.

*Ground 105.* The Trial Chamber erred in law and fact in relying on the civil party application of Pal Rattanak as the sole support for the conclusion that a particular incident in which Khmer Republic soldiers were executed on the spot during the evacuation of Phnom Penh occurred. *See* para. 507, fn 1518.

*Ground 106.* The Trial Chamber erred in law and fact in relying on the victim complaint of Prum Sokha as the sole support for the conclusion that a particular incident in which Khmer Republic soldiers were executed on the spot during the evacuation of Phnom Penh occurred. *See* para. 507, fn 1518.

*Ground 107.* The Trial Chamber erred in law and fact in relying on the victim complaint of Mey Nary as the sole support for the conclusion that a particular Khmer Republic soldier's family was executed on the spot during the evacuation of Phnom Penh. *See* para 507 fn 1518.

*Ground 108.* The Trial Chamber erred in law and fact in relying on the statement of Pam Moeun in the Government of Norway Submission to the Commission on Human Rights as the sole support for the conclusion that Khmer Republic soldiers were executed in Kampong Kantuot and on Mao Tse-Toung Boulevard during the evacuation. *See* para. 507, fn 1518.

*Ground 109.* The Trial Chamber erred in law and fact in relying on the statement of Chhiev Si Lang in a report by Locard as the sole support for the conclusion that her husband was unlawfully executed during the evacuation. *See* para. 507, fn 1518.

*Ground 110.* The Trial Chamber erred in law and fact in relying on the statement of Ket Chhean in a report by Locard as the sole support for the conclusion that a particular Khmer Republic colonel was unlawfully executed during the evacuation. *See* para. 507, fn 1518.

*Ground 111.* The Trial Chamber erred in fact in relying on the WRI of Seang Chan as the sole support for the conclusion that certain Khmer Republic soldiers separated at a checkpoint at Chamkar Mon were later killed. *See* paras 508 (fn 1521), 553 (fn 1653).

*Ground 112.* The Trial Chamber erred in fact in relying on the civil party application of Sau Sary as the sole support for the conclusion that her husband and daughter were killed. *See* paras 508 (fn 1521), 553 (fn 1653).

*Ground 113.* The Trial Chamber erred in fact in relying on the victim complaint of Kim Sarou as the sole support for the conclusion that her brothers were killed. *See* paras 508 (fn 1521), 553 (fn 1653).

*Ground 114.* The Trial Chamber erred in fact in relying on Sao Theoun's victim complaint as the sole support for the conclusion that her father was killed. *See* paras 508 (fn 1521), 553 (fn 1653).

*Ground 115.* The Trial Chamber erred in fact in relying on a refugee account at E3/4590, ERN 00820523 as the sole support for the conclusion that a particular incident in which certain military officers were killed occurred. *See* paras 508 (fn 1521), 553 (fn 1653).



*Ground 116.* The Trial Chamber erred in fact in relying on a refugee account at E3/1714, ERN 00170756 as the sole support for the conclusion that a particular incident in which certain officers were killed in Amleang occurred. *See* paras 508 (fn 1521), 553 (fn 1653).

*Ground 117.* The Trial Chamber erred in fact in relying on the victim complaint of Phan Yim as the sole support for the conclusion that her husband was killed after being arrested near Chaom Chau. *See* paras 508 (fn 1521), 553 (fn 1653).

*Ground 118.* The Trial Chamber erred in fact in relying on the civil party application of Rou Ren as the sole support for the conclusion that his father was killed. *See* paras 508 (fn 1521), 553 (fn 1653).

*Ground 119.* The Trial Chamber erred in fact in relying on the testimony of Sum Chea as the sole support for the conclusion that loudspeakers were used within Phnom Penh to lure in former Lon Nol Soliders after which they were killed. *See* para. 511, fns 1529-30.

*Ground 120.* The Trial Chamber erred in fact in relying on the testimony of civil party Lay Bony as the sole support for the conclusion that an in-law of hers, a Khmer Republic colonel, was executed or disappeared during the evacuation of Phnom Penh. *See* para. 511, fn 1530.

*Ground 121.* The Trial Chamber erred in fact in relying on the civil party application of Chhor Dana as the sole support for the conclusion that Chhor Sien and seven other Khmer Republic soldiers were executed or disappeared during the evacuation of Phnom Penh. *See* para. 511, fn 1530.

*Ground 122.* The Trial Chamber erred in fact in relying on the WRI of Sam Sithy as the sole support for the conclusion that certain Khmer Republic soldiers were executed or disappeared at Wat Chrek Sdek during the evacuation. *See* para. 511, fn 1530.

*Ground 123.* The Trial Chamber erred in fact in relying on the WRI of Khoem Samhuon as the sole support for the conclusion that Khmer Republic officers were killed and thrown into a well in Tuol Kork. *See* para. 511, fn 1530.

*Ground 124.* The Trial Chamber erred in fact in relying on the WRI of Seng Mardi and the attached annex as the sole support for the conclusion that his father was executed or disappeared during the evacuation of Phnom Penh. *See* para. 511, fn 1530.

*Ground 125.* The Trial Chamber erred in fact in relying on the WRI of Koy Mon as the sole support for the conclusion that Khmer Republic soldiers who boarded a truck following an invitation from Southwest zone troops during the evacuation of Phnom Penh were killed. *See* para. 511, fn 1530.

*Ground 126.* The Trial Chamber erred in fact in relying on the alleged observations of Sor Buon to support the conclusion that certain Khmer Republic soldiers were executed on the spot after being identified at checkpoints. *See* paras 513 (fn 1532), 553 (fn 1655).

*Ground 127.* The Trial Chamber erred in fact in relying on the WRI of Chum Sokha as the sole support for the conclusion that a particular incident in which Khmer Republic soldiers were killed during the evacuation occurred. *See* paras 513 (fn 1537), 553 (fn 1653).

*Ground 128.* The Trial Chamber erred in fact in relying on the victim complaint of Tieng Sokhom as the sole support for the conclusion that the family of a Khmer Republic colonel was killed during the evacuation of Phnom Penh. *See* paras 513 (fn 1537), 553 (fn 1653).

*Ground 129.* The Trial Chamber erred in fact in relying on the civil party application of Beng Boeun as the sole support for the conclusion that teachers, doctors, soldiers and persons of rank were killed at Bak Ka pagoda during the evacuation of Phnom Penh. *See* paras 513 (fn 1537), 553 (fn 1653).

*Ground 130.* The Trial Chamber erred in fact in relying on the testimony of Pech Chim as the sole support for the conclusion that the husbands of particular women were killed after being taken out during the evacuation of Phnom Penh. *See* para 513 (fn 1539), 553 (fn 1653).

*Ground 131.* The Trial Chamber erred in fact in relying on the testimony of Francois Ponchaud as the sole support for the conclusion that Khmer Republic officials in Kien Svay who answered a call for registration during the evacuation of Phnom Penh were ‘rounded up and killed’. *See* paras 514, 553 (fn 1653).

#### **XI. Errors concerning alleged deaths due to conditions during the Phase I movement**

*Ground 132.* The Trial Chamber erred in law and fact in finding that ‘some [evacuees] even died’. *See* para. 491.

*Ground 133.* The Trial Chamber erred in law and fact in relying solely on the victim impact testimony of Seng Sivutha to conclude that an old man she saw on the side of the road died due to conditions imposed during the evacuation. *See* paras 492, 556 (fn 1659).

*Ground 134.* The Trial Chamber erred in law and fact in relying solely on the testimony of Pin Yathay to find that due to the conditions during the evacuation, ‘some evacuees [...] killed themselves’. *See* para. 497, fn 1487.

*Ground 135.* The Trial Chamber erred in fact in relying on the testimony of Sydney Schanberg as the sole support for the conclusion that certain people died of illness or exhaustion during the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 136.* The Trial Chamber erred in fact in relying on a US embassy telegram at E3/3004 as the sole support for the conclusion that certain people died of bad water, sunstroke and cholera during the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 137.* The Trial Chamber erred in fact in relying on US embassy telegram E3/3006 as the sole support for the conclusion that certain old, young and infirm people died of cholera and insufficient food and water during the evacuation. *See* para. 497, fn 1487.

*Ground 138.* The Trial Chamber erred in fact in relying on the civil party application of Phat Han as the sole support for the conclusion that certain elderly people died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 139.* The Trial Chamber erred in fact in relying on the DC-Cam statement of Chim Morn as the sole support for the conclusion that certain elderly people and children died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 140.* The Trial Chamber erred in fact in relying on the refugee account of Ni Bunly as the sole support for the conclusion that certain people who had been driven from hospitals and women who had just given birth died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 141.* The Trial Chamber erred in fact in relying on the civil party application of Ly Ream as the sole support for the conclusion that certain people died from starvation and disease as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 142.* The Trial Chamber erred in fact in relying on the civil party application of Sam Pha as the sole support for the conclusion that certain children died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 143.* The Trial Chamber erred in fact in relying on the civil party application of Soth Navy as the sole support for the conclusion that certain people, including her siblings, died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 144.* The Trial Chamber erred in fact in relying on the victim complaint of Loas Vannan as the sole support for the conclusion that certain people died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 145.* The Trial Chamber erred in fact in relying on the victim complaint of Preab Ken as the sole support for the conclusion that certain people died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 146.* The Trial Chamber erred in fact in relying on the victim complaint of Kem Kuon as the sole support for the conclusion that her father died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 147.* The Trial Chamber erred in fact in relying on the civil party application of Toch Monin as the sole support for the conclusion that certain elderly people died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 148.* The Trial Chamber erred in fact in relying on the WRI of Im Sunty as the sole support for the conclusion that her mother-in-law died as a consequence of the evacuation of Phnom Penh. *See* para. 497, fn 1487.

*Ground 149.* The Trial Chamber erred in fact in relying on a refugee account at E3/4590, ERN (En) 00820369 as the sole support for the conclusion that a 7 year old child died at Banteay as a consequence of the evacuation of Phnom Penh. *See* para. 498, fn 1491.

*Ground 150.* The Trial Chamber erred in fact in relying on a refugee account at E3/4590, ERN (En) 00820516 as the sole support for the conclusion that two particular children died as a consequence of the evacuation of Phnom Penh. *See* para. 498, fn 1491.

*Ground 151.* The Trial Chamber erred in fact in relying on a refugee account at E3/4590, ERN (En) 00820569 as the sole support for the conclusion that three particular children died as a consequence of the evacuation of Phnom Penh. *See* para. 498, fn 1491.

*Ground 152.* The Trial Chamber erred in fact in relying on the civil party application of Soth Navy as the sole support for the conclusion that her two siblings died as a consequence of the evacuation of Phnom Penh. *See* para. 498, fn 1491.

*Ground 153.* The Trial Chamber erred in fact in relying on the victim complaint of Kem Kuon as the sole support for the conclusion that her child died as a consequence of the evacuation of Phnom Penh. *See* para. 498, fn 1491.

*Ground 154.* The Trial Chamber erred in fact in finding that children ‘died from gastrointestinal afflictions’. *See* para. 498.

*Ground 155.* The Trial Chamber erred in fact in relying on Pech Srey Phal’s testimony to find that her baby died from conditions imposed during the evacuation. *See* para. 498.

*Ground 156.* The Trial Chamber erred in law and fact in relying on Bay Sophany’s victim impact testimony concerning the alleged death of her daughter. *See* para. 498.

*Ground 157.* The Trial Chamber erred in law and fact in holding that corpses seen at the time of the evacuation included evacuees. The Trial Chamber cited no credible evidence and failed to adequately consider the alternative reasonable inference that any such corpses were casualties of the battle to capture Phnom Penh. *See* paras 499-500.

## **XII. Errors concerning alleged deaths during the Phase II movement**

*Ground 158.* The Trial Chamber erred in fact in relying on Kong Vach’s civil party application and WRI as the sole support for the conclusion that her son and daughter died as a consequence of the Phase II population movement. *See* paras 592, 598; *see also*, paras. 635 (fn 2014), 644 (fn 2031-2033), 646 (fn 2036).

*Ground 159.* The Trial Chamber erred in fact in relying on San Mom’s civil party application as the sole support for the conclusion that people drowned during the Phase II population movement. *See* para. 594.

*Ground 160.* The Trial Chamber erred in law and fact in relying on Chan Socheat’s victim impact testimony as the sole support for the conclusion that Khmer Rouge soldiers shot a man upon arrival in Phnom Penh. *See* para. 595.

*Ground 161.* The Trial Chamber erred in fact in relying on the testimony of Pech Srey Phal as the sole support for the conclusion that certain people died of exhaustion or starvation caused by the Phase II movement. *See* para. 597, fns 1836-7.

*Ground 162.* The Trial Chamber erred in law and fact in relying on the victim impact testimony of Aun Phally as the sole support for the conclusion that certain people died of exhaustion caused by the Phase II movement. *See* para. 597, fn 1836.

*Ground 163.* The Trial Chamber erred in fact in relying on the testimony of Nou Mao as the sole support for the conclusion that certain people died of exhaustion caused by the Phase II movement. *See* para. 597, fn 1836.

*Ground 164.* The Trial Chamber erred in fact in relying on the victim complaint of Treh Eal as the sole support for the conclusion that his grandmother died of exhaustion caused by the Phase II movement. *See* para. 597, fn 1836.

*Ground 165.* The Trial Chamber erred in law and fact in relying on the testimony of Francois Ponchaud as the sole support for the conclusion that certain people died due to the Phase II movement. *See* para. 597, fn 1836.

*Ground 166.* The Trial Chamber erred in fact in relying on a refugee account at E3/4590, ERN (En) 00820558 as the sole support for the conclusion that certain children and elderly people died due to the Phase II movement. *See* para. 597, fn 1836.

*Ground 167.* The Trial Chamber erred in fact in relying on Dy Roecun's civil party application as the sole support for the conclusion that children were thrown from the windows of trains during the Phase II movement. *See* para. 597, 632 (fn 2004), 644 (fn 2033).

*Ground 168.* The Trial Chamber erred in fact in holding that witness Sokh Chin 'buried decomposing bodies found along the tracks' and that the bodies belonged to people who had been on trains during the Phase II movement. *See* paras 597, 632 (fn 2004), 644 (fn 2033).

*Ground 169.* The Trial Chamber erred in relying on Toeng Sokha's testimony as the sole support for the conclusion that Khmer Rouge soldiers shot at people who tried to escape during the Phase II movement. *See* para. 598, fn 1845.

*Ground 170.* The Trial Chamber erred in relying on Pin Yathay's testimony as the sole support for the conclusion that two particular people died due to exhaustion, starvation or illness caused by the Phase II movement. *See* para. 598, fn 1849.

*Ground 171.* The Trial Chamber erred in relying on a refugee account at E3/4590, ERN 00820444 as the sole support for the conclusion that certain people died due to exhaustion, starvation or illness caused by the Phase II movement. *See* para. 598, fn 1849.

### **XIII. Errors concerning murder and extermination during population movements**

*Ground 172.* The Trial Chamber erred in law in holding that the *mens rea* of murder includes the intent to cause bodily harm 'in the reasonable knowledge that the act or omission would likely lead to death'. *See* paras 412, 556-8.

*Ground 173.* The Trial Chamber erred in law in wrongly defining the elements of extermination. Specifically, the Trial Chamber failed to hold that: (i) conditions of living may constitute extermination only if calculated to bring about destruction of part of the population; (ii) the acts and omissions concerned must form part of a vast murderous enterprise; and (iii) the Accused must know that his acts and omissions form part of a vast murderous enterprise. *See* paras 416-7. The Chamber erred in law and fact in failing to conclude that this definition was not satisfied. *See* paras 560-562, 646-648.

*Ground 174.* The Trial Chamber erred in law in assessing the number of deaths which occurred during the evacuation of Phnom Penh rather than the number of deaths it caused. Alternatively the Trial Chamber erred in fact and failed to cite any credible evidence that death on a massive scale was caused by the evacuation. *See* paras 497-500, 521, 560.

*Ground 175.* The Trial Chamber erred in law and fact in holding that ‘people died on a massive scale during’ the Phase II population movements. *See* para. 647.

#### **XIV. Errors concerning conditions and the use of violence during the Phase I movement**

*Ground 176.* The Trial Chamber erred in fact in making broad conclusions concerning conditions and the use of violence during the evacuation on the basis of anecdotal, inadequate and unreliable evidence. Relevant findings include, by way of example:

- i. ‘Conditions throughout the journey were miserable and most lacked even the most basic of equipment with which to cook. Many people had limited food and water supplies or went without. Many were forced to exchange whatever belongings they had including clothes or to beg for food, searched for plants, vegetables and insects to eat, and drank dirty water from ponds along the way to survive.’ *See* para. 487.
- ii. ‘The journey of most evacuees was marked by terror and threats or incidents of violence by Khmer Rouge soldiers.’ *See* para 489.
- iii. ‘[T]hose evacuated experienced terrible conditions throughout their journey including extreme heat and a lack of sufficient food, clean water, medicine or adequate accommodation.’ *See* para. 491.

Other similar findings are at paras 473, 476-7, 482-3, 488, 491-2, 495 and 517. Relevant legal conclusions are found at paras 552, 556-557, 562-5 and 570.

#### **XV. Errors concerning conditions and the use of violence during the Phase II movement**

*Ground 177.* The Trial Chamber erred in fact in making broad, overarching conclusions concerning conditions during the movement on the basis of anecdotal, inadequate and often unreliable evidence. The Trial Chamber’s findings in this regard include, by way of example:

- i. ‘People were constantly monitored, had no water and insufficient food, and were not allowed to carry any belongings.’ *See* para. 591.
- ii. ‘Others were overcrowded with men, women, children and the elderly. People on the trains had insufficient food and were not allowed to carry belongings. Khmer Rouge soldiers provided no assistance to sick or vulnerable people.’ *See* para. 597.
- iii. ‘The trucks were crowded, conditions in the trucks were poor, and those on board had to relieve themselves on the truck. Many were sick and had diarrhoea.’ *See* para. 597.
- iv. ‘From season to season, these people, in particular mobile units specifically designated in each cooperative, were moved, often on foot, under guard and with insufficient food or accommodation.’ *See* para. 608.

- v. '[H]undreds of thousands were re-located with insufficient accommodation and assistance and under inhumane conditions.' *See* para. 647.

Other similar findings are at paras 592, 594, 596, 598, 600, 608, 612 and 617. Relevant legal conclusions are found at paras 632, 635, 639, 644 and 647.

*Ground 178.* The Trial Chamber erred in law and violated Nuon Chea's right to be informed of the charges and confront the evidence against him by finding facts concerning conditions at destination locations or which otherwise did not occur as part of the Phase II movement. These facts were outside the scope of Case 002/01. *See* paras 609, 618-9, 622.

#### **XVI. Errors concerning other inhumane acts through forced transfer and attacks against human dignity during population movements**

*Ground 179.* The Trial Chamber erred in law and violated the principle of legality in applying the definition of deportation to the charge of other inhumane acts through forced transfer. In 1975, forcible transfer was lawful under circumstances beyond civilian security or military necessity, the transfer was not required to be 'the least intrusive instrument', and evacuees were not required to be returned as soon as possible. *See* paras 450-455.

*Ground 180.* The Trial Chamber erred in law and fact in failing to find that most of those present in Phnom Penh on 17 April 1975 were refugees from the countryside who were willing to leave and therefore were not 'forcibly' transferred. *See* paras 157, 485, 547-8.

*Ground 181.* The Trial Chamber erred in law and fact in failing to find that the evacuation of Phnom Penh did not constitute an other inhumane act under all of the circumstances. This error was comprised of numerous other errors, including:

- i. The Trial Chamber erred in fact in concluding that it was 'improbable that the American bombing campaign in Cambodia would continue following the fall of Phnom Penh', and the CPK did not believe 'that the claimed threat existed at that time'. The Trial Chamber erred in law in making those conclusions after refusing to hear Defence witnesses to give relevant testimony. *See* paras 527-9, 534, 541, 549.
- ii. The Trial Chamber erred in fact in concluding that the CPK's expressed desire to maintain order and security following its capture of Phnom Penh disproves Nuon Chea's contention that the evacuation was designed in part to guard against US bombings, as any reasonable trier of fact would have concluded that the fear of US bombings was part and parcel of the Party's legitimate security concerns in light of US aggression. *See* paras 530-534, 549.
- iii. The Trial Chamber erred in fact in relying on the testimony of Sum Chea, an ordinary soldier, to establish the intent of the Party center in relation to the evacuation of Phnom Penh. *See* para. 530.
- iv. The Trial Chamber erred in fact in failing to recognize the legitimate military objectives underlying the CPK's siege of Phnom Penh and blockade of the Mekong, and in finding that hundreds of civilians were killed by CPNLF shelling. *See* paras 159, 163, 537-8.

- v. The Trial Chamber erred in fact in finding that food supplies could have been obtained through Pochentong Airport and Kompong Som, and that either a ‘staged evacuation’, or the transportation of rice to the city, would have been an effective means of feeding the population of Phnom Penh. The Trial Chamber erred in law in making those conclusions while refusing to hear Defence witnesses to give relevant testimony. *See* paras 538-9, 543, 549.
- vi. The Trial Chamber erred in law and fact in finding that the evacuation was not proportional under all the circumstances. *See* paras 550-1.

*Ground 182.* The Trial Chamber erred in law and fact in finding that all or nearly all evacuees were victims of other inhumane acts through attacks against human dignity. *See* paras 563-565, 644.

### **XVII. Errors concerning other inhumane acts through enforced disappearances**

*Ground 183.* The Trial Chamber erred in law and violated the principle of legality in finding that the notion of enforced disappearance existed under customary international law in 1975, and in finding that it was recognized as being of the nature and gravity of other enumerated crimes against humanity. *See* paras 443-445.

*Ground 184.* The Trial Chamber erred in fact in making overly broad conclusions concerning alleged disappearances on the basis of anecdotal, and often inadequate and unreliable evidence. *See* paras 640 (fn 2024-5), 593, 599, 601, 609, 611, 614, 618, 625. The Trial Chamber furthermore erred in law and fact in finding that the crime of enforced disappearance was committed without finding that any disappearances occurred. *See* paras 640 (fn 2024-5), 595, 623.

*Ground 185.* The Trial Chamber erred in law in failing to consider whether CPK officials refused to provide information concerning the whereabouts of people whose liberty was allegedly deprived, or alternatively erred in fact in so finding. *See* para. 641.

### **XVIII. Errors concerning the treatment of ‘New People’ during the Phase II population movement**

*Ground 186.* The Trial Chamber erred in fact in concluding that ‘the overwhelming majority of persons displaced during phase two were Cambodians already re-located by the Khmer Rouge prior to September 1975.’ *See* paras 631, 584, 588-9, 622-3.

*Ground 187.* The Trial Chamber erred in fact in holding that New People were screened during the Phase II movement, and that after being moved, many so-called New People disappeared or were killed. *See* paras 614, 625.

*Ground 188.* The Trial Chamber erred in fact in holding that Khmer Rouge soldiers often directed evacuees to different destinations on the basis of their background as revealed in questioning. *See* para. 655.

### **XIX. Errors concerning the treatment of Khmer Republic soldiers during the Phase II movement**



*Ground 189.* The Trial Chamber erred in law in holding that Khmer Republic soldiers were gathered and transported to locations in Battambang, Pursat and Kratie. The Chamber erred in making findings outside the scope of Case 002/01, thus violating Nuon Chea's right to fair notice of the charges and to confront the evidence against him, and in relying on victim impact testimony. The Trial Chamber furthermore erred in fact in so finding. *See* para. 617.

## **XX. Errors concerning the crime of persecution during population movements**

*Ground 190.* The Trial Chamber erred in law in holding that persecution may occur on political grounds even where the group targeted does 'not hold any political views'. Alternatively, the Trial Chamber erred in law in holding that discrimination may amount to persecution on political grounds merely because it 'has been effected pursuant to political motivations or a political agenda'. *See* para. 430.

*Ground 191.* The Trial Chamber erred in law in holding that the CPK viewed 'New People' as a discernable political group with identifiable characteristics while repeatedly shifting its definition from an agglomeration of a series of sub-groups, such as feudalists, capitalists, petty bourgeoisie, Khmer Republic officials and others, to an entirely different definition of 'people who lived in the city'. *See e.g.*, paras 169, 195, 517, 569.

*Ground 192.* The Trial Chamber erred in fact in holding that the population of Phnom Penh as of 17 April 1975 was viewed by the CPK as a political group opposed to the Party. The Trial Chamber repeated this error consistently, including: (i) 'New People' were perceived as political and social enemies of the revolution and the collective system; (ii) 'well before 17 April 1975, the Khmer Rouge had been fomenting resentment towards city people'; (iii) 'The Party identified the "New People", including former government officials, intellectuals, landowners, capitalists, feudalists and the petty bourgeoisie, as key enemies of the revolution and collectivisation.' *See e.g.* paras 111-112, 169, 195, 517, 544, 571, 613-616, 621, 634, 653, 731-2, 734, 737, 745, 769, 770, 784, 787-8, 795, 840, 844-5, 851, 867-8, 873, 875, 880, 887, 902-4, 906, 908, 912, 919 and 926.

*Ground 193.* The Trial Chamber erred in law and fact in holding that soldiers who implemented the evacuation of Phnom Penh intended to discriminate against city people on political grounds. In addition to failing to cite adequate evidence, the Trial Chamber erred (i) in law in making findings outside the scope of Case 002/01; (ii) in law and fact in holding that conduct at the base is relevant to and probative of the intent of soldiers implementing the evacuation; (iii) in fact in concluding that evacuees were treated with suspicion at the base. *See* paras 471, 474, 486, 490, 507, 508-511, 513-5, 517, 571.

*Ground 194.* The Trial Chamber erred in law and fact in holding that soldiers who implemented the evacuation of Phnom Penh had the requisite *mens rea* for persecution in regard to Khmer Republic officials. *See* para. 571.

*Ground 195.* The Trial Chamber erred in fact in holding that soldiers who implemented the evacuation of Phnom Penh discriminated in fact against 'City People' by identifying them at checkpoints in the course of the evacuation, since every person evacuated from Phnom Penh was a 'city person' in the Trial Chamber's formulation. *See* para. 572.

*Ground 196.* The Trial Chamber erred in law and fact in holding that soldiers who implemented the Phase II population movement had the requisite *mens rea* for persecution of

New People. In particular, the Trial Chamber erred in law in failing to consider reasonable inferences from the transfer of New People during the Phase II movement consistent with the innocence of the accused. *See* paras 588, 631, 655. The Trial Chamber furthermore erred in law and fact in finding that other alleged differential treatment of ‘New People’ was probative of discriminatory *animus* as to New People. *See* paras 600, 617, 621-2. Other alleged indicia of *animus* are unsupported by the evidence. *See* Grounds 186-189.

*Ground 197.* The Trial Chamber erred in fact in finding that soldiers who implemented the Phase II movement discriminated in fact against ‘New People’ even while finding that both New People and Base People were transferred during the movement. *See* para. 655. The Trial Chamber furthermore erred in fact in identifying forms of differential treatment which were unsupported by the evidence or insufficient to constitute a persecutory act. *See* Grounds 186-189, 196.

## **XXI. Errors concerning JCE and the nature of the CPK leaders’ shared purpose**

*Ground 198.* The Trial Chamber erred in law in finding that Joint Criminal Enterprise, as it was described in the Judgment, existed as a matter of customary international law in 1975. In 1975, joint perpetration of a criminal act was a narrower form of individual criminal liability limited to joint contributions to specific criminal conduct with shared criminal intent. *See* paras 695-6; Document No. E100/6.

*Ground 199.* The Trial Chamber erred in law by imputing criminal liability to Nuon Chea on the basis of a common purpose which ‘resulted in’ or ‘involved’ criminal policies and the commission of crimes, a purposefully vague formulation of no legal relevance to Nuon Chea’s criminal liability. *See* paras 692, 695-696, 778, 804, 835, 843.

*Ground 200.* The Trial Chamber erred in law and fact in finding the existence of a shared common purpose to implement a ‘rapid’ socialist revolution and to defend the Party against internal and external enemies ‘by whatever means necessary’, a vague characterization unsupported by the evidence. *See* paras 777-778; *see also*, para. 737.

## **XXII. Errors concerning the CPK leaders’ shared purpose as to the Phase I movement**

*Ground 201.* The Trial Chamber erred in law and fact in finding that CPK leaders adopted a JCE policy of movement of population which involved the commission of crimes during the Phase I movement. *See* paras 804-807. This error comprised numerous factual errors, including:

- i. The Trial Chamber’s holding that the alleged JCE population movement policy was driven by *animus* toward New People and/or the killing of enemies. *See* paras 104-112, 169, 469, 530, 532, 534, 569-571, 781, 784, 787-8, 803, 805.
- ii. The Trial Chamber’s failure to acknowledge the splintered command structures in place during the evacuation of Phnom Penh. *See e.g.*, paras 148-152, 460.
- iii. The Trial Chamber’s finding that orders concerning the evacuation of Phnom Penh were ‘uniform’, its failure to specify in which respects those orders were ‘uniform’, and its decision to draw improper inferences from this finding concerning the nature of the JCE among the CPK leaders. *See* paras 148-152, 805, 807.

- iv. The Trial Chamber's finding that CPK forces were ordered to evacuate Phnom Penh 'using any means'. *See* paras 471-475.
- v. The Trial Chamber's finding that there was a consistent pattern of poor conditions, death and the use of violence during evacuations prior to and during April 1975. *See* paras 105-109, 792, 794, 803-5, 842, 849, 856, 880.

### **XXIII. Errors concerning the CPK leaders' shared purpose as to the Phase II movement**

*Ground 202.* The Trial Chamber erred in law and fact in finding that Nuon Chea was a member of a JCE which included or involved a policy of movement of population which included or involved the acts alleged to constitute the Phase II movement. *See* paras 804-6, 808-810. This error comprised numerous factual errors, including the Chamber's finding that:

- i. After April 1975, Party policy contemplated population movements for the purpose of building cooperatives, building and defending the country, and re-organising the people, economy, politics and military, and that such policy was frequently addressed in Party propaganda, education and publications. *See* paras 576-577, 602-6, 610, 795.
- ii. In August 1975, 'the Standing Committee ordered that between 400,000 and 500,000 people be moved to Battambang and Pursat' and 20,000 to Preah Vihear from areas in the Southwest, West and East zones. *See* para. 796; *see also* paras 584-7, 634, 637.
- iii. According to Party policy, New People had to be moved and separated as part of the Phase II movement. *See* para. 796. New People were identified by the 'upper level' to be moved to new villages in Kampong Thom. *See* paras 623.
- iv. Some people were moved by train under the guard of Khmer Rouge soldiers from Phnom Penh. *See* para. 809.
- v. The 'Party controlled the means and modes of transportation necessary to effectuate the population movements'. *See* paras 578, 809, 860.
- vi. '[H]undreds of thousands of people were displaced' between regions and that 'tens of thousands' more were displaced during within regions during the Phase II movement. *See* paras 579-581, 588, 630, 638, 802.
- vii. There was a consistent pattern of poor conditions, death and the use of violence during the Phase II movement. *See* paras 793, 803, 805, 850-1, 856, 900, 902.

### **XXIV. Errors concerning the events at Tuol Po Chrey**

*Ground 203.* The Trial Chamber erred in law and fact in relying on the testimony of Lim Sat, Ung Chhat and Sum Alat despite numerous gaps and inconsistencies in their evidence. *See* paras 663-81. The Trial Chamber further erred in law and fact in relying on Lim Sat's testimony despite having explicitly found that he deliberately lied under oath before the Trial Chamber. *See* para. 665. The Trial Chamber erred in fact in concluding on the basis of this testimony that an order was issued from the zone committee to kill soldiers and officials. *See* paras 661-666.

*Ground 204.* The Trial Chamber erred in fact in making findings concerning the manner in which individuals arrived at the provincial town hall and were transported to Tuol Po Chrey despite numerous inconsistencies and gaps in the evidence. *See paras 666, 673-676.*

*Ground 205.* The Trial Chamber erred in fact in concluding that ‘a minimum of 250 former LON Nol officials died in this period’. *See para. 681.*

#### **XXV. Errors concerning the alleged JCE policy of targeting Khmer Republic soldiers and officials**

*Ground 206.* The Trial Chamber erred in law and fact to whatever extent it found that a CPK policy of killing former Khmer Republic soldiers and officials existed prior to 17 April 1975. This error comprised numerous factual errors, including its holdings that:

- i.* Khmer Republic officials were executed following the capture of Oudong by CPNLF forces in 1974. *See paras 124-127.*
- ii.* The Central Committee discussed alleged executions of Khmer Republic officials in Oudong and decided to emulate those alleged executions in future evacuations. *See paras 127, 134, 816.*
- iii.* CPK policy toward Khmer Republic officials became radicalized between 1970 and 1975, and that such officials were executed with increasing frequency between 1972 and 1975. *See paras 120-123, 127, 830.*
- iv.* FUNK’s broadcasts in early 1975 were calculated to lull Khmer Republic officials into a false sense of security, and also meant to convey that clemency would be denied for soldiers who did not cooperate immediately. *See paras 120, 822, 826.*
- v.* Beginning before 1975 and throughout the DK period, ‘officers of the Lon Nol regime were also identified as the key enemies.’ *See paras 118, 815.*

*Ground 207.* The Trial Chamber erred in law and fact to whatever extent it found that a CPK policy of killing former Khmer Republic soldiers and officials came into existence on or after 17 April 1975. *See paras 814-8.* This error comprised numerous factual errors, including:

- i.* The Trial Chamber’s mischaracterization of CPK philosophy and class theory in support of its conclusion that the CPK had a policy of targeting Khmer Republic officials. *See para. 815.*
- ii.* The Trial Chamber’s finding that a ‘policy to target former Khmer Republic officials was expressly ordered and affirmed by the Party leadership during the final offensive to “liberate the country”’. *See paras 817-8, 794.*
- iii.* The Trial Chamber’s reliance on the alleged ‘execution order’ of Comrade Pin without assessing its probative value or considering reasonable inferences consistent with Nuon Chea’s innocence. *See para. 817.*

- iv. The Trial Chamber's finding that CPK publications 'praised the elimination of enemies, including former Khmer Republic officials.' *See* para. 818.

*Ground 208.* The Trial Chamber erred in law and fact to whatever extent it found that a consistent pattern of killing former Khmer Republic soldiers and officials existed on or after 17 April 1975. *See* paras 830-4. This error comprised numerous factual errors, including its holdings that:

- i. A 'deliberate, organized, large-scale operation to kill former officials of the Khmer Republic' was in place during the evacuation of Phnom Penh. *See* para. 561, 515, 823.
- ii. 'As the evacuation proceeded, former Khmer Rouge soldiers reported they were instructed to kill all identified Khmer Republic soldiers'. *See* para 509, fns 1523-4.
- iii. The CPK 'announced by radio and via loudspeaker in several areas around Phnom Penh that Khmer Republic officials should turn themselves in, reveal their former ranks and either return to Phnom Penh to collaborate or join the Khmer Rouge army.' *See* para. 511.
- iv. 'Targeting of former Khmer Republic officials through arrests, killings and disappearances continued in late April and May 1975, before, during or after evacuations, including in Battambang, Kampong Thom, Pursat, Kampong Chhnang, Kandal, Takeo and Siem Reap.' *See* para. 832.
- v. 'There was a clear pattern in the way Khmer Republic officials were identified by the Khmer Rouge after the cessation of the armed conflict and throughout the DK era.' *See* para. 834; *see also* para. 665.
- vi. 'In late 1975, having already taken care of many high-ranking officials, refugees reported that the Khmer Rouge continued targeting low-ranking officials, their families and those who had been disguised' and that 'not only Khmer Republic officials, but also their families had to be killed.' *See* para. 829.
- vii. In 1976, the CPK killed refugees who were returned to Cambodia. *See* para. 825.

*Ground 209.* The Trial Chamber erred in law and fact in holding that the CPK targeting policy involved the commission of crimes at Tuol Po Chrey. *See* para. 835.

- i. The Trial Chamber was unable to find beyond a reasonable doubt that the CPK leaders had the shared intent to kill Khmer Republic officials. The Trial Chamber found instead that CPK leaders adopted a policy to 'target for arrest, execution and/or disappearance all elements of the former Khmer Republic regime'. As the Trial Chamber also found no evidence that the CPK leaders had any knowledge of crimes at Tuol Po Chrey, it erred in law and fact by inferring that the JCE included or involved crimes committed there. *See* paras 829, 835.
- ii. The Trial Chamber erred in law in failing to consider reasonable inferences consistent with Nuon Chea's innocence, including that any alleged killings at Tuol Po Chrey were the consequence of a revenge action on the part of local officials in Pursat. *See* Document E295/6/3, paras 430-3.

- iii. The Trial Chamber erred in law and fact in failing to conclude that the purported JCE targeting policy did not involve the killing of ordinary soldiers and officials, such as the alleged victims at Tuol Po Chrey. *See* Document E295/6/3, paras 422-6.

#### **XXVI. Errors concerning Nuon Chea's individual criminal responsibility for commission through a Joint Criminal Enterprise**

*Ground 210.* The Trial Chamber erred in law in failing to consider whether Nuon Chea made a substantial contribution to the crimes charged. The Trial Chamber furthermore erred in law and fact in failing to find that Nuon Chea made no such contribution to any of the crimes charged, other than other inhumane acts through forced transfer in connection with the evacuation of Phnom Penh. *See* paras 861-874.

*Ground 211.* The Trial Chamber erred in law and fact in holding that Nuon Chea contributed to the common purpose and had knowledge of the commission of crimes by virtue of having taught CPK cadres to 'deceive people and behave in accordance with the principle of secrecy' and through 'indoctrination to hate'. The use of secrecy within the CPK was for the purpose of protecting itself against legitimate enemy threats, not as 'lies [...] to control the situation and the people'. *See* paras 834, 840.

*Ground 212.* The Trial Chamber erred in law in assessing whether Nuon Chea had the intent to advance the common purpose of socialist revolution rather than to commit the crimes charged. Alternatively, the Trial Chamber erred in fact in finding that Nuon Chea had the requisite intent to commit the crimes charged. *See* paras 875-6.

*Ground 213.* The Trial Chamber erred in fact in concluding that Nuon Chea had knowledge of alleged crimes concurrent with or following their commission. *See* paras 847-857.

#### **XXVII. Errors concerning Nuon Chea's individual criminal responsibility for planning, ordering, instigating and aiding and abetting the crimes charged**

*Ground 214.* The Trial Chamber erred in law by finding Nuon Chea criminally responsible for planning all of the crimes charged without finding that he engaged in any conduct which amounts to the *actus reus* for planning or alternatively, erred in fact in finding that Nuon Chea engaged in conduct which amounts to planning. *See* paras 878-883, 899-904, 918-922.

*Ground 215.* The Trial Chamber erred in law by finding Nuon Chea criminally responsible for ordering all of the crimes charged without finding that he engaged in any conduct which amounts to the *actus reus* for ordering or alternatively, erred in fact in finding that Nuon Chea engaged in conduct which amounts to ordering. *See* paras 884-886, 905-907, 923-925.

*Ground 216.* The Trial Chamber erred in law and fact in finding that Nuon Chea instigated the crimes charged as Nuon Chea's activities through the Ministry of Propaganda, including his political trainings and similar statements, did not involve or amount to encouragement or prompting to commit crimes. *See* paras 887-8, 908-9, 926-7.

*Ground 217.* The Trial Chamber erred in law and fact in finding that Nuon Chea aided and abetted the crimes charged as Nuon Chea's activities at the Ministry of Propaganda, including political trainings and similar statements, did not involve or amount to assistance, moral support or encouragement to commit crimes. *See* paras 889-91, 910-2, 928-31.

*Ground 218.* The Trial Chamber erred in law in adopting an incorrect standard for the *mens rea* of planning, ordering, instigating and aiding and abetting: whether an accused was aware of ‘a substantial likelihood of’ the commission of crimes, or that crimes ‘would likely be committed’. Alternatively, the Trial Chamber erred in law by assessing Nuon Chea’s knowledge of the likelihood that lower level cadres would commit crimes, instead of his knowledge of the likelihood that his plan, order or encouragement would result in criminal acts. In the further alternative, the Trial Chamber erred in law and fact in holding that Nuon Chea was aware of the likelihood that his actions would result in the commission of criminal acts. *See* paras 698, 700, 702, 704, 842-6, 882, 886, 888, 891, 904, 906, 909, 912, 921, 925, 927, 931.

### **XXVIII. Errors concerning Nuon Chea’s superior responsibility for the crimes charged**

*Ground 219.* The Trial Chamber erred in law in holding that superior responsibility under customary international law in 1975 did not include a requirement that the Accused was under an affirmative duty to act and that civilian superiors could be held liable only to the extent that his effective control over subordinates is similar to that of a military superior; or alternatively the definition of superior responsibility was ambiguous in that regard and must be interpreted pursuant to *in dubio pro reo*. *See* paras 718-721.

*Ground 220.* The Trial Chamber erred in law and fact in finding that Nuon Chea exercised effective control over the troops who implemented the evacuation of Phnom Penh and the Phase II movement, and over Ruos Nhim and other troops and cadres in the Northwest Zone in April 1975. *See* paras 893-6, 913-4, 933-4.

*Ground 221.* The Trial Chamber erred in law and fact in holding that Nuon Chea knew or had reason to know of murder, extermination, political persecution or other inhumane acts through attacks against human dignity or enforced disappearances during the evacuation of Phnom Penh or the Phase II movement. *See* paras 897, 915.

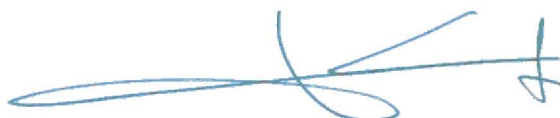
*Ground 222.* The Trial Chamber erred in law and fact in holding that Nuon Chea failed to prevent or punish crimes committed during population movements. *See* paras 898, 916.

*Ground 223.* The Trial Chamber erred in law and fact in holding that Nuon failed to prevent the alleged executions at Tuol Po Chrey. *See* para. 938.

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